LEGAL REFORMS THROUGH JUDICIAL LAW-MAKING: A CRITICAL APPRAISAL FROM ROMAN LAW TO COMMON LAW

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I Introduction

LEGISLATION IS undoubtedly indispensable for legal reform. Though precedent has only constitutive efficacy and cannot discharge the abrogative function, it must not be forgotten that historically legal amelioration was affected by the judges before legislators came on the scene.[1] Sometimes the parliamentary reforms may borrow the ideas on which they acted from the precedents. For example, the principles laid down in English cases from *Balfour* v. *Balfour*[2] to *Hadley* v. *Baxandale*[3] were incorporated in the Indian contract law. So is the case with *Rylands* v. *Fletcher*[4] upto *Donaghue* v. *Stevenson*[5] in tort law and cases on principles of natural justice *viz. Dr. Bonhams* case,[6] and *Ridge v. Baldwin*[7] reflected in administrative law. Legislation as an instrument of legal reform is superior to precedent/judge made law. However, changes in law may be effected judicially too and law reforms had to be a part of judicial law-making. In what follows an attempt is made to trace the historical origins of legal reforms in the form of judicial law-making in different legal systems to critically analyze how in the beginning Romanization took place in the continent and how the common law conquered the continent ultimately.

II Greek Period

If one traces the historical origin of the judicial process, according

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1. Dicey, *Law and Opinion in England* 396.
2. (1919) 2 KB 571.
3. (1854) 9 EX 341.
4. (1868) LR 3 HL 330.
5. (1932) AC 562.
6. 77 ER 647.
7. (1963) 2 All ER 66.

to Aristotle judicial application of law should be purely a mechanical process.[8] It was no more than as involving a mechanical fitting of the case with straitjacket rule or remedy. Therefore, the courts must take the law as they find it. And the process of finding it is a matter purely of observation and logic, involving no creative element. It is to be noted that Aristotle was against giving discretion to courts. He conceived that discretion was an administrative attribute. Such concept met the needs of the strict law, which was a primitive law. It was suited to the *Byzantine* theory of law giving effect to the will of the emperor. It is submitted that Greek approach was in accordance with declaratory theory of judicial process. It has long been the accepted position that judges filled in the gaps left by rules by using their discretion. Positive jurisprudence from Austin to Hart placed emphasis on the part played by judicial discretion .[9] The view espoused by the realists also emphasized the paramountacy of the judge's discretion.[10]

However, a determined effort has been made by Ronald Dworkin'[11] Rolf Sartorius[12] and others[13] to cast doubt on orthodox opinion. It is the thesis of Dworkin that judicial discretion in its strong sense does not exist. For Dworkin, judges are always constrained by the law. There is no law beyond the law. He objects to judges acting as 'deputy legislators.'[14] In a way, he is supporting Aristotlean theory of adjudication. However, Plato emphasized that equity is indispensable to intelligent administration of justice. Aristotle held that the function of equity is that of a corrective legal justice. But, as far as possible equity must follow the spirit of law. It embodies a moral ideal, and is constant and immutable.[15] It is submitted that when equity itself is of discretionary modification of the strict law, why was he opposed to giving discretion to the judges?

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8. See, *Aristotle's Politics* (350 B.C.) translated by Benjamin Jowett, for details see Roscoe Pound, *An Introduction to the Philosophy of Law* 52-53 (1954).

9. H.L.A.Hart, *The Concept of Law* 132 (1961).

10. Holmes for example referred to "the sovereign prerogative of choice" (*Collected Legal Papers*) 1920 at 239.

11. See, 60 *Journal of Philosophy* 624 (1963); *Taking Rights Seriously* (revised ed. 1978)

12. 78 *Ethics* 173 (1968); 8 *Amer. Phil.Q* 151 (1971).

13. For example, see, Christe 78 *Yale Law Journal*1311(1968); Huges 77 *Yale Law Journal* 411 (1967); see also Loyd's *Introduction to Jurisprudence* 1391(2001).

14. For Raj's criticisms of Dworkin's account of legal reasoning, see chapters 8, 9 and 10, James Penner, David Schiff and Richard Nobles (ed.) *Introduction to Jurisprudence and Legal Theory, Commentary and Materials* (2002).

