CHAPTER 6

JUDICIAL LAWMAKING IN INDIA: TRANSITION FROM 'ACTIVISM' TO 'OVERREACH'

Background

An active claim of Indian judiciary over the functions falling constitutionally within the legislative competence raises certain serious and prominent issues qua 'Judicial Activism' in India. This aspect of 'Judicial Activism' equally holds the debatable field amongst others since the judge made law has gained a vast recognition throughout the world. The Indian Supreme Court has contributed to such recognition to a very large extent by giving directions to the government from time to time seeking compliance under its contempt power and many a times by legislating exactly in a manner akin to the legislative. Such instances of judicial intervention call for a need to closely scrutinise the essence and the constitutional perspective of the 'lawmaking' function of judges in distinction with the constitutionally conferred legislative powers of the legislative.

It is indeed true that within the given set up of 'separation of powers', the legislature under the Indian Constitution, acts as a prime mover in enacting laws to suit the changing circumstances of the society. However, the role of judiciary is also largely acknowledged since judges, while leading with real life situations to adjudicate upon, do get opportunities to interpret the existing laws and apply them in a given situation to cater the changing needs and keeping pace with varying societal notions. The chief reason that can be attributed to such an important facet of judicial function is the undisputed fact that since law by its very nature is organic[102] no legislature can foresee, with reasonable certainty, the future and forthcoming contingencies which the law attempts to address. Practically, every enacted law on a probing analysis reveals certain gaps which the judiciary is expected to fill up by way of

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[102] See generally B.N. Cardozo, *The Growth of the Law* (1964).

interpretation. This is popularly known as 'Judicial Legislation'.[103] This filling up is however expected to be done in consonance and conformity with the constitutional dictates and confined to the extent permitted by the Constitution which distinguishes it from being branded as an instance of 'judicial overreach'.

This chapter, in the light of this background, attempts to unfold the dichotomy of 'judicial lawmaking' vis-a-vis legislative power to 'legislate' as enshrined in the Constitution and analyses as to how far the judiciary can be legitimately understood as playing an 'activist' lawmaking role. It further delves and highlights certain glaring instances where there have been an utmost disregard to the constitutional mandate and values that are necessary in the working of a healthy democracy, by the judiciary under the pretext of 'judicial activism'. Eventually the trend reflects transition in the lawmaking role of judges from 'activism' to 'over-activism' or 'overreach' thereby implying that judiciary in India has transformed itself from a judicial to a super legislative organ of the state.

Since a page of history is worth a volume of logic, to begin with, an analysis of the 'Realist' philosophy of law breeds fruitful thematic thrust to examine the theory of 'judicial lawmaking' since it was a unique approach which, unlike other theories that aimed at defining the law in abstract senses, while scientifically analysing the nature of law in practical terms kept the judicial process of a judge at its centre stage

The 'Realists' Philosophy and Judicial Lawmaking

The lawmaking function of the judiciary can be traced as being obscurely rooted in 'Realist School' of Jurisprudence since inline with the Austinian conception of law as a command of sovereign, realists regarded law being a command of a judge considering him supreme for the purposes of setting laws in the legal system.[104] However, since there was no unanimity amongst the scholars who contributed to this way of thought, 'realism' was never regarded

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[103] See M. N. Rao, "Judicial Activism" available at www.geocities.com/borrosia/jud.html assessed on 02-12-11, 22:33.

[104] See generally, M.D.A. Freeman (Ed), *Lloyd's Introduction to Jurisprudence* 644 (1994). (Sweet & Maxwell London).

as a school of jurisprudence as such.[105] Jerome Frank, John Chipman Grey, Oliver Wandell Homes, Cardozo, and Karl Llewellyn are regarded as the chief proponents of this scientific and judge centred approach of law. The movement was regarded as 'realist' as it studied law as a body of rules and principles which are enforced by the courts.

'The law (or the Constitution) is what the courts say it is' is the working principle of realist jurisprudence.[106] It develops naturally when there is a multiplicity of jurisdictions,[107] and the Constitution or the laws, whether enacted or common law; leave 'open texture'[108] to be resolved by the courts. The constitutional system of the United States is highly dependent on judicial interpretative process for achieving any finality or certainty in the Constitution or the laws. On the other hand, in the United Kingdom the concept of sovereignty has led to the legal positivism which regards the sovereign, Parliament in modern times, as the ultimate source of positivity in law.

The Constitution of India partakes of both, the United States and the British Constitutions since it has Parliament and cabinet systems of government from England and federalism with its characteristic system for distribution of legislative functions and judicial powers of review from the United States Constitution. Since realist jurisprudence and analytical positivism draw heavily from the respective constitutional systems of the United States and United Kingdom, it is natural that the two theories of law and jurisprudence may make an impact on each other continuously or intermittently in the working of the Indian Constitution.

Legal Realism emphasises that law can be properly understood or defined in terms of judicial process only. The law on paper and the law in action are distinct from each

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[105] Ibid.

