**TOOLS AND TECHNIQUES OF JUDICIAL CREATIVITY, AND PRECEDENT: A CRITICAL ANALYSIS**

**Awadhesh Pratap Singh**

**Neha Diwakar**

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**M.J.P.Rohilkhand University, Bareilly**

**Mobile No. 8318102315**

**7055339394**

**Email- singhap875@gmail.com**

**nehadiwakar301094@gmail.com**

**Abstract**

Human is a social Person. He conducts his activities by staying in the society. It is the responsibility of the state to guide and ensure a just life in the society. Population, definite territory, government and sovereignty constitute a state. The government is the think tank of the state. The combined form of legislature, executive and judiciary is called government. The above various organs of the government are legally empowered and accountable for performing their respective functions. The legal strength of the government reinforces the accountability of the organs of the government. Law making is a major responsibility of the legislature. The legislature also delegates its legislative power due to work overload, subject-specialization and other reasons, the law made by which is called delegated legislation. In addition to all this, through judicial creativity, law making is also done, which is considered more clear and binding. Judicial creativity is the result of the judicial discretion of the judge through logic, reasoning and interpretation at the time of interpretation of statutes and decision of cases. In the exercise of judicial discretion, judges make judicial laws with the help of various types of legal means, tricks and discretion in the process. Some (political pressure, problem of laws, delay in delivery of justice, criticism of judges, problem of corruption etc.) have been objected to judicial law making. These raised objections are not baseless. The danger of disintegration of the basic structure of the society has arisen due to these rising objections. The same state or government is considered best, and decision of cases The purpose of this paper is to strengthen the rule of law and social system by analyzing judicial law making and its means and techniques in the light of the rising objections.

Keyword - Society, state, government, law making and judicial creativity

**Introduction**

Human is a social person, he conducts his activities by living in the society. Society is the focal point of his activities. The society makes its own rules and laws for how a person should behave while living in the society. Its compliance is expected from all. It doesn't matter if people follow it, but when it is violated then the balance of the society gets disturbed. This happens because man, being a rational intellect, keeps striving for the fulfillment of his interests, desires and aspirations. In doing so, a situation of mutual conflict and conflict arises. In this way, there is a fear of disintegration of the basic structure of the society. To save the basic structure of the society from disintegration, judicial process is required. No state can escape from its liability, the same government or state is considered best, whose judicial process is well-organized.

**Judicial process**

Judicial process civilized through which justice is delivered is an accepted fact. Judicial Process mean such a process there are two main aspects of judicial process:

1. Judicial causality, it has the power of reasoning, which is called reasoning skill of propriety.
2. The study of judicial decision making is called the process of decision making.

Evils and vices are redressed by the judiciary through judicial process, in which decisions and orders are passed using prior decisions, arguments, interpretation and discretionary power. Due to judicial activism, the election of law takes place in a different form, in which the judges exercise their discretion. Judges make laws by deciding disputes and interpreting the law. This law making combines ductility with the element of permanence in law which is the result of the judge's discretion. Now it has become a common principle.

In the words of Pollock, no jurist at the present time will pretend that the decisions of the court do not contribute or change the law.

Judicial law making is the law making done by the judges. Elements of judicial creativity are visible in many of the judgments delivered by our judges. Many techniques and tools are used by judges for judicial creativity. Judges interpret the law. Many times the errors of the omissions of law in this interpretation are seen by the judges, they make up the laws by giving decisions at their discretion.

The main instrument of judicial creativity is the selection of laws established by the legislature. And it is used within the intention of the legislature. So it is only an assumption that judges only find the law. Through election law, judges not only make laws but also establish what the law should be.

In the Constitution of India, the Supreme Court has been considered a vigilant watchdog of the Fundamental Rights and has been given the power of judicial review. If any law passed by the legislature takes away or abridges the rights conferred by Part III of the Constitution, such law shall be void**1**. The creative right of law has been provided by Article 32 (Supreme Court) and Article 226 (High Court) of the Indian Constitution.

**Tools of Judicial Creativity of Law**

It is universally accepted that judges make laws while settling disputes and electing law, but judges make laws more definitively and authentically than legislatures. In making this law, they have to adopt some means, which are as follows:

**Article 32**

Article 32 of the Indian Constitution empowers the Supreme Court to conduct appropriate proceedings for the enforcement of Part III of the Constitution. The jurisdiction of the Supreme Court under Article 32 is the basic structure of the Constitution, it cannot be destroyed by amendment under Article 368. **L. Chandra Kumar V. Union of India2.**

**Article 226**

Article 226 provides that notwithstanding anything contained in Article 32 Every High Court shall have power to issue directions, orders or writs for the enforcement of the Fundamental Rights of Part III of the Constitution or for any other purpose in all areas in respect of which it exercises its jurisdiction. For other purposes the expression means any legal right or legal duty3.