15. Aristotle, *Nichomachean Ethics* (B.C. 384-322) translation in Mc Keon, *Basic Work of Aristotle* (1941); see also *Aristotle's Politics.*

III Roman Practice

The imperial Roman law was to be found in the *Justinian* Code. It did not favour judge-made law. It favoured legislation as enacted by the emperor.[16] Under the Roman jurisprudence, the *orators* included *res judicata* among the sources of law. It is not a precedent in the modern sense and there is no theory of binding case-law. The law of the *praetors* and the juris consultants was largely built upon cases, and the bar did for the development of Roman case-law-much the same as the bench has done for the English common law. *Justinian* expressly discountenanced the obligatory force of any decisions except those, which emanated from the emperor himself. Judicial precedent is not a primary source of law. It is only a gloss on the law.[17]

During the formative periods of Roman and English law the creative function of equity was most marked.[18] Equity had come not to destroy the law but to fulfil it. In Roman law the rigidity and shortcomings of the civil law were remedied by the *praetors.* It was called as *praetorian* law. In English law similar deficiencies were remedied by the chancellors. The *praetors* and chancellors are the parallel sources of equity in the two systems. It is clear, therefore, that equity arises out of the processes of law-making and is fashioned by the hands of those charged with that task.[19] The necessity for a supplementary and benevolent jurisdiction was insisted on by the Greek philosophers—Plato and Aristotle. They observed that 'equity follows the law'. The pleaders made appeals to equity when solid legal resources failed them and equity became this valuable part of the Athenian administration of justice.[20] Roman jurisprudence was thus influenced in some measure by Greek philosophical ideas and this influence is to be easily traceable in Roman law.[21] It is no longer doubted by the modern students of Roman law that the influence of Greece from the time of the *twelve tables* was real and considerable.[22]

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16. See, R.W. Lee, *Roman Law in the British Empire* 282(1935); see also Prof. Jolowicz, "Case Law in Roman Egypt" *Journal of the Society of Public Teachers of Law* 1 (1937).

17. Henry Maine, *Ancient Law* 39(1861).

18. Maitland *Equity* (ed. Brunyate)17(1936).

19. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. Cook) 115 (1964).

20. C.K.Allen, *Law in the Making* 422 (7th Ed., 1977).

21. Vinogradoff, *Historical Jurisprudence* ii.66(1920).

22. See Fritz Schulz, *History of Roman Legal Science* 62 ff(1953); and *Principles of Roman Law* 129 ff.

According to Sir Henry Maine,[23] when the primitive law had been embodied in a code, there is an end to its spontaneous growth and such communities are 'static societies'. The societies, which continue development of law, are called 'progressive societies'. There are three methods by which progressive societies develop their laws. They are : (1) legal fiction, (2) equity, and (3) legislation. Legal fictions change the law according to the changing needs of the society without, however, making change in the letter of the law. As Julius Stone has rightly put it fictions are "Swaddling Clothes" of legal change.[24] They are used for covering the rigidity of law. Sir Henry Maine pointed out that fiction played a dominant role in shaping law in earlier times but today with the evolution of the system of amendments in law, fiction has lost its value.

IV Continental Practice

In the continent, decisions should be based on laws, not on precedents. This doctrine lies at the root of the continental practice. Continental legal systems, *viz.*, Germany, France and Italy are essentially codified. The continental systems are of Romano-Germanic family. Continental jurisprudence has been decisively influenced by the reception of Roman law. Scottish law, like continental law has been directly influenced by Roman law and therefore, is ranked with continental law rather than English jurisprudence.[25] As a result, there was Romanization of continental and Scottish law. A judicial decision cannot *per se* claim any legal authority or binding force since the doctrine of precedent has not been firmly established in continental Europe. All continental codifications owe their inspiration to the principles of the Napoleonic Codes.[26] The judges look to the legislation or the will of the legislature for interpretation of law and are not bound to follow a previous decision. The judge is limited strictly to the issue before law, and it is not part of his function to lay down any 'general disposition'.[27]

However, it appears that respect for the decided cases is a growing element in modern French legal method and precedents repeated so as to give rise to a line of authority is recognized as a form of law. In France the development of law of unfair competition, the imposition of strict liability, large parts of the law notably the *droit administratif* and

23. See *supra* note 17 at 31.

24. Julius Stone, *Human Law and Human Justice* (2000).

25. See A.L. Goodhart, "Precedent in English and Continental Law" 50 *LQR* 40.

26. Art. 5 of the French Civil Code specifically forbid the judges to be bound by the earlier case.

27. Gray, *Nature and Sources of the Law* 212

the *counseil d' etat* are of judicial creations. Germany presents many examples of judicial law-making of outstanding social and political importance.[28] Despite this increase of creative judicial activity in continental jurisprudence there has never been a theory of precedent analogies to the Anglo-American one.[29]