[106] "We are under the Constitution, but the Constitution is what the judges say it is" was the dictum of Chief Justice Homes quoted in Henry J. Abraham, *The Judicial Process: An Introductory Analysis of courts of United States, England & France 326 (1968);* H.L.A. Hart, *The Concept of Law* 138 (1961).

[107] Carleton Kemp Allen, *Law in the Making 41 (1964).*

[108] Hart, *supra* note 102 at 121. 'Open texture' refers to ideas, words or phrases left undefined in the Constitution or enactments, such as 'due process of law', 'liberty', or 'personal liberty', 'reasonable restrictions' or 'matters of religion' in Indian Constitution.

other.[109] It says that after the law has been laid down by the legislature, it is nothing but 'a prophecy of what the courts will do in fact'[110] and so long as the courts have not given their final pronouncement on it, the law remains uncertain, a child's world.[111] To define law on a subject, to know what 'the law' is in question the lawyer, the administrator or the affected person may look into the prescribed law (designated as 'command' by the positivists) but ultimately they have to find how the courts have already defined it and how are they likely to define the same when the matter again goes before them.

In modern times 'policy decision making' is advocated for breaking the rigidity of the Constitution and laws when their acquired meanings fail to achieve the socio-economic ideals of a socialist or welfare state. In developing countries law is desired to be dynamic. It should change with the changing needs of the society in time and space; in that way law becomes an instrument for social engineering.[112] Indian juristic thinking also recognises 'the dynamic character of law'.[113]

However, the realist jurisprudence has a non-doctrinaire approach or politically neutral approach to the content of law or the Constitution. It focuses attention on the judicial process through which Constitution and law in practice operate. The law is made by the legislature but it is enforced through the agency of courts.

Judicial lawmaking in 'realist' sense can thus be understood as a process that aims at determining all questions affecting interpretation, application, operation and working of the Constitution or other statutory enactments. No contributor of realism however negated the competence of the legislature in lawmaking which suggests that lawmaking function of judiciary is secondary in contrast with the legislature since courts can, by way of interpretation, only supplement the true essence and objective of the law primarily enacted

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[109] K.N. Llewellyn, *Jurisprudence: Realism in Theory and Practice 23 (1962).*
[110] G.W.Paton, *Textbook of Jurisprudence* 68 (1951).
[111] Jerome Frank, *Law and the Modern Mind,* 35 (1930).
[112] G.S.Sharma, "Horizons *of Indian Legal Philosophy" 2 Jaipur Law Journal 180 (1962).*
[113] Gajendragadkar, *The Indian Parliament and Fundamental Rights* 190 (1972).

by the legislature.[114] Since such a supplement has an effect of law and a binding sequence, 'lawmaking' in realist sense is a fact and a stark reality.

Do Judges Make Law?

No informed citizen who is governed under a modern Constitution disputes the notion that judges do not make law, especially the judges of constitutional courts. This is so since such courts have meticulously come at par with the expectations of the people and the changing social circumstances by way of their interpretative skills. In Indian context, a glaring example of this fact can best be evidenced from the complete shift accorded by the Supreme Court of India in interpreting Article 21 of the Constitution from *Gopalan*[115]*to Maneka.*[116] Further, innovations in the field of PIL have also provided thrust to the undisputable notion that judges do indeed make law through directions.

In erstwhile halcyon days, it was argued by many commentators that a judge simply declares, discovers and applies the existing body of legal principles by a logical and a purely mechanical process. The law was seen by those commentators, in Oliver Wendell Holmes' memorable phrase, as a 'brooding omnipresence in the sky'.[117] However, it is now a well settled fact that by applying or extending established rules to novel circumstances and by altering the content of legal rules in accordance with changed economic and social circumstances, judges do make law. The notion that courts make law is now widely understood not only by lawyers but also by lay commentators and the general community.

According to Hans Kelsen all judges, trial as well as appellate, create individual specific norms by their decisions. Specific individual norms directed to persons do not and cannot pre-exist a judicial decision. Such norms come into being only when a judge decides in accordance with the higher norm, which is concretised by that decision. In other words,

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[114] "The judges are always constrained to follow the law; for there is no law beyond the law. They cannot act as super-legislatures." Ronald Dworkin, *"No Right Answer?"* in P.M.S. Hacker and J.Raz, *Law, Morality and Society: Essays in Honour of H.L.A.Hart* 84 (1977).

[115] *A.K.Gopalan v. State of Madras* AIR 1950 SC 27.

