BANCUSPRUDENCE

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Abstract

As the final doctor of all legal and constitutional maladies, the Supreme Court of India has to lay down law for all the courts in India. The judicial process in the apex court makes it abundantly clear that the Supreme Court does not confine itself to mere interpretation of laws. Judges do make law but it depends on the selective wisdom of the benches of the Supreme Court. The jurisprudence developed is inconsistent, unpredictable and sometime unjustified. Being a polyvocal court, any given bench has a slightly different interpretation and sometimes a starkly different interpretation than other benches. Thus, in addition to jurisprudence, legisprudence and demosprudemce which define the province of constitutional hegemony as argued by Upendra Baxi, this paper explores a fourth prudence *i.e.,* 'bancusprudence' which would define the province and *prudentia* developed by different benches of the Supreme Court of India.

I Introduction

WRITINGS OF professor Upendra Baxi discourses three forms of prudence namely *jurisprudence, legisprudence and demosprudemce* which define the province of constitutional hegemony. Jurisprudence which is derived from Latin term *juris prudentia implies* "the study, knowledge, or science of law" is the most common body of thought discussed in legal parlance. Professor Baxi elucidated *legisprudence* as the principles or theories of legislation that take it beyond the contingency of politics and *demosprudence* to signify judicial review process and power that enhances life under a constitutional democracy.[1] This paper discourses a fourth category of prudence namely *bancusprudence* to study and examine the principles and precedents developed by benches of Indian Supreme Court. The word '*bench*' is derived from the *latin* word *bancus* which is used to denote tribunals in England. In England, there are two courts to which this word was applied. *Bancus Regius i.e.,* King's or Queen's Bench and *Bancus Communis i.e.,* the Bench of Common Pleas. So, Bench is a seat of judgment for the administration of justice or the aggregate of the judges composing a court, as normally used with phrases "before the full bench" or "before the constitutional bench."

The constitutional court in the United States (US), the United Kingdom (UK), Australia, Canada and South Africa sit either *en banc* or in large benches. All judges sitting together and deciding cases not only reduces the probability of a judicial error but also brings consistency in judicial decision making. Justice Frankfurter of the US Supreme Court advised B. N. Rau, an advisor to the Constituent Assembly of India that jurisdiction exercisable by the Indian Supreme Court must be exercised by the full court. Justice

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1 A. K. Sikri, Foreword in *Judicial Review: Process, Powers, and Problems* (eds.), Cambridge University Press, viii (2020).

Frankfurter was of the considered view that highest court of the country should not sit in benches. Regrettably, this proposal was not accepted by the Constituent Assembly on the ground that judicial time should not be unnecessarily wasted.

The Constitution of India nevertheless made provision that a case involving a substantial question of law as to the interpretation of the Constitution will be decided by a bench of minimum five-judges.[2] Subject to this, power was delegated to the Supreme Court to make rules for constituting smaller benches. This means that the Supreme Court can frame rules to fix the minimum number of judges to sit in a bench without violating the mandate of clause (3) of article 145. The Supreme Court Rules vest power to constitute benches in the Chief Justice of India (CJI) and allow the constitution of three judges, two-judges and even a single judge bench.

A survey of the Supreme Court cases discloses that two-judge or three-judge benches were not common in the early decades. But with the growing number of cases, the practice of smaller benches became the routine. The recent trends in the Supreme Court makes it evident that much of the dispute resolution in apex court is done by two-judge or three-judge benches. With increasing workload, and the rise in division benches not only amplified the probability of inconsistent judgments but also caused many other unpredicted complications which rationalizes the study of *prudentia* developed by benches *i.e.*, *bancusprudence.*

This paper is broadly structured in two parts. Part one examines the issue of judicial law making, its theoretical underpinnings, the trajectory of judicial law making by the benches of the Supreme Court and some ancillary issues related to judicial law making. Part two examines some structural issues and trends with respect to the benches of the Supreme Court.