Francois Geny[30] jurist of sociological jurisprudence in France is the first on the continent to realize and emphasise the importance of judicial decisions and judicial process in the moulding of any system of law. He makes a bold plea for a revision of the traditional French methods of interpretation of law, which he demonstrates to be out of harmony with actual requirements of law. He advocated a new method, *free scientific research* to replace the traditional method. Jerome Frank in *Law and the Modern Mind* considers Geny a realist while Dean Pound regards him a neo-scholastic.[31] For Frank , law consists of decisions. The individual decision is the law *par excellence*. For him, one who wants to study the law in action, the court-room should be the laboratory not the library.[32] Thus, freedom of the interpreter seems to be practically unlimited if the case is outside the expected scope of law.

V English Law

Common law tradition

The English lawyers have moulded the common law by the infusion of legal ideals. It would appear that legal ideals have moulded the common law mainly through three channels: the development of precedent, the concept of public policy and principles of general equity. Seen from this angle, the modern English judges have a considerable amount of freedom in the judicial law-making.[33] Common law is variously known also as English, Anglo-Saxon or Anglo American law. It is judge-made, bench-made law rather than a fixed body of definite rules such as the modern civil law codes. Judicial activity as observed by Roscoe Pound in one of his lectures is really the creative element in law. "It is a

28. For details, see the comparative materials on French and German Law in Von Mehren, *The Civil Law System*: *Cases and Materials* 339-464 (1957).

29. Civil Decisions (BGZ) Vol.II, Appendix P.35 (1953), (1957); Goodhart, "Precedent in English and Continental Law" 50 *LQ Rev* 40 (1934).

30. In 1988 he published his *Methoded Interpretation et sources en droit prive positif* which ushered in the movement among European and American jurists to intensive study of the nature of juridical process.

31. See, Harold Gill Reuschlein, *Jurisprudence its American Prophets* 125-146 (1971).

32. Friedman, *Legal Theory* 328 (1967).

33. For details see W.Friedmann, *Legal Theory* 463 (Fifth ed. 2002).

mode of judicial and juristic thinking, a mode of treating legal problems."[34]

In the words of Arthur T. Vanderbilt J, "it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law."[35] Often based on precedents, common law embodies continuity in that it binds the present with the past. The binding character of judicial precedent is a unique feature of English law.[36]

It is in this respect that the common law system differs from Roman law system or continental system. Precedent is particularly important at common law, because there is no legal text or legislative history on which to base decisions. In fact, the concept of common law was adopted from the *cannon law* of the Christian church, which was the common law of Christendom. It is of course important to recognize that ultimately, statutory law is supreme. The judges are bound to give effect to an Act of Parliament. Thus, many statutes have modified the common law.

Under common law, the judge is the creator, interpreter and modifier of laws. Discussing the benefits of judge-made law, Benjamin N.Cardozo J pointed out that the judge can use 'free scientific research' when analyzing a problem.[37] Judges not only occasionally depart from precedent when it 'appears right to do so' but many distinguish between various precedents in evolving the new law. Moreover, times and conditions change with changing society and "every age should be mistress of its own law" – an era should not be hampered by outdated law.[38] Though the common law has not been logic but has been experience, it is treated as working hypothesis, continually retested in what Munroe Smith called "those great laboratories of the law, the courts of justice."[39]

Perhaps, the most radical rejection of judicial law-making by the contemporary British judges are Lord Jowitt, Lord Porter, Lord Simmonds and Lord Evershed who have sharply emphasized the role of the judge as who ought to apply the law, just or unjust, as it is and not concern himself with the evolution of the common law.[40]

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34. Roscoe Pound, *The Spirit of the Common Law* 1 (1921) ; see also Henry J.Abraham, *The Judicial process (*7th Ed. 1998).

35. *The Challenge of Law Reform* 4-5 (1955).

36. See, C.K Allen, *Law in the Making* 187 (1964); F.T. Plucknett, *A Concise History of the Common Law* 342 (1956).

37. Quoted by Benjamin N. Cardozo, *The Nature of the Judicial Process* 23 (1921).

38. Roscoe Pound, from 1897 address, reprinted in his *Collected Legal Papers* 187 (1920).

39. *Ibid*.