[116] *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

[117] See Holmes J. dissent in *Southern Pacific Co v. Jensen* 244 US 205 (1917) at 222.

the process of concretisation of general and abstract norms always results in creation of new law, individuated and specific norms. In this sense, the distinction between norm creation and norm application is not an absolute but a relative distinction.[118]

In this context, it is appropriate to consider a basic objection to the very notion of lawmaking by the judges on the ground that the judges in India were trained in the conservative English tradition under which they were expected to depart as little as possible from established precedents and that the judiciary should not be concerned with the policy underlying any legislation.[119] It must however be noted that it is impossible for a judge who, unlike his counterpart in England, functions under a written Constitution not to make any law, to inquire into the policy behind the law and, indeed, to ensure that such policy conforms to the demands of the Constitution. The principle of grammatical interpretation is inapplicable since it is a Constitution and not a statute, whose interpretation is really in issue so that it can be worked.

But even in the United Kingdom (UK) the judgments of the House of Lords have shown conclusively in the last several decades that judges often do make law and that the fiction that they merely find it must be discarded. To talk openly of judicial lawmaking is therefore honest and makes sense as Justice Holmes, Brandeis, Cardozo, Warren and many other judges in the United States have shown.[120] Only a minority of judges such as Frankfurter and jurists such as Wechsler have believed in sticking to a narrow, grammatical or neutral view of the cold constitutional provisions, occasionally under the umbrella of a scientific approach.[121]Even in Australia, an eminent judge Dixon C.J. who was noted for his strict construction-ism had accepted the need for a judge to be concerned with policy questions and even with political considerations in the following words:

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[118] See Hans Kelsen, *General Theory of Law and State (1961).*
[119] M.Hidayatulla, *Democracy in India and the Judicial Process 71 (1965).*
[120] See for example, *Lockner v. New York* 198 U.S. 45 (1905).
[121] *Baker v. Carr* 368 U.S. 186 (1962).

It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described but whether they are compelling.[122]

To the same tune are certain judgments of Canadian Supreme Court, especially those of Rand J.[123]

Having arrived at the practical answer to the dilemmatic and yet controversial question 'Whether Judges make law?' the most important analysis for the purposes of the present work is the ascertainment that what sort of law do the judges are entitled to make? Since actual lawmaking fall constitutionally in the domain of Legislature, who among the two organs of state enjoy primacy in lawmaking? And what is the distinction between a judge made law (adjudication) and a law enacted by the legislature (legislation)? These are certain issues which deserve discussion in this context.

'Adjudication' vis-a-vis 'Legislation'

In order to properly appreciate the distinction between 'Adjudication' and 'Legislation', it is first appropriate to analyze the word 'interpretation' which is central to the entire judicial process. To Salmond, 'interpretation' and 'construction' are synonymous by which he meant "the process by which the courts reach to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed".[124]Justice Grey described it as "the process by which a judge construes from the words of a statute book the meaning of which he either believes to be that of legislature, or which he proposes to attribute to it."[125] However, the soul of interpretation vanishes if the very purpose of the statute is given a go-by. In the process of evolution of law judges act as the selective agents. However, law as a bundle of rules on which justice can rest is a mirage. It is akin to folkways and mores of a society; it is an existing fact with an ever changing trajectory.

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[122] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31.

[123] *Switzman v. Elbling & Attorney General, Quebec* (1957)7 D.L.R. 337.

[124] Cited in G.P.Singh, *Principles of Statutory Interpretations* 1-2 (1996).

[125] Cited *Ibid at 2.*

In this context, the question then arises that whether interpretation necessarily involves legislation. Judicial decision is however not akin to lawmaking; it is rather an alternative available whether the applicable precepts provide more than the choices. In justification of this, one needs to understand the fundamental differences between 'legislation' and 'adjudication'.

Adjudication presupposes initiation by the parties in the disputes who render reasoned advocacy based upon which and the existing law, the judicial opinion manifests itself in the form of a result necessarily in the 'either-or' form. It is therefore mono-centric, that is, rooted in disputes while legislation is polycentric, that is, when variables multiply, and the answer cannot be 'either-or' to a given dispute. It thus needs legislation because resolution to such polycentric matters involves negotiation and bargain between the conflicting social interests which is a political act.[126] 'Adjudication' can, however be better explained as "a decision based on some principle to protect rights (of an individual or a group) and, being based on this principle, has to be anticipatively consistent for uniform distribution of benefit from one case to next."[127] The process of adjudication, therefore, negates any 'intuitive' decision since the latter cannot stand to future consistency in enforcement of rights; it is so because 'intuition' is usually a product of the synthesis of the philosophy, values, and political leanings of an individual, and hence is quite individuated in character.

During adjudicatory process the law-making power of the judge, of late, has been acknowledged by most of the jurists. The idea of strict adherence to procedure, called 'formalism', has waned away the 'ends' of law and has gained primacy in the judicial process. It is probably because "there can be no wisdom in choice of a past unless we know where it will lead".[128] In fact, it cannot be denied that in the process attaining the 'ends' of

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[126] Upendra Baxi, "On the Problematic Distinction between 'Legislation' and 'Adjudication': A Forgotten Aspect of Dominance" 12 *Delhi Law Review 4 (1990).*

[127] Ronald Dworkin, cited in Ibid at 11.

