International Research Journal of Engineering and Technology (IRJET) e-ISSN: 2395-0056
Volume: 10 Issue: 10 | Oct 2023 www.irjet.net p-ISSN: 2395-0072

Judges as Lawmakers: An Examination of the Dichotomy

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Abstract

The separation of powers doctrine is a cornerstone of democratic governance, delineating the distinct roles of the legislative, executive, and judicial branches. While the traditional view posits that judges are mere interpreters of laws, a growing body of literature challenges this strict separation, advocating for a more active judicial role in shaping legal norms. This debate has not been confined to philosophical discourse; it is a live issue in practical jurisprudence. This paper delves into the contentious issue of whether judges can make laws, exploring historical perspectives and contemporary debates. It examines how this debate manifests in India's unique legal system, with its blend of common law traditions and statutory law. The paper reviews influential legal scholars' views, such as Blackstone and Bentham, and their impact on the debate. It also explores the role of judges in India's legal landscape, from landmark constitutional cases to the concept of judicial activism. The findings highlight the complex relationship between the judiciary and the legislature, shedding light on the dynamic nature of democratic governance.

Keywords: Separation of Powers, Judges, Lawmaking, Declaratory Theory, Judicial Activism, Indian Constitution, Legal Precedent, Judicial Review.

Introduction

The separation of powers doctrine is a fundamental cornerstone of democratic governance, delineating the distinct roles of the three branches of government: the legislative, executive, and judicial. The legislative branch, composed of elected representatives, is entrusted with the primary responsibility of lawmaking. This division of authority is carefully crafted to establish a system of checks and balances, preventing any single branch from accruing excessive power or encroaching on the jurisdiction of another. In this traditional framework, the judiciary's role is to interpret and apply the laws promulgated by the legislature. However, this article ventures into the heart of a contentious issue that has ignited impassioned debates

within philosophical and legal spheres: the question of whether judges possess the capacity to create laws. Historically, the prerogative of lawmaking has resided firmly in the hands of elected representatives in the Parliament and state legislatures, as they are chosen by the majority to conceive and enact legislation. Judicial authority, in contrast, is traditionally circumscribed to the interpretation and application of these statutes. Yet, this enduring dichotomy has generated fervent discussions among scholars, legal experts, and policymakers, and it continues to be a subject of profound interest in contemporary democratic societies.

Traditionally, the judiciary's role has been narrowly defined as the impartial interpretation and application of existing laws. As per this conventional perspective, judges are expected to act as neutral arbiters, ensuring that the laws enacted by the legislature are faithfully applied to individual cases and controversies. This restrained role is often encapsulated in the Latin phrase "iudex non calculat," which translates to "the judge does not calculate." It underscores the idea that judges should refrain from engaging in lawmaking and instead confine themselves to the task of elucidating the intent of the legislature. This viewpoint is rooted in the belief that elected representatives, who are directly accountable to the electorate, are the appropriate agents for crafting and amending laws. Accordingly, the judiciary's responsibility is limited to ensuring that these laws are implemented justly and consistently. This traditional understanding of the judiciary's role has been upheld by legal luminaries throughout history.

Nevertheless, the question of whether judges can create laws has not remained stagnant within legal discourse. In recent years, a growing body of literature and legal scholarship has emerged, challenging the strict separation between legislative and judicial powers. Advocates of judicial lawmaking argue that judges can, and sometimes should, play a more proactive role in shaping legal norms, especially when faced with legislative inaction or perceived injustices that result from statutory constraints. One prominent figure in this debate is Ronald Dworkin, a renowned legal philosopher, who contends that judges, through a process he terms "constructive interpretation," engage in a form of lawmaking by extrapolating principles from existing legal materials to resolve cases that are not explicitly covered by statute. Dworkin's argument has had a substantial impact on the discourse surrounding judicial lawmaking, emphasizing the role of judges as moral interpreters of the law rather than mere passive rule-appliers. Moreover, the concept of "common law" has historically allowed judges to develop legal precedents through case-by-case adjudication, effectively contributing to the evolution of the legal landscape. This approach has been particularly

significant in jurisdictions with a common law tradition, such as the United States and the United Kingdom, where courts have played an influential role in shaping legal principles over time.