**Article 136**

Under Article 136, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, concept, sentence or order passed or made by any court or tribunal in India in any suit or case. Use of Discretionary Power on the Principle of Equity - **Shivanand Gaurishankar Vasvanti Banmam Vishnu Textiles Mill4.**

**Article 137**

Judges also create law by the power of review of the Supreme Court under Article 137 of the Constitution of India. This Right Basis-

1. Disclosure of new and important cases of evidence.
2. An apparently visible error or error in judgment
3. Any other sufficient reason.

**Article 141**

The law declared by the Supreme Court under article 141 of the Constitution of India shall be binding on all courts within the territory of India.

Now the question arises whether the Supreme Court is bound to follow its earlier decisions?

From the expression sub-courts used in Article 141 makes it clear that it does not include the Supreme Court. In other words, the Supreme Court is not bound by its own decisions and in appropriate cases it can reverse its earlier decisions- **Bengal immunity Company v State of Vihar5**

In the case of **Golaknath v state Punjab6**, the Supreme Court revers its earlier judgments in the case of shakari Prasad and sajjan singh. But in **Kesavananda Bharati v State of Kerala7**, the Supreme reverse the decision given in the case of Golaknath, it is clear from the above examples that the principle of Precedents of Stare Decis is followed to a very limited extent in India.

The House of Lords of England, which so far was strictly following the precedent, also refused to accept it and said that its strict observance could cause injustice in a particular case.

The Allahabad and Bombay High Courts have just held that the Supreme Court is also a law within the meaning of Article 141 of the Obiter Dicta and is therefore binding on all courts.

The Supreme Court itself in the case of **Amritsar Municipality v. Hazara Singh8** the opinion expressed by him that the above general views are also binding on the subordinate courts.

In case of conflict between the decision of the smaller bench of the Supreme Court and the decision of the larger bench, the decision of the larger bench should be followed - **State of Uttar Pradesh v Ram Chandra Dwivedi9**

The law declared by the Supreme Court under Article 141 is binding on all irrespective of whether they take that action Whether party to or not or notice has not been given to them, **M/s Diamond Company of India V Union of India10** Law of Judicial Creativity

The judges use many techniques in the making of the law as well as the means, which are provided to them by law. Are, as

1. **Through the technology of election of statutes,**

Although the Parliament has narrow power in the election of statutes, but the main authority of the election of statutes is with the courts. Parliament has the power to declare or repeal any judicial legislations which have misinterpreted or misinterpreted any previous statute or to give retrospective effect to the enactment which is declaratory or repealed.’

In the case **State of Gujarat Vs. Jeena Bhai11**, the Court held that if the intention of the Legislature is not properly elected by a decision, Parliament can nullify its effect by legislation. Parliament cannot declare the decision of the Court to be wrong.

The power to interpret statutes comes under the exclusive domain and exclusive control of the court. One of the important reasons for the authenticity of judicial election is that the statute makers are no more, the new statute makers cannot tell what the old makers meant. Not only this, Parliament meetings are sometimes held. Therefore, there was a need for a continuously functioning institution in the form of a court, which interprets the statutes in an objective way. The principle of cover, the principle of abstraction, the principle of essence and substance, the principle of color legislation, the principle of incompatibility, harmonious economic development, through the means of economic development, etc.

1. **By Writs:**

Under Article 32 of the Constitution, the Supreme Court and Article 226 High Court

1. Habeas Corpus, 2. Mandamus, 3. Prohibition, 4. Certiorari & 5. Quo Warranto
2. **Discretionary remedy :**

The discretion of the High Court, under Article 226 of the Constitution, is a judicial discretion which must be exercised in a judicial manner in accordance with well-established principles - **Uttar Pradesh v. Mohammad Nuh12**

**Other provisions relating to judicial law making**

1. According to section 23 of the Indian Contract Act, 1872 any contract when found to be against public policy can be declared unlawful. When a judge decides whether it is against public policy, he acts indirectly to make laws.
2. Article 13 of the Constitution gives wide powers to the Courts to declare which statute or other legal rule is void by virtue of being inconsistent with the provisions of Part III of the Constitution.
3. Articles 14, 15 (1) and which classification is reasonable and lawful within the meaning of 16(1) and which specific provisions are lawful within the meaning of Articles 15(3), 15(4) and 16(4).
4. Which of the restrictions are reasonable and in the public interest within the meaning of Article 19(2) to (6) of the Constitution.
5. What is included in the right to life and right to personal liberty within the meaning of Article 21, etc.

**Judicial precedent**

Under the judicial prejudgment method, the precedent is used as a sample paper, on the basis of which another paper or document is prepared. Precedent means adopting past decisions as a guide and applying them to future decisions. In other words, pre-judicial judgments are such principles laid down by the court which are to be applied in future similar suits to be decided before the court. It is noteworthy that all judicial decisions do not take the form of prior judgments, but only such decisions have the importance of aforesaid, which render a new rule or principle of law.

The decision reached by the adjudicating judge on the basis of material facts and exclusion of material facts in a previous judgment is called adjudication.

Interpretation Such a statement of the judge which is not necessary for a particular decision, is called cross-examination.