[128] B.N. Cardozo, *The Nature of Judicial Process* 102 (1961).

law, the judges do get more space for lawmaking; however, it is a limited one. As Justice Holmes said:

I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions."[129]

Therefore, the general framework provided by the statute is to be filled in each case by means of interpretation following the principles of interpretation of the statute.

Such adjudication has often been considered by many jurists as a freedom to operate within the gaps in the statute law. The principles developed by the judge, to be applied in a given case, have to be within the structure of the statute. Only such decisions can expect to command respect that begets certainty and uniformity for future references. What is a judge's 'limit' is also his 'duty'. Although guided by his own experiences, the statute does circumscribe his choices. "He may intervene only to supplement the formal authorities, and even in that field there are limits to his discretion in establishing rules of law. Neither may he restrict the scope of the general principle of our juridical organisation, explicitly or implicitly sanctioned, nor may he lay down detailed regulations governing the exercise of given rights, by introducing delays, formalities, or rules of publicity."[130] He should rather stick to objective interpretation even in the so called 'hard cases' since after all, hard cases make a bad law. "They (the judges) have the power, though not the right, to travel beyond the walls of interstices, the bounds to judicial innovation by precedent and customs. Nonetheless, by that abuse of power, they violate the law."[131]

Scope for 'Judicial Lawmaking' under the Indian Constitution

The scope for judicial innovation or creativity is more profound when it pertains to constitutional interpretation being an organic law, and also the source of all future law-making. For "a constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends

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[129] Cited in *Ibid* at 69.
[130] Cited in *Ibid* at 114-115.
[131] *Ibid* at 129.

into details and particulars, it loses its flexibility and the scope of interpretation contracts, and the meaning hardens."[132] The more detailed a Constitution is more restricted is the scope of judicial lawmaking since the gaps get narrowed down.

In addition to the scope for 'Judicial Activism' as discussed in the preceding chapters, Article 141 is one such provision under the Indian Constitution which recognise 'judicial lawmaking' in the sense we have observed so far.[133] However, considerable misunderstanding prevails over this article, as if by it the Supreme Court is given the power to make substantive law of the land and its declarations are binding on everybody and they must be unquestioned.[134] The article, however, only means that the declarations of the Supreme Court are binding on all the courts as a matter of judicial precedent until they are reversed by the Supreme Court itself.

The following can be cited as certain illustrations, the interpretation of which leads to judicial lawmaking within the scheme of Indian Constitution. The list is however not exhaustive.

- What classification is reasonable and legitimate within the meaning of articles 14,15(1) and 16(1), and what special provisions are legitimate within the meaning of articles 15(3),(4) and 16(4);
- What restrictions are reasonable and in the public interest within the meaning of clauses (2) to (6) of article 19;
- What is comprised in the right to life and right to personal liberty within the meaning of article 21, and what amounts to procedure established by law within the meaning of that article;

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[132] Ibid at 83.

[133] Article 141 provides that the law declared by the Supreme Court is binding on all courts in India.

[134] See for example C.J. Subba Rao in *Golakh Nath v. State of Punjab* AIR 1967 SC 1643-1669 and C.J. Sabyasachi Mukherjee in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress* AIR 1991 SC 101 at 151 and Krishna Iyer J. in *Gujarat Steel Tubes v.Its Mazdoor Sabha* AIR 1980 SC 1896 at 1923.

- What regulations are reasonably related to " public order, morality and health" and to other provisions of Part III within the meaning of articles 25(1) and 26(1), and what regulations are legitimate under article 25(2)(a);
- What regulations governing minority educational institutions are reasonably related to the need of maintaining educational standards and do not amount to an unreasonable interference with the right of the minorities to establish and administer the institutions of their choice;
- Whether the principles laid down by legislation regarding compensation, within the meaning of original article 31, was a just equivalent of the property acquired. Now, article 300A, in the light of the interpretation given in *Maneka Gandhi* to the expression 'law' in article 21, brings about the same result.
- What provisions of a law contemplated by article 31 A are reasonably related to the purposes mentioned in sub-clauses (a) to (e) of clause (1) of article 31 A.
- What law abridging a fundamental right is, within the meaning of article 31C, genuinely gives effect to or secures any of the directive principles mentioned in Part IV.

'Activist' Instances of 'Judicial Lawmaking' in India

In the light of above discussion, it can very well be made out as to what actually is the nature of a judicial legislation and how it stands at a different and restricted footage as compared to the laws enacted by the legislature in its representative capacity. The process of interpretation necessarily results in lawmaking by interpretation but within the contours legislative and constitutional framework. Thus, law-making by interpretation of statutes and the Constitution up to the permissible extent constitutes a purely 'activist' category of judicial legislations.