The controversy surrounding judicial lawmaking persists, and it has not been confined to the realm of legal philosophy. In practice, judges often find themselves navigating a delicate balance between upholding existing laws and addressing societal changes or injustices that may not be adequately addressed by legislative bodies. For example, in the United States, landmark decisions like Roe v. Wade (1973) and Obergefell v. Hodges (2015) involved judges interpreting the Constitution to establish new legal rights, respectively related to abortion and same-sex marriage. These decisions, while celebrated by some as progressive advancements, have also been fiercely criticized for what opponents perceive as judicial overreach. Similarly, in India, the Supreme Court has been hailed for its role in expanding the scope of fundamental rights and ensuring access to justice for marginalized communities, but it has also faced backlash for perceived encroachments into legislative territory, such as the banning of certain activities or policy decisions. The question of whether judges can make laws is a deeply contentious issue that has ignited vigorous debates in philosophical, legal, and political circles. While the traditional view of judicial restraint and deference to legislative authority remains influential, it is increasingly challenged by arguments advocating for a more active judicial role in shaping legal norms. The tension between these perspectives underscores the dynamic nature of democratic governance and the ongoing need to strike a delicate balance between the branches of government to uphold the principles of justice, accountability, and the rule of law.

In the context of India, the question of whether judges can make laws has been a subject of extensive scholarly inquiry and legal discourse. India's unique legal system, which is a blend of common law traditions and statutory law, has generated specific perspectives on the role of judges in lawmaking. At the heart of the Indian legal system lies the Indian Constitution, which provides a framework for governance and delineates the powers and responsibilities of various branches of government. The Constitution, in itself, represents a significant source of law. The Indian judiciary, particularly the Supreme Court, has played a pivotal role in interpreting and evolving the Constitution. India's legal system is also deeply rooted in its colonial past, marked by the British Common Law tradition. The Constitution of India, adopted in 1950, established the framework for governance and judicial power. The Constitution, in Article 141,

accords the decisions of the Supreme Court binding precedential authority. Additionally, Article 142 grants the Supreme Court discretionary powers to pass any decree or order necessary to secure justice. These constitutional provisions have been central to debates about the extent of judicial lawmaking authority. The Declaratory Theory, with its roots in British jurisprudence, has influenced early Indian legal thought. Legal scholars like M.P. Jain (1965) have argued that judges in India adhere to this theory, focusing on interpreting and declaring the law rather than creating it.

Notably, the "Basic Structure Doctrine," articulated in the landmark case of Kesavananda Bharati v. State of Kerala (1973), stands as a testament to judicial lawmaking in India. This doctrine, which is not explicitly outlined in the Constitution, was enunciated by the Supreme Court. It asserts that while the Constitution can be amended, certain fundamental features, or the "basic structure," are beyond the reach of amendment (Kesavananda Bharati v. State of Kerala, 1973). This doctrine has been a subject of significant academic analysis. Scholars such as Granville Austin have examined its origins and implications for the Indian legal system (Austin, 2003). The case itself represents a critical example of how the judiciary can shape and interpret constitutional provisions in a manner that effectively creates law and legal principles. In India, judges have also played an active role in addressing pressing social issues through Public Interest Litigation (PIL). PIL cases allow judges to step beyond traditional roles of interpretation and apply the law to address socio-economic injustices and human rights violations (Eckert, 2010). Legal scholars like Upendra Baxi have explored the concept of judicial activism in the Indian context (Baxi, 1986). Judicial activism involves judges actively engaging in policy and law formulation, often in response to public interest concerns. This judicial role in shaping public policy and law, particularly in the absence of legislative action, is a central theme in discussions about judges making laws in India.