II Judicial law making

According to Professor Hans Klinghoffer, making general norms is law-making in the functional sense, without distinction as to the organ creating the general norm.[3] But in the constitutional democracies, law making is the primary function of the political body *i.e.,* the legislative wing of the state. Besides, the executive authority also makes laws in the form of subordinate or secondary legislation. But a judge, by deciding a case is also involved in the creation of general legal norms. The judge, too, is occupied with law-making *i.e.,* judicial law making.[4] Judicial law-making is, therefore, the creation of general legal norms by the judge in the process of adjudication. Of course, there are substantive differences between judicial law making and formal law making by the legislature and the executive. For instance, judicial law making is always the by-product

2 Constitution of India, 1950, art. 145(3).

3 Hans Klinghoffer, "Legislative Reaction to Judicial Decisions in Public Law" 18(1) *Israel Law Review* 30 – 48 (1983).

4 Ahron Barak, Judicial Law-making 13 *Mishpatim* 25 (1983).

of the act of adjudication and it does not stand on its own. When a precedent is binding, the rule embedded in the judgment binds not only the parties to the dispute but the entire public. The judicial creation of the court thereby acquires general validity. As Lord Diplock observed:

> Yet implicitly every judgement delivered not under a palm tree but in a court bound by rules of precedents speak to the future and speaks generally. If says not only to the particular party to the action but to all to whom the judgement becomes known: If anyone does this kind of thing in the future this kind of consequence will follow. If is by that implicit content of every judgement that the Court is performing a judicial exercise-a legislative power.

Pitched against each other in this discourse are H. L A. Hart, Ronald Dworkin, American Realists and recent proponents of critical legal studies. One of the known theories proposed by Professor Hart argues that there are some cases where 'rules of a legal system' do not clearly stipulate the correct legal outcome. These cases according to Hart arise due to in-eliminable open-texture of the natural language of a legal rule.[5] Thus, when a case arises within the "open texture" of a legal rule, a judge exercises 'discretion' to make a 'choice between open alternatives,' and hence engages in a "creative or legislative activity." The proponents of realism discourse this indeterminacy even more pervasive and deeper that the theory attributed by Professor Hart.

The other justification is found in the writings of Ronald Dworkin, who contended that the volume of indeterminacy argued by Hart is overstated. Dworkin strived to show that in most legal cases, even in "*hard cases'*[6] where there is "deep and intractable disagreement" over what the law requires, the 'right' answers can be found by searching in "reason and the imagination" and hence there is no indeterminacy or under-determinacy. Dworkin articulates that though the theories of adjudication are now more refined, nevertheless most popular theories yet place judging in the shadow of legislation. Judges are supposed to apply the law made by other institutions *i.e.,* legislature or executive. They should not make new law. This is ideal situation but it cannot be apprehended fully in practice due to various reasons. Statutes and common law rules are often imprecise and therefore it entails interpretation before it can be applied to novel cases. Some cases encompasses issues which are so unique that they cannot be decided even by stretching or reinterpreting the existing rules. Thus, in these cases,

5 Yogesh Pratap Singh, "Judicial Review and Process of Judging: The Jurisprudential Analysis" 60(1) *Journal of Indian Law Institute* 69 (2018).

6 Hard cases are those cases where in order to meet the requirements presented by the extreme hardship of one party, decisions deviate from the settled principles of law. Hard cases make bad law because logic is often shortcut in a hard case.

judges make new laws, either overtly or covertly.[7] Dworkin contends that, judges should not exercise "strong discretion" in deciding issues of law, even in cases where legal rule do not dictate a clear result. When a judge runs out of "textbook rules", Dworkin emphasizes that he must base his decision not on non-legal standards but legal principles. According to Dworkin, legal principles are as much a part of the law as are the black-letter rules, and are equally binding on judges. Cases in which the rules failed to decide the case, principles would guide judges to a determinate outcome.

Justice Benjamin Cardozo argued that though a judge is not a legislator in general sense, he does create new law in close cases to fill the vacuum between the existing laws. His theory was a departure from the traditional Blackstonian proposition of "pre-existing rules of law which judges found and did not make."[8] While comparing the task of the judge with that of the legislator, Cardozo, in his third lecture in "The Nature of the Judicial Process, entitled *"The Judge as a Legislator*,"[9] observed: [10]

> Legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open space in the law. ... [His] action [is] creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.