Under this category, decisions rendered by the Supreme Court with regard to speedy trial,[135] prisoner's rights,[136] preventing children from being engaged in match manufacturing,[137] protection of ecology,[138] laying down the principle for the award of compensation,[139] right to privacy,[140] handcuffing of prisoners,[141] right to free legal aid[142] etc. fall which illustrate legitimate 'judicial activism'.

There is yet another category of cases that can be considered to be in nominate to the 'activist' and 'overreaching' instances of judicial lawmaking. They are 'activist' in the sense that they provide a plethora of reasons for showing a fundamental re-codification of legislative power with an express justification to the effect that they would operate only till the legislature comes up with an enacted law. They are 'overreaching' in the sense that they have manifestly and clearly entered the constitutional domain of lawmaking akin to the legislature. Interestingly, though they appear to have overreached, they do not actually overreach because any time the legislature can come up and enact law as it wishes to.
The court under these instances has used Article 32 for a much wider purpose than its ordinary purpose, viz. to lay down general guidelines having the effect of law to fill the vacuum till such time the legislature steps in to fill in the gap by making the necessary law. The Court has derived this power by reading Article 32 with Articles141 and 142.

In *Union of India v. Association for Democratic Reforms*[143], the Supreme Court issued certain directions to the Election Commission that it should *inter alia* all for information from each candidate contesting election on an affidavit regarding his past criminal record, his financial assets (including those of his spouse or dependants), and his

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[135] *Hussainara Khatoon v. Home Secretary, Bihar* (1980) 1 SCC 98.
[136] *Sunil Batra v.Delhi Administration* AIR 1980 SC 1759; P*rabha Dutt v. Union of India* AIR 1982 SC 6.
[137] *M.C.Mehta v. State of Tamilnadu* AIR 1991 SC 417.
[138] *The Ganga Water Pollution Case (1988) SCC 41; M.C.Mehta v. Union of India(1987) 4 SCC 463;*
[139] Nilabati Behera v. State of Orissa (1993) 2 SCC 746.
[140] Kharak Singh v. State of U.P. AIR 1963 SC 1295.
[141] Premshankar Shukla v. Delhi Administration AIR 1980 SC 1535.
[142] Supra note 135.
[143] (2002) 5 SCC 294.

liabilities to public sector bodies and educational qualifications. Justifying this, the Supreme Court confessed:[144]

.....It is not possible for this court to give any directions for amending the Act or the statutory rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no directions can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Similarly basing its opinion on the same reasoning, the Supreme Court in *Vishakha v. State of Rajasthan,* declared sexual harassment of a working woman at her workplace as amounting to violation of rights of gender equality and right to life and liberty which it said was a clear cut violation of Articles 14, 15 and 21 of the Constitution. To this effect, the court came up with model legislation with elaborate guidelines.[145]

In *Vineet Narain v.Union of India,*[146] the court laid down directions to ensure the independence of the Vigilance Commission and to reduce corruption among government servants. The court did so since there was no legislation enacted by the Parliament to cover the said field so as to ensure proper implementation of the rule of law.

To the same tune, in *Common Cause v.Union of India,* [147]the Supreme Court issued directions for revamping the system of blood banks in the country. These directions provided for how blood should be collected, stored, and given for transfusion and how blood transfusion could be made free from hazards. In *Vishwa Jagriti Mission v. Central Government,*[148] the Supreme Court issued guidelines against ragging in educational institutions.

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[144] *Ibid* at 309.
[145] (1997) 6 SCC 241.
[146] (1998) 1 SCC 226.
[147] AIR 1996 SC 929.
[148] JT 2001 (6) SC 151.

Similarly the Supreme Court laid down directions as to how children of prostitutes should be educated;[149] on what grounds should be the fee structure in private medical or engineering colleges,[150] and on preparing a scheme for the housing of pavement dwellers or squatters.[151] These directions issued by the Supreme Court under Article 32 have the force of law.[152] Since they are to remain in force till the legislature enacts a suitable law, they can be referred to as being in nominate to the instances of 'Activism' and 'Overreach'.

'Overreaching' Instances in Legislative Functions

Appropriate judicial intervention or legitimate judicial activism is founded on an established or evolved juristic principle having a precedential value and performed within judicially manageable standards.[153] It should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate.[154] Judicial creativity may produce good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences resulting in conflicts.[155] In the words of Prof. Sathe, "When populism prevails over legal requisites, the rule of law suffers and it is in the long run adversely affects the legal culture."[156]

In *Mohini Jain v. State of Karnataka,* the Supreme Court held that right to education was included within right to life[157].The court, realising the impracticability of such a proposition, tried to narrow down the dictum in *Unni Krishnan v. State of Andhra Pradesh,* where it said