The question of whether judicial decisions amount to legislation has been a matter of contention. While some scholars argue that Indian judges are not lawmakers per se but rather interpreters of the law (Viswanathan, 2003), others contend that the dynamic nature of the Indian legal system, coupled with the judiciary's role in addressing legislative gaps and social issues, effectively transforms judges into lawmakers to some extent (Rai, 2001). Overall, the literature on judicial lawmaking in India reflects the country's unique legal landscape, where the judiciary's role in interpreting the Constitution, shaping public policy, and addressing social issues has significant implications for the ongoing debate on whether judges

can make laws. Understanding this debate in the Indian context requires a nuanced consideration of constitutional principles, legal traditions, and the judiciary's evolving role in society. Thus, this article delves into the contentious issue of whether judges can make laws.

Literature Review

The question of whether judges can make laws has been a longstanding and contentious issue in the realm of jurisprudence. Legal scholars, philosophers, and jurists have grappled with this question, offering diverse perspectives that have evolved over centuries. This literature review provides an overview of key historical and contemporary sources that have contributed to the discourse surrounding judges' role in lawmaking.

One of the earliest and most influential voices in this debate is Sir William Blackstone, whose work in the 18th century laid the foundation for the Declaratory Theory of Law. Blackstone maintained that judges had a solemn duty to ascertain and declare existing customs and principles, refraining from the creation of new laws based on personal preferences (Blackstone, 1765). This perspective was shared by legal luminaries such as Sir Matthew Hale and Dr. Carter, who considered judges as mere discoverers of the law, tasked with identifying and pronouncing the law as it existed (Hale, 1713; Carter, 1670).

In contrast to the Declaratory Theory, Jeremy Bentham and John Austin vehemently challenged this view. Bentham argued that judges actively participated in lawmaking, often usurping the role of elected legislatures (Bentham, 1838). He dismissed the Declaratory Theory as a falsehood and contended that judges wielded true lawmaking authority. Austin characterized the theory as a childish fiction, asserting that judges were the de facto lawmakers who applied preexisting legal principles as they saw fit (Austin, 1861).

The question of judges making laws remains a subject of contemporary debate, with legal scholars offering nuanced perspectives. American Realism, a movement that emerged in the early 20th century, redefined the understanding of judicial decision-making. Scholars like John Chipman Gray, Oliver Wendell Holmes, Jerome Frank, and Karl Llewellyn emphasized the importance of practical experiences, societal contexts, and individual judges' backgrounds in shaping legal outcomes (Gray, 1921; Holmes, 1897; Frank, 1930; Llewellyn, 1931).

Gray argued that courts were vital sources of law, while Holmes famously proclaimed that "law is the thing that the courts do," emphasizing the pragmatic application of law (Holmes, 1881). Jerome Frank's work challenged the notion of legal certainty, highlighting the ambiguity inherent in law and the role of judges in interpreting and applying it (Frank, 1930). Karl Llewellyn viewed law as a dynamic institution shaped by precedent, ideology, and societal factors, emphasizing the influence of judges' personal histories and experiences on their decision-making (Llewellyn, 1931).

In a global context, the role of judges in lawmaking varies across different legal systems and jurisdictions. Comparative legal analysis reveals divergent approaches, with some legal systems granting judges greater latitude in shaping legal norms while others adhere more strictly to the separation of powers doctrine, limiting judicial lawmaking (Pound, 1917). The examination of cases from various jurisdictions provides insights into the practical application of judicial decision-making in different legal contexts.

One of the seminal works in this area is the book "The Indian Constitution: Cornerstone of a Nation" by Granville Austin (1966). Austin's comprehensive analysis of the framing of the Indian Constitution sheds light on how the Constituent Assembly, which included many legal luminaries, played a significant role in shaping the legal framework of the country. This work provides insights into the delicate balance between legislative and judicial authority in post-independence India.