As a source of law, prejudicial judgment is of substantial importance. In Babylonia it was customary to record court judgments before 2000 BC so that they could be used for legal advice. Under Roman jurisprudence, the judges were instructed to follow the earlier decisions given by eminent jurists in the cases. It is noteworthy that in the Continental System, prior judgment is not considered binding and judges have the discretion whether to base their decision on precedent or not. But in English law, in some cases, prior decisions have a binding effect, that is, it is mandatory for the judges to follow the earlier decisions in similar cases. Doctrine of stare decisis is a universal principle of English law. According to this principle, prior decisions are authoritative and binding and must be followed. When a legal question is clearly decided by several decisions, then the principle of following and not changing it is called the principle of following decisions. Decisions made by the courts of England are binding on the courts of Britain in cases of similar facts. That is why there pre-judicial judgments are recognized as the essential source of law. Two things are necessary for adjudication:

(1) There should be a proper system of reporting the cases decided; and

(2) There should be a definite series of graded courts,

The decision of the Supreme Court of India, the decision of the High Court on all the courts of India, is binding on all the subordinate courts of jurisdiction.

In the case of **Saurashtra Cement and Chemical Industries v Union of India13**, it has been held that adjudication has no statutory recognition, yet it is a rule of convenience and understanding and above all

It is a rule of public policy. It is used in two senses:

1. In a loose sense
2. In a strict sense

Prejudgment is used in a loose sense in India. Our Supreme Court is not bound by its previous decision, it can change or reverse its earlier decisions and it has done so many times in public interest.

Prejudice as a part of law, if judicial pre-judgment is the authority or in other words they speak the language of authority, then the principles they propound will be binding on future suits or subsequent suits.

In the case of **S.I. Ruplal vs. Lt. Governor of Delhi14**, it has been held that prior judgments which firmly express our rule of law, form the cornerstone of the administration of justice in our legal system.

A creative prior decision is one that creates and uses a new method. When the judges interpret the statute, they make the law i.e.

1. Finding out the real intent of the legislature
2. Resolving suspicious
3. Filling the gap (Gap)
4. Removing absurdity or difficulties
5. Harmonizing the statutes with the constitution and other laws do judges make laws

The answer to the question of whether judges make laws by harmonizing statutes with the constitution and other laws is linked to the creative principle of prior judgment. According to the creative principle, judges create or create new rules through their decisions. In the case of **Golaknath v State of Punjab15**, the Supreme Court, by applying the principle of retrospective ruling to the domain of the Constitution, accepted that the courts make the law.

**Objections on Judicial Creativity**

1. Courts seem to be acting as a conservative force, such as land reform laws (1951-1953), nationalization of banks, declaring laws related to appointment in the judiciary illegal.
2. There appears to be a situation of uncertainty in the law of the land due to the change of its earlier decisions by the court.
3. Courts seem to be encroaching on constitutional limits, such as judicial review between 1964 and 1971. There was a struggle over declaring it unconstitutional.
4. There seems to be a conflict situation between the judiciary and the legislature, as there was a struggle to declare the amendments made in the Election reform act (Representation of the people act) as unconstitutional happen.
5. There seems to be a decrease in social, economic and political stability, such as declaring special rules, policies and programs of the Central and State Governments from time to time as illegal.

**Problems of accountability of the judiciary**

Court is the temple of our faith and belief. Keeping the judiciary free from the influence of the legislature and executive means that the courts should be free from any pressure or influence. The job of a judge is not only to provide justice, but it is also that they should be honest about their profession and get justice done in an honest and fair manner. At the time of judicial review, they are expected to be more careful, because at that time the judges use their discretion more, the responsibility of the judiciary to keep itself independent and impartial is huge. But at present, there are many problems in the responsibility of the judiciary to provide free and fair justice, which are facing the judges, such as-

1. Political pressure
2. Problem of laws,
3. Delay in providing justice
4. Sufficient Lack of judicial officers
5. E-judiciary,
6. Criticism of judges,
7. Problem of corruption, etc.

**Conclusion**

1. Various articles and sections of the Constitution and statutes of India respectively provide for judicial law making.
2. The judges, drawing power from the Constitution and statutes of India, try to ensure social order through judicial creativity.
3. Judicial creativity is now a widely accepted fact of civilized society.
4. Excess of general legal statement is a mirror of independence and clarity of judicial rule.
5. The allegations on judicial creativity are not baseless.

**Suggestion**

Judiciary is an important pillar in democracy, whose responsibility is very important and sensitive for the society and the people. The ability of the judiciary is affected in the light of the rising objections to judicial law making and the problems of accountability of the judiciary. The predominance of justice is the philosophy of civilized society and systematic judicial process is the basis of the predominance of justice. The same state or government is considered best whose judicial process is well organized.

The following measures can be taken to ensure the governance of the democratic spirit and the full utilization of the capacity of the judiciary -

1. Judicial decisions should be strictly followed.
2. Persons of excellent character and hard work should be appointed as judges.
3. By amending the Prevention of Corruption Act, stringent provisions should also be made against people who offer bribes to judges.
4. The systems of the judiciary (long, expensive and boring judicial system, appointment and transfer etc.) should be improved.
5. The problems of the judiciary (lack of advanced resources etc.) should be effectively resolved. Reference

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