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[149] Gaurav Jain v. Union of India AIR 1990 SC 292.
[150] TMA Pai Foundation v. State of Karnataka (1995) 5 SCC 220.
[151] Sodan Singh v. NDMC (1998) 2 SCC 727.
[152] Some other cases where the court has laid down general principles having the force of law are: State of West Bengal v.Sampat Lal AIR 1985 SC 195; K Veeraswami v. Union of India (1991) 3 SCC 655; Union Carbide Corporation v. Union of India AIR 1992 SC 248; Delhi Development Authority v. Skipper Construction Co (P) Ltd. (1996) 4 SCC 622; Dinesh Trivedi v. Union of India (1997) 4 SCC 306.
[153] S.P.Sathe, "Judicial Activism: The Indian Experience" 6 *Washington University Journal of Law 7 Polity 29 (2001).*
[154] *S.C.Chandra and Others v. State of Jharkhand and Others,* AIR 2007 SC 3021.
[155] M.Rao, "Judicial Activism" 8 SCC Journal 2 (1997)
[156] See S.P. Sathe, *Judicial Activism in India* 1 (2002).
[157] (1985) 3 SCC 545.

that the right to life included the right to primary education.[158] This decision can rightly be branded as a decision rendered by the judiciary overstepping its constitutionally prescribed domain. The Constitution in one of the Directive Principles of State Policy specifically enjoins on the state to provide within a period of ten years free and compulsory primary education for all children below the age of fourteen years.[159] It is not for the Court to convert a directive principle of state policy into a fundamental right. Moreover, even if it does so, it will merely amount to conversion of a non-enforceable directive principle into a non-enforceable fundamental right. Further, the court said that all private institutions shall charge different fee for half of the students. Half of the seats were called 'free seats' and the others were called 'payment seats'. Such kind of judicial lawmaking of a substantive nature is legally untenable. If the Parliament feels to induct such directive principles into the fundamental rights, it is competent to do so; and to this effect it did the same when it inserted Article 21-A into the Constitution. Moreover the policy of subsidising cannot be attained by way of judicial process. It is purely a legislative function. Unlike the category discussed above, it seems apparent in these cases that the Supreme Court has merely interpreted the provisions of the Constitution. However, after having a detailed analysis, one cannot deny that in fact, the Supreme Court has made a law which otherwise fall into the exclusive domain of the legislature.

In *All India Judges Association v. Union of India,* the Supreme Court issued directions to the Government to create an all-India Judicial service so as to bring about uniform conditions of service for members of the subordinate judiciary throughout the country.[160] This was, in fact, a policy question requiring a constitutional amendment and the judiciary clearly overreached since it was not proper for the Supreme Court to direct the Parliament as to what policy it should adopt.

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[158] (1993) 1 SCC 645.
[159] Article 45.
[160] AIR 1992 SC 165.

In *Prakash Singh v. Union of India,*[161] a petition under Article 32 was filed in the Supreme Court praying for the issue of directions to the Union Government to frame a new Police Act on the lines of the model Act proposed and suggested *inter alia* by the National Police Commission in order to ensure police accountability to the law of the land and the people. It was contended that the existing legislation, that is, the Indian Police Act, 1861 is inadequate to cater to the changing needs of the system since it had not been reviewed for many years. The Court, in addition to what was suggested by the Commission, issued time bound directions ranging *inter alia* from the constitution of State Security Commission, selection and minimum tenure of the DGP and IGs, separation of investigation, constitution of Police Establishment Board, Police Complaints Authority to the constitution of National Security Commission. Further, to seek compliance of the said directions passed, the Court directed the Cabinet Secretary to the Government of India and the Chief Secretaries to the respective State Governments as well as Union Territories to file affidavits stating compliance of the said directions. At the outset this can be distinguished from *Vishakha*[162] since there was no legislation to cover the malady of sexual harassment caused to women in their workplaces. However, in the present case, there was a legislation to regulate the police force and it is for the legislature or the government, as the case may be to decide whether a new law is required to this effect or not. The Supreme Court, through this judgment clearly and whimsically encroached into the legislative domain.

In *State of U.P. v. Jeet Singh Bisht,* the Supreme Court was approached by the respondent Uttar Pradesh Government against the order of Allahabad High Court where the high court apart from making observations on the merits of the case, directed the respondent government to constitute at least five state consumer forums at the state level under section 16 of the Consumer Protection Act by making necessary amendments.[163] Further direction was also issued by the high court to the effect that the presiding officer of a bench shall be a retired high court judge who would enjoy the same facilities and amenities as enjoyed by the

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[161] (2006) 8 SCC 1.
[162] (1997) 6 SCC 241.
[163] (2007) 6 SCC 586.

sitting high court judge. The dividing opinion amongst the division bench eventually led the matter to be referred to the larger bench. Interestingly, creation of tribunals and deciding the amenities to be given to the presiding officers along with their eligibility criteria and qualifications is purely a legislative function which can only be prescribed by the legislature through an enactment and not by the judiciary.