The Indian judiciary's role in interpreting and sometimes crafting laws has been a subject of scrutiny. In his book "Judicial Activism in India: Transgressing Borders and Enforcing Limits" (2002), S.P. Sathe explores the concept of judicial activism and its impact on lawmaking. He discusses instances where the Indian judiciary, particularly the Supreme Court, has been proactive in shaping legal standards and policies, often to fill legislative gaps or to address pressing social issues.

Justice V.R. Krishna Iyer, a distinguished former judge of the Supreme Court of India, made significant contributions to the debate. His writings, including "The Judge as Lawmaker" (1976), have delved into the nuanced relationship between the judiciary and the legislature in India. Justice Iyer's work underscores the idea that judges have a creative role to play in the development of law, especially when faced with legislative inertia or inadequacies.

The jurisprudential perspectives of Indian legal scholars such as Upendra Baxi, who authored "The Role of Judges in Developing Countries" (1984), have also enriched the discourse. Baxi's work explores the challenges and responsibilities of judges in countries like India, where the judiciary often has to grapple with socio-economic issues and human rights concerns that necessitate judicial intervention.

Methodology

The research methodology employed in this study relies solely on secondary resources to investigate the question of whether judges can make laws. A comprehensive literature review is conducted, encompassing academic articles, legal texts, historical documents, and books to trace the historical evolution of thought on judges' role in lawmaking. This review is complemented by a detailed analysis of relevant case law from diverse legal systems and jurisdictions, providing insights into the practical application of judicial decision-making in shaping legal norms. Additionally, a comparative legal analysis is undertaken to highlight commonalities and differences in approaches across different legal systems. This study does not involve primary data collection methods such as interviews or surveys, but instead synthesizes existing scholarship and legal precedents to provide a comprehensive examination of the subject matter.

Findings and Discussions

The role of judges in the creation of laws has been a subject of intense debate throughout history. This discussion revolves around the concept of judges as law-makers, a theory known as "The Declaratory Theory of Law." This theory posits that judges do not create laws but merely discover and declare existing legal principles, customs, and statutes. This view has been endorsed by several influential legal scholars and figures, including William Blackstone, Mathew Hale, Dr. Carter, and Lord Esther. In the 18th century, William Blackstone articulated the Declaratory Theory of Law, emphasizing that judges are bound by their oath to interpret and apply the laws and customs of the land as they exist, rather than exercising personal discretion to create new laws. Blackstone's view is often regarded as the cornerstone of this theory (Blackstone, 1765).

Mathew Hale, another prominent legal thinker, supported this perspective by asserting that while courts cannot create new laws, they possess the authority to articulate and announce what the law of a nation is

at a given time (Hale, 1713). Dr. Carter, echoing similar sentiments, argued that the primary duty of judges is to declare the law, leaving the legislative branch, namely Parliament, responsible for making new laws (Carter, 1787). Lord Esther also aligned with this view, emphasizing that judges do not possess the power to make laws independently (Esther, 1830). However, this Declaratory Theory of Law faced criticism from legal scholars like Jeremy Bentham and John Austin. Bentham vehemently rejected this theory, labeling it a "willful falsehood" (Bentham, 1843). He argued that the theory concealed the fact that judges were not mere declarants but active lawmakers, thereby undermining the separation of powers between the judiciary and the legislature. According to Bentham, judges had effectively usurped legislative authority, subverting the democratic process (Bentham, 1843).

John Austin, a legal philosopher, went even further in his critique of the Declaratory Theory. He dismissed it as a "childish fiction" aimed at deflecting the reality that judges wielded significant law-making power. Austin believed that law existed independently of judges and that judges merely "found" and applied it intermittently (Austin, 1861). His viewpoint challenged the notion that judges were merely passive discoverers of pre-existing laws. These opposing viewpoints regarding the role of judges in law-making have profound implications for the understanding of the legal system's dynamics. While proponents of the Declaratory Theory argue for a strict separation of powers and the limited role of judges in shaping legal principles, critics like Bentham and Austin contend that judges have a more active role in law creation.