40. Evershed, "The Judicial Process in Twentieth Century England" 61 *Colum L Rev* 761 (1961).

Among the contemporary judges, Lord Denning stood almost alone for many years in proclaiming, in a series of important decisions as well as in his extra-judicial writings, the task of the common law as an instrument of evolution according to the changing needs of society and the demands of justice.[41] It is submitted that later on Lord Reid and Lord Wilberforce joined Lord Denning who spearheaded with their doctrine of purposive interpretation, which breathed new life in English law. As Lord Reid[42] expressed the view on the law-making function of the courts in the adaption of law to new circumstances.

The common law would no longer exist if great judges had not from time to time boldly laid down new principles to meet new social problems. The decisions, which reflect such judicial revolutions, are relatively few in number, but they stand out as landmarks.[43] Every one of them symbolizes a new social epoch and has laid the foundations on which hundreds of elaborations or routine decisions can be built up. *Rylands* v. *Fletcher*[44] adopting the principles of tort liability to the area of expanding industrial enterprise; *Mersy Docks Trustees* v. *Gibbs*[45] laying the foundations for the principle of legal liability of public authorities; *Bendall* v. *Mc Whirter*[46] adjusting the law to new social realities in the field of matrimonial relations and *Hadley Byrne* v. *Heller*[47] protecting the consumers by reversing the principle laid down in *Chandler* v. *Crane, Christmas & Co.*[48] are all examples in point. The history of the common law has been a constant give and take between consolidation and progress, between the legal technicians and the creative jurists. It is submitted that, in the past, the tempo of social change was very much less rapid than it is today.

Development of equity law

Equity is a branch of Anglo-American jurisprudence. In fact, it was Aristotle who first articulated the idea of juridical equity. Actually, it is a supplement to the common law and thus apparently the 'conscience' law as the court of chancery was a court of conscience.[49] It mitigates in

41. Among his many judicial efforts in this direction, see *Robertson* v. *Minister of Pensions* (1949) 1 KB 227; *Bendall* v. *Mc. Whirter,* (1952) 2 QB 446; *Hadley Byrne* v. *Heller,* (1964) AC 465; *Bonsor* v. *Musicians Union,* (1956) AC 104.

42. *Petti* v. *Pettit,* (1969) All ER 385.

43. *Supra* note 34 at 45-50.

44. (1868) LR 3 HL 330.

45. (1866) LR 1 HL 93.

46. (1952) 2 QB 466.

47. (1964) AC 465.

48. (1951) 2 KB 164.

49. For details see Lord Nottingham (1673-1682) who systematized the rules of equity and who has been called the "Father of Modern Equity."

various ways the effects of the strict law in its application to individual cases. In the Anglo-Saxon times, justice was administered by local courts presided over by laymen who had to depend blindly on precedents. They were thus incapable of coping with the progress of the nation. In the course of time, however, professional judges well versed in Roman law were appointed and to meet the demands of justice, they borrowed from the store-house of Roman law to meet the limitations of the local law. Therefore, equity is more of an 'historical accident'. It is essentially an addendum to common law.[50] In a sense it is synonymous with justice. It created and continues to create precedents. The Anglo-American legal framework in effect now consists of a mixture of common law, equity and statutory law.

VI The American Position

The legal system of the US belongs to the family of common law legal systems. Since the American judges have had to enunciate legal standards in the absence of legislation in order to resolve disputes between litigants, this in turn has guaranteed American judges a major role in law-making.[51] They adopted common law doctrines in order to encourage economic development and accommodate industrialization. And they altered the common law in response to changing circumstances.[52]

Since the US Supreme Court's first use of the power of judicial review in *Marbury* v. *Madison*,[53] judicial review has furnished a prime basis for judicial involvement in policymaking. The historical shifts in judicial policy making of the US Supreme Court is clearly discernible in the constitutional, remedial, statutory and administrative regulations and common law and cumulative[54] fields. The policy-making agenda of the Supreme Court and of other courts reflects societal changes in America. Judicial policy making is the unavoidable result of judges fulfilling their responsibility to decide cases in accordance with the law and does not involve judicial usurpation of power. On the other hand, they are involved in the development of public policy. The transformation of political issues into legal disputes furnishes judges with the opportunity to influence the course of public policy. Because courts regularly decide

50. Note equity's development in the jurisprudential works of Coke, Hobbes, Blackstone and Story.

51. William E Nelson, *Americanization of the Common Law* (1975).

52. Morton J. Horwitz, *The Transformation of American Law* 1780-1860 (1977).

53. 1 Cranch (US) 137, 173 (1803).