The recent enhancement of fines pertaining to traffic violations in *Court on its own Motion v.Union of India & Others*,[164] can be cited as a glaring example of 'judicial overreach' where the Delhi High Court, taking *suo motu* cognisance of increasing death toll on Delhi roads enhanced the traffic fines. This illustrates how the judiciary has transgressed its functions and took over the job which falls exclusively in the domain of Parliament. On account of legitimate judicial activism, what it could at the most do was to only reflect the need of revising the fine charges or could have commanded the government to do so by way of issuing a writ of mandamus since enhancement or revision of fines is purely a legislative function which can only be done by way of an amending enactment passed by the legislature.

In *Vishnu Dutt Sharma v. Manju Sharma*[165] the Supreme Court rightly rejected the contentions of the petitioner for granting him divorce solely on the ground of 'irretrievable breakdown of marriage'. The court negated the precedential sanctity of its earlier pronouncements which 'overreachingly' recognised such ground as a valid ground for divorce.[166] Taking a right step towards the mandate of the Constitution, the Court held that adding such a ground in section 13 of the Hindu Marriage Act, 1955 would tantamount to adding a clause to the provision by way of a judicial verdict. In fact, the Court took a right stand since it is for the legislature to decide as to what grounds should be provided for affecting the divorce.

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[164] 139 (2007) DLT 244.

[165] Civil Appeal No 1330/09 reported in MANU/SC/0314/2009.

[166] See *Neelu Kohli v. Naveen Kohli AIR 2004All. 1; Satish Sitole v. Ganga (2005) 7 SCC 734; A Jayachandra v. Aneel Kaur (2005) 2 SCC 22.*

More recently the Supreme Court expressed its displeasure at the Central Government for not coming out with suggestions to prevent damage to public property and said special courts would be directed to try these cases of damage done to public property and dispose them off expeditiously. The Judge noted that it was unfortunate that our country seemed to have an unlimited tolerance and said, "Since you (the government) are not doing, being the third constituent of the state we (the judiciary) will do it. But it is your function, not ours." The Justice made it clear that if the government did not come out with concrete proposals, "the government would be left with no option but to implement the court order."[167]

Likewise, opposing its monitoring of the 2G spectrum case probe, the senior counsel for the Centre said that "the Supreme Court should not cross the *Lakshman Rekha* and must act in accordance with the law"[168]. It was a moot question whether courts had the jurisdiction to pronounce on a policy matter?

In the *Salwa Judum case,* The Supreme Court declared the appointment of tribal youth as Special Police Officers/ Salwa Judum by the Chhattisgarh government to counter Maoist violence as illegal and unconstitutional. The Union Government said the court order directing disbanding and disarming of tribals, deployed as SPOs would affect not only anti-Naxal operations but also its fight against militants in J &K as well as in other States and in particular the Northeast. The Centre said that under the Constitution, policing was exclusively in the domain of the executive and the judiciary could not interfere in it.[169]

Two recent judgments by the Supreme Court have been lauded by many citizens for upholding the rights of the underprivileged sections of the society. The first is upholding the right of free treatment in private hospitals in New Delhi which utilised the grant of subsidised or free land with an undertaking for free treatment of patients up to 25 percent of bed capacity. The second is the apex court's warning to employers against the exploitation of workers – under the ruse of growth through globalisation and liberalisation –

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[167] "Special Courts mooted to try cases of Damage to Public Property", *The Hindu, Delhi Edition, 23 Nov 2011.*
[168] "Don't Cross Lakshman Rekha, Centre tells Court", *The Hindu, Delhi Edition, 23 Sep 2011.*
[169] "Salwa Judum Review Plea Hearing", *The Hindu, Delhi Edition, 10 Sep 2011.*

by denying them their rightful claims, through the backdoor of misusing the concept of contractual labour.[170] Are such decisions not 'judicial overreach'?

The following two recent examples, however, amply illustrate that the Supreme Court is well aware of its *Lakshman Rekha* when it comes to separation of powers:-

- While confirming the death sentences on an accused for burning to death his wife and three children, the Supreme Court said that "It is only the legislature which can abolish the death penalty and not the courts. As long as the death penalty exists in the statute book, it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary". A two Bench Judge said, "It is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature. The very fact that it has been held that death penalty should be given only in the rarest of the rare cases means that in some cases it should be given and not that it should never be given.[171]
- In the instant case, wholesale vendors questioned the Assam Government's policy decision to shift a wholesale market to the outskirts of Guwahati city. The Guwahati High Court upheld this decision. Disposing of appeals against this order, the Supreme Court said: "The State should not be hampered by the court in dealing with evils at their point of pressure. All legislation, including delegated legislation and executive action, are essentially *ad hoc.* Since social problems nowadays are extremely complicated, this inevitably entails special treatment for distinct social phenomena. If any piece of legislation or executive action is to deal with realities, it must address itself to variations in society. The State must, therefore, be left with wide latitude in devising ways and means of social control and regulation, and the court, unless compelled by the law, should not encroach on this field". The Supreme

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[170] The Hindu, Delhi Edition, 5 Sep 2011.