The debate surrounding whether judges make laws is a fundamental issue in jurisprudence. The Declaratory Theory of Law, championed by figures like Blackstone, Hale, and Dr. Carter, posits that judges do not create laws but merely declare existing ones. On the other hand, critics like Bentham and Austin argue that judges play a more significant role in shaping legal principles, challenging the traditional view of judges as passive discoverers of the law. This ongoing debate underscores the complex relationship between the judiciary and the legislative branches of government, with implications for the distribution of legal authority and the nature of legal interpretation.

The debate over whether judges make laws is not confined to Western legal traditions; it has also been a topic of discussion in the context of India's legal system. In India, as in many common law countries, the role of judges in law-making has been a subject of scrutiny and debate, with differing viewpoints mirroring

the global discourse on this issue. Historically, Indian jurisprudence has been influenced by British legal principles, and this influence extends to the question of whether judges make laws. Much like William Blackstone's Declaratory Theory of Law, Indian jurists have articulated similar ideas about the role of judges in interpreting and applying the law rather than creating it.

One of the seminal Indian legal figures who upheld the view that judges do not make laws was Justice G.P. Singh. In his work, "Principles of Statutory Interpretation," Justice Singh emphasized that the judiciary's primary function is to interpret and apply the law as enacted by the legislature. He argued that judges must respect the legislative intent and not usurp the law-making function (Singh, 2003). Furthermore, Indian courts have often cited the doctrine of judicial restraint when addressing questions related to the judiciary's role in law-making. This doctrine calls for judges to exercise caution and restraint in interfering with legislative matters, reinforcing the idea that their role is primarily interpretative (Pandey, 2001).

However, much like the debates in Western legal thought, there are dissenting voices in India as well. Some legal scholars argue that judges in India do play an active role in shaping the law, particularly through the development of common law principles and the interpretation of constitutional provisions. This perspective suggests that judges, by virtue of their decisions, can effectively contribute to the evolution of legal norms and principles. For example, landmark judgments by the Indian Supreme Court, such as the Kesavananda Bharati case (1973), have been seen as instrumental in shaping the Indian Constitution's interpretation and establishing judicial review as a fundamental feature of the Constitution. These decisions are often cited as examples of judges actively participating in the development of constitutional law.

Supporters of judges making the laws

"The Original Law-Making theory" posits that judges play a significant role in the creation of laws through their distinct decisions in cases. This theory has been supported by many prominent jurists throughout history, highlighting the notion that judges not only interpret statutes but also contribute to the development of new laws through their precise determinations in cases. This paper will delve into the perspectives of influential legal scholars, such as Lord Bacon, A.V. Dicey, and Salmond, who advocated for "the original law-making theory." Additionally, we will explore the relevance of this theory in the context of

India's legal system. Lord Bacon, a renowned legal thinker, asserted that judges' first involvement in cases and their subsequent rulings constitute a distinct contribution to the evolution of existing laws. He believed that the judiciary's role in shaping legal precedent is pivotal to the development of the legal framework.

A.V. Dicey, an eminent scholar of the 19th century, argued vehemently in favor of the idea that judges actively participate in lawmaking. He contended that a substantial portion of England's legal framework was crafted through the judicial process, where judges applied existing laws and principles to resolve cases. Dicey emphasized that judges possess a deep understanding of legal matters and are often better equipped to create laws than politicians who may be swayed by public sentiment. Albert Venn Dicey's work, "Introduction to the Study of the Law of the Constitution," is a foundational text that expounds upon his views regarding the judiciary's role in lawmaking. He posits that judges, in their pursuit of justice, inadvertently contribute to the development of legal principles and precedents, thereby influencing the course of legislation. W.P. Salmond, another staunch advocate of judges' role in lawmaking, argued that it is essential to acknowledge that precedents established by the courts effectively create statutes. Furthermore, Salmond maintained that the judiciary not only interprets the law but also actively shapes it. He asserted that courts intentionally apply their privilege to create new laws while simultaneously exerting control over existing precedents.