54. See G Alan Tarr, *Judicial process and Judicial Policy Making* 283-307. (second Edition, 1999).

cases that involve important policy issues, it might seem that they are in a position to dominate policy making in the United States.[55]

VII Indian Scenario

In India the common law has been translated into statutory law with necessary changes and modifications to suit the needs of the present Indian society. With the advent of the British rule the Law Commission while preparing substantive law for India recommended that the judges should decide those cases for which there is no provision in law in the manner they deem most consistent with principles of justice, equity and good conscience. The Regulating Act, 1873 clearly provided for the guidance of the judges to apply rules of natural justice for the decision of the cases not covered by rule of law. It is submitted that both common law and equity law doctrines found place in Transfer of Property Act, 1882; Contract Act, 1872; The Specific Relief Act, 1877 and the Indian Trust Act, 1882 etc., on the respective subjects.[56] It is to be noted that during the British rule, the judiciary was bound to apply the statutory law only. And the same trend continued till commencement of the Indian Constitution.

Indian constitutional history is replete with record of events showing the judicial ingenuity that has changed the flow of reforms for better in the society. Tradition dictated by necessity has assigned the judiciary a role much beyond than that of merely an interpreter. According to Patrick Devlin, the judges are also lawmakers, law reformers and even social reformers.[57] Every new decision on every new situation is a development of law.[58] The basic structure and the foundation of the Constitution cannot be tinkered with due to the theory of basic structure evolved by the Supreme Court from *Kesavananda Bharati*[59] case onwards. The public interest litigation strategy devised by the constitutional courts for ameliorating the social and economic conditions of the society resulted in the evolution of human rights, environmental, compensatory jurisprudence and more so the poverty jurisprudence.[60] The far-reaching implications and contributions to social dynamics made by judge-made law of recent times on electoral reforms, right to strike, population

55. See, Henry J. Abraham, *The Judicial Process* (seventh edition, 1998).

56. See, S.N. Dhyani, *Jurisprudence and Indian Legal Theory* 124 (1999).

57. Patric Devlin, *The Judge VII.*

58. Lord Denning stated in Foreword to the Supreme Court of India, for details *see ILI News Letter*, Jan-Mar 5- 8 (2004).

59. *Kesavananda Bharti* v. *State of Kerala,* AIR 1965 SC 845.

60. See, S.K. Verma and Kusum, *Fifty years of the Supreme Court of India, Its Grasp and Reach* (2001).

control, the need for uniform civil code and enacting a piece of legislation to check sexual harassment at workplace are noteworthy[61] to mention few.

The beauty of social dynamics through judge made law is that it aims at evolution and not revolution and that is why it has come to be widely accepted.[62] Holmes J observed that judges being a part of the society, cannot remain uninfluenced by the social and legal changes taking place around them. Therefore, it is quite natural that those changes are clearly reflected in their judgments. This is evident from some of the landmark decisions of the Supreme Court of India pronounced in recent years.[63] Paton has also expressed a similar view and observed that main function of law is to reconcile the conflicting interests of individuals in the society.[64] The changes introduced in the law relating to property in India through frequent constitutional amendments clearly indicate that law has to adapt itself to the changing needs of society so as to be an effective instrument of social justice.[65]

It is submitted that the Supreme Court has always been keeping pace with society to retain its relevance for if the society moves but the law remains static, it shall be bad for both. Political, social and economic changes in the country entail the recognition of new rights and the law in its eternal youth grows to meet the demands of society. The judiciary has therefore a socio-economic destination and a creative function.[66] It is to be noted that post-*Maneka* article 21 includes a variety of rights and is the heart of fundamental rights. One can witness judicial creativity in the expanding connotation being given to the 'other authorities' in article 12 of the Indian Constitution and also in the integration of directive principles with fundamental rights. The law reform carried on

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61. T.R. Andhyarajina, *Judicial Activism and Constitutional Democracy in India* (2001); S.P. Sathe, *Judical Activism in India* (2002).

62. Justice R.C.Lahoti, ILI Foudation Day Lecture on "Law and Social Dynamics" *ILI News Letter 5-10* (2004).

63. See *National Textile Workers Union* v. *P.R. Ramakirshnan,* AIR 1983 SC (75-81); *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597; *Olaga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180.