[171] "Legislature alone can abolish death penalty." *The Hindu, Delhi Edition,14 Sep 2011.*

Court cautioned courts against passing orders that would hamper the State in its routine administrative functions.[172]

On 15 December 2011, The Hindu carried an Editorial titled, "*Just Cool It*" on the Mullaperiyar Dam issue lauding the Supreme Court's intervention. It reads thus: "With the Centre lacking in both political will and moral authority to help find solutions to inter-State disputes, it needed the Supreme Court of India to step in to cool tempers between Tamil Nadu and Kerala on the overheated issue of the Mullaperiyar dam. Putting first things first, the five-judge Constitution Bench of the Supreme Court asked the two States not to arouse people's feelings and create a fear psychosis on this issue. Clearly, the situation was threatening to get out of hand with chauvinist elements on both sides trying to shut out reasoned debate on what was essentially a question for technical experts to resolve. Neither political leaders nor lay people can contribute meaningfully to making decisions about the safety and stability of the 116-year-old dam. On the directions of the Supreme Court, the Empowered Committee, headed by the former Chief Justice of India A.S.Anand, is looking into all aspects of safety of the dam, and will soon submit its findings – on the basis of expert assessments. The proper course, as the Supreme Court pointed out, is to wait for the recommendations of the committee. The matter must not be left to fringe elements that are out to whip up emotions cynically."[173]

Most recently, on 03 February 2012, in an historic judgment on 2G Spectrum sale, holding that spectrum was a natural resource, the Supreme Court said natural resources "are vested with the government as a matter of trust in the name of the people of India, and it is the solemn duty of the state to protect the national interest, and natural resources must always be used in the interests of the country and not private interests". In The Hindu editorial titled, *"Fruit of the Poisonous Tree"*[174] the newspaper comments on the Supreme Court's judgment on 2G Spectrum sale thus:

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[172] "Only Wearer knows where the shoe pinches", *The Hindu, Delhi Edition, 31 Aug 2011.*
[173] "Just Cool It", Editorial in The Hindu, Delhi Edition, 15 Dec 2011.
[174] The Hindu, Bangalore Edition dated 03 Feb 2012, p 14.

"When the rot runs deep, partial remedies won't do. By cancelling the 122 licences for 2G Spectrum that were the product of an illegal policy process that was contrary to public interest and "violative of constitutional principles", the Supreme Court has struck a blow for justice, transparency and ethical business practices. For those business houses used to bending or breaking laws to rake in excess profits, this verdict is a lesson that will forever remain etched in their institutional memory. The present case may relate to the telecom sector but there is hardly any industry in India today where unscrupulous companies have not sought to use their nexus with elected leaders and government officials to get ahead in their quest for quick and easy profits. Influence peddling and rent seeking have been the bane of the Indian economy and reforms do not seem to have reduced their incidence. The lesson for corporate India from the Supreme Court's landmark judgment is that there is little to be gained- and a lot to be lost- from doing business this way."

Other instances from the recent past 'when Court put Government on the mat'[175] in the Law and Order front are :-

- Bihar Assembly. Supreme Court passed strictures on then Bihar Governor in 2006 for recommending dissolution of the State Assembly just to prevent a political party from forming government. The Governor resigned later.
- CVC Appointment. Supreme Court set aside appointment of CVC in 2011, terming the decision 'illegal' and laid down stringent guidelines for future appointments to the post.
- Salwa Judum. Supreme Court ruling in July 2011 held the appointment and arming of civilians as special police officers in anti- Naxalite operations illegal and unconstitutional.
- Black Money. Pulling up central agencies for not "showing seriousness" in bringing back black money stashed away abroad, the Supreme Court last year constituted a special investigation team to be monitored by the court.

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[175] Sunday Times of India, Bangalore Edition, 05 Feb 2012, p 17.

- Gujarat Lokayukta. Gujarat High Court upheld the appointment of Lokayukta by Governor in January 2012 and dismissed the plea of the State Government that had challenged it.
- 2G Case. Pulling up the PMO for delaying sanction to prosecute then telecom minister, the Supreme Court order on Jan 31, 2012 has empowered citizens to file complaints against public functionaries.

Findings

To summarise, one can say that when the judges make law it is essentially a sort of a restricted form of legislation which cannot go beyond the limits of the statutes itself. Such lawmaking is essentially a rule making power to be used as a judicial tool to apply and administer the statute law to adjudicate upon disputes between the parties *inter se*. A judge made law in its essence is an extension of the statute law; its flexibility is pragmatic as the judge has the comfort of dealing with a concrete situation. However, a mere remarkable advantage to a judge does not authorise him with respect to lawmaking in a generic nature. 'Judicial Activism' in order to be appreciated, demands a distinction from 'Judicial Overreach' or 'Judicial Excessivism' since it requires a delicate combination of discretion, tact and vision. Any exercise of which transgresses the four walls of the Constitution is counterproductive since it disturbs the delicate balance and harmony of the respective organs of the state.