Judiciary's Role as an Organ of Government

The concept of the separation of powers, as elucidated in the "Massachusetts Declaration of Rights in 1780," underscores the importance of delineating distinct areas of jurisdiction for different branches of government. This doctrine ensures that the legislative, executive, and judicial branches do not encroach upon each other's functions. Baron de Montesquieu, a prominent French philosopher, championed the "Doctrine of Separation of Powers" in his seminal work, "The Spirit of the Laws." Montesquieu argued that the government's power should be divided among three distinct organs—legislative, executive, and judicial. This division of power is essential for the smooth functioning of the state machinery and prevents any one organ from becoming an unchecked authority that could infringe upon the jurisdiction of others. Montesquieu's ideas on the separation of powers significantly influenced the drafting of modern constitutions, including that of the United States. His concept of checks and balances, where each branch of government monitors and limits the powers of the others, has become a cornerstone of democratic

governance. In this tripartite division, the legislature assumes the role of lawmaking, with laws passed by this body being binding on all citizens. The executive branch is responsible for day-to-day administrative functions within the framework of laws enacted by the legislature. The judiciary, on the other hand, serves as the interpreter of existing laws and has the authority to examine the boundaries of executive power. In cases where laws are found to be unconstitutional, the judiciary can strike them down, thus ensuring the protection of fundamental rights and the rule of law.

In India, the doctrine of the separation of powers is enshrined in its Constitution. The Indian judiciary, as one of the key organs of government, plays a vital role in upholding the rule of law and ensuring that the powers of the legislative and executive branches are exercised within constitutional limits. The Indian Supreme Court, in numerous landmark cases, has affirmed its authority to review and strike down legislation that violates the Constitution, thereby actively participating in the lawmaking process. India, as the world's largest democracy, has embraced the principles of the separation of powers and judicial law-making. The Indian judiciary, particularly the Supreme Court, has been instrumental in interpreting the constitution and crafting legal precedents that have a profound impact on the nation's legal landscape. Through landmark decisions, such as the Kesavananda Bharati case and the Maneka Gandhi case, the Indian judiciary has demonstrated its commitment to shaping and defining the legal framework of the country. The Indian judiciary has a rich history of precedent-setting decisions and interpretations of statutes. The principle of judicial review in India allows the judiciary to scrutinize and interpret laws, often leading to the development of new legal principles and standards. For instance, landmark cases in India, such as the Kesavananda Bharati case (Year), have demonstrated the judiciary's active role in shaping constitutional and legal frameworks. The Supreme Court of India, through its judgments, has played a vital role in establishing and clarifying legal principles that govern the country.

Conclusion

The question of whether judges can make laws is a perennial and contentious issue that has intrigued legal scholars, philosophers, and jurists for centuries. This debate has transcended geographical and temporal boundaries, persistently challenging the traditional understanding of the judiciary's role in democratic governance. While the Declaratory Theory of Law, championed by luminaries like William Blackstone, Mathew Hale, and Lord Esther, posits that judges are mere interpreters and declarants of existing laws,

critics such as Jeremy Bentham and John Austin vehemently argue that judges are active lawmakers, shaping legal principles through their decisions. This study has revealed that the debate over whether judges make laws is not limited to Western legal traditions but extends to diverse legal systems, including India's. In India, the legacy of British common law and the influence of constitutional principles have given rise to a nuanced discussion on the judiciary's role in lawmaking. While some Indian jurists uphold the view that judges primarily interpret and apply the law, others contend that judges actively contribute to the development of legal norms, particularly in areas where legislative action is lacking. The literature review presented in this study showcases the diverse perspectives that have shaped the discourse on judges' role in lawmaking, from the early writings of William Blackstone to the contemporary insights of scholars like S.P. Sathe and Upendra Baxi. It is evident that this debate is dynamic, reflecting the evolving nature of democratic governance and the complexities of legal interpretation.

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