64. See G.W. Paton, *Textbook of Jurisprudence* 118-158 (1964).

65. The first, fourth, seventeenth, twenty fifth, thirty ninth, forty second, forty-fourth and sixty-second amendments to the Indian Constitution relating to changes in right to property. The relevant cases are *Shankari Prasad* v. *Union of India,* AIR 1951 SC 458; *Sajjan Singh v. Rajasthan,* AIR 1965 SC 845; *Golakanth* v. *State of Punjab,* AIR 1967 SC 1643*; Kesavananda Bharati* v. *Union of India*, AIR 1973 S**C** *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789 etc.

66. For advocating a more activist law-making role for judges, see the observations of Krishna Iyer J in *Gujarat Steel Tubes* v. *Its Mazdoor Union*, AIR 1980 SC 1896 at 1919-21.

through judicial activism inherent in judicial review would go a long way in acknowledging the fact that judicial law-making is an indispensable part of law reform.

VIII Analysis on Judicial Process

Judicial decision-making process

The process of judicial decision making may be regarded as either deductive or inductive. Deductive method is associated principally with codified systems. It assumes that the legal rule applicable to any particular case is fixed and certain from the beginning, and all that is required of the judge is to apply this rule as justice according to the law demands, without reference to his personal view. His decision is deducted directly from general to particular–from general legal rule to the particular circumstances before him.[67]

This method was prevalent in ancient Rome and in the continent. Inductive method characteristic of English law, starts with the same primary object of finding the general rule applicable to the particular case; but this method is wholly different. It does not conceive the rule as being applicable directly by simple deduction. It works forward from particular to the general. The English judge has to search for his master principle in the learning and dialectic which have been applied to particular facts. Thus, he is always reasoning inductively, and in the process he is said to be bound by the decisions of tribunals higher than his own.[68]

It is submitted that the deductive model is not a fully adequate description of judicial decision-making. The model portrays the law as static.[69] In actuality, however, judicial decisions may change the law by overruling precedents or by announcing new legal standards. The deductive model may explain legal stability but it cannot account for legal change. One influenced legal realist, Edward Levi, has suggested that legal reasoning is best understood as reasoning by example and analogy rather than as deductive reasoning. According to Levi,[70] judicial determination of similarity and difference is the key step in the legal process. A survey of some of the US Supreme Courts' rulings on privacy illustrates one way that legal change occurs in a system of precedent. Judges may not apply precedent in mechanical fashion, suggested by

67. See, Lord Wright, *Cambridge Law Journal* 124 (1943).

68. G.W. Paton, *A Textbook of Jurisprudence* (1964) and Rupert Cross, *Precedent in English Law* (1968).

69. *Supra* note 55.

70. Edward Lavi, *Practical Reason and Norms* (Chicago University Press, 1949).

the deductive model. The process whereby a court distinguishes one case from another plays central part in case-law reasoning. Raj distinguishes two views of distinguishing *viz.*, a 'tame' view and a 'strong' view by holding on the latter representing a limited form of law-making.[71] Like distinguishing, overruling is changing a common law rule established by precedent.

Theories of judicial process

In England, the governing rule was that judges were not law makers which tradition made the English judges to follow the principle of literal interpretation of statutes. The British judges for long abided by this theory. This was due to Blackstonean orthodox declaratory theory of judicial process. According to Blackstone, "a judge is sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and explain the old one."[72] The function of the judge is thus to discover in the existing rules of law the particular principles that govern the facts of individual cases. Judges are thus, it is said, law-finders rather than law-makers. Bentham and Austin criticized this orthodox theory. Lord Reid has denounced the declaratory theory as 'fairy tale',[73] Dicey and Chipman Gray, on the other hand, propounded creative theory according to which judges are law-makers. The best part of the law of England is judge-made and work of the courts. It is the fruit of judicial legislation.[74] Gray indeed goes to the extreme length of contending that judges alone are makers of law.[75]

Out of declaratory and creative theories of judicial process, creative theory of law must be regarded as the most widely accepted view of the judicial process. Because, laws do not of themselves decide disputes, for they have to be applied to the case at hand. As Holmes said general propositions do not decide concrete cases.[76] This process leaves to the judge an element of choice, which is guided, by a variety of considerations. This is in contradistinction to judicial process which

71. Joseph Raj, Practical Reason and Norms (1999); see also Penner, *Legal Reasoning and the Authority of Law in Rights* (2002); Nigel Simmonds, *The Decline of Juridical Reason* (1984); Maccornick, *Contemporary Legal Philosophy: The Rediscovery of Practical Reason* (1983).

72. Blackstone, *Commentaries –I*, at 69.

73. See Lord Reid, "The Judge as Law Maker" 2 *Jl of SPTL*, 22-3 (1997); Lord Edmund-Davies, "Judicial Activities" *Current Legal Problems*, 1, 2 (1975).

74. *Supra* note 1 at 361.

75. *Supra* note 27 at 102.

76. Oliver Wendell Holmes, *The Common Law* 35-36 (1965).

was normally viewed as logical deductions from the authoritative premises of the code. Further, when legal precepts fail, judicial choice will be given a way. When the leeways left by precepts and precedents have confronted the courts with choices, it must be guided by law and justice. When leeways for judicial choice exist, either openly or cryptically decisions within the leeways are, objectively speaking, creative of law.[77]

It is submitted that some exercise of discretion is unavoidable in the very nature of the judicial process. Due to 'open texture of law' or 'penumbral areas', the judge is given a limited discretion to look outside the law.[78] Of course, discretion is always to be guided by values – the life-blood of the law. The leeways of discretion could be utilized in a socially cohesive way though subjectivity cannot be excluded altogether since the pattern of values is what the individual thinks it is. Hence, the need is to stress as objectively as possible.[79] As Benjamin Cardozo has rightly said, the alternative approaches to such choices in terms of logic, philosophy, history, tradition, sociology or the like have fostered recognition of the fact of judicial choice making.[80] This is in the words of Ehrlich, English system of 'free finding of law'. Coke praised 'renovation' in common law growth, but condemned innovation. Lord Mansfield has correctly remarked, "judging is an act of will-choice".[81] Their choices cannot be divorced from their backgrounds and beliefs except through training professional habits, self-discipline etc.[82] Berger and Luckmann have said that "to engage in judging is to represent the role of judge. It is not acting on his own but *qua* judge. The role represents an entire institutional nexus of conduct".[83] Therefore, judges do make law. A scrutiny of the judicial process shows that the Blackstonian doctrine is unacceptable. It fails to explain how the common law and equity have grown. The principles of equity have helped common law attain perfection.[84] If no rule is at hand, the judge invents one. Legal thinking is *sui generis.* It is creative and purposive but not mechanical and haphazard.

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77. Cf. Robson, *Justice and Administrative Law* Ch. 5.

78. See H.L.A. Hart, *The Concept of Law* 89 (1961).

79. *Cf.* Ulpian, *Digest* 1.1.1.pr-I; see also DN Mac Cormick, *Legal Reasoning and Legal Theory.*

80. *Supra* note 38 at 167.

81. A.R.N. Cross, *Precedent in English Law* (3rd ed.); Julius Stone, *Reason and Reasoning in Judicial and Juristic Argument* in *Legal Essays* at 170.

82. See, Lief H. Carter, *Reason in Law* (1979).

83. *The Social Construction of Reality* 92 (1966).

84. Dias and Hughes, *Jurisprudence* 151 (1957).

IX Concluding Remarks

From the above, it is concluded that the traces of legal reforms by way of equity as corrective of legal justice were found in the Greek period itself. Its influence on Roman practice was clearly discernible in the development of *praetorian* law and equity law in England. The law creative function of equity is the resultant common law reforms in England. This is through judicial law-making. In the ancient Greek and Roman periods due to the rigidities of civil law in their application, there was not much judicial law - making except equity law. Due to Romanization of the continent and Scotland the scope for legal reform through judicial policy making and creativity was little. Reforms by judiciary was almost nil in the continent till recently. This is due to mechanical application of law by the judges to whom discretion was not available. The development of judicial law was marginal in Greek, Roman and continental legal systems. However, the seeds of creativity and legal reforms were sown in Greece while administering justice in Athens. In the Anglo-American legal systems it need not be overemphasized that judicial law-making made an indelible mark in effecting legal reforms and this is undoubtedly more reformed law. The contribution of the Indian judiciary for legal reforms is unprecedented after the commencement of the Constitution particularly in the post - emergency period. Broadly speaking, the differences between these two legal systems have been eliminated gradually, so far as judicial law-making is concerned and there is a strong movement of Anglo-American legal development towards the continental technique.