III The scope of judicial law making

The scope of judicial law making is a function of the scope of judicial discretion. As judicial discretion is limited, judicial law making is also limited. Not every option that the judge would prefer is possible; not every consideration is permissible. When the discretion involves the interpretation of a statute, the statute itself limits the scope of law-making. As Holmes J., stated "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion."[11] Moshe Landau J., discussed the same principle, "Even after such legislation the courts go back and weave anew the web of their interpretation around the sections of the statute or within its cracks."[12] The material is statutory, only its adaptation is judicial. The notes are statutory; only their rendition is judicial. The legal blocks to use Landaus's J., imagery—are statutory; their rearrangement is judicial. Therefore, the words of a statute and its intention, both determine the scope of judicial

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7 *Supra* note 5 at 70, 71.

8 Benjamin N. *Cardozo*, *The Nature of the Judicial Process* 41 (1921) at 131.

9 Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges" 75 *Colum. L. Rev*. 359, 361 (1975) [hereinafter cited as Discretion and Judicial Decision].

10 *Supra* note 8 at 113-15.

11 Frederick D. Wilhelmsen, *The Mind and Faith of Justice Holmes His Speeches, Essays, Letters, and Judicial Opinions,* (Routledge, 2nd edn.) 1989.

12 Ahron Barak, *Judicial Discretion*, Yale University Press 101(1989).

law-making. Similarly, limitations apply to judicial discretion in case laws also. Principles, policies, and standards all create judicial discretion, yet, they also limit it and with it judicial law making. Thus, judicial discretion outlines a zone—the zone of formal legitimacy. Every option within this zone is formal and a subject for judicial discretion, while every option outside this zone is unlawful and not a subject for judicial discretion. Judicial law making is possible only within the borders of the zone.[13]

However, judicial law-making or legislating from the bench has been one of the most intense criticisms faced by the judiciary in recent times. The critical discourse identifies the practices as consisting of courts' policy encroachment, policy interference, and inconsistent interference as problematic areas of judicial decision-making.

IV The beginning of judicial law-making in the Indian Supreme Court

Judicial law making is more pervasive and candidly recognised in common-law traditions. In addition to its primary duty of giving decisions that firmly interpret existing laws, common law courts have created a vast body of law beyond any statutory framework.[14] When a judge finds a question for which there is no solution in existing legal framework, he/she decides as per his own notions of justice.[15] The Supreme Court has been proactively involved in judicial law-making, initially by incorporating concepts and principles through interpretation and later by laying down intricate and detailed guidelines on specific issues, both of which contributed to the positivist content of domestic legal regime. This phase began when the Supreme Court conceived the basic structure doctrine in the *fundamental rights* case.[16] The doctrine was condemned as judicial law making having no basis in the Constitution's text. It may be pointed out that though it was judicial law making but there was sufficient constitutional nexus.

13 *Id.* at 101.

14 See Court Structure and Organisation "Judicial Law-making", *available at:* https://www.britannica.com/topic/court-law/Judicial-lawmaking#ref191256(last visited on Dec.20, 2021).

15 *Ibid.*

16 See *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.

The doctrine was not only legitimate[17] but also had sufficient textual[18] and substantial moral rationalisation constructed on idea of constitutionalism.[19]

The government did not like this judicial law making and three senior judges which included the incumbent CJI were superseded, violating the established convention of appointing the senior most judge as the CJI. In an unprecedented decision, the government appointed the fourth senior most judge, A N Ray J, who had then ruled in its favour, as the CJI, forcing the three senior judges to resign in protest. The tussle finally led to the imposition of an emergency lasting 21 months[20] and successfully cut down the independence of the judiciary. The end of emergency displayed a strong quest for reviving faith of citizenry in the judiciary. The advent of public interest litigation was part of this quest for legitimacy in the post-emergency period. In *Maneka Gandhi*,[21] the Supreme Court strongly echoed that articles 14, 19 and 21 will offer a composite test for any legislation or executive action rather than examining it in silos. It also enthusiastically supplanted the "*procedure established by law*" in article 21, with "*Due Process*" despite the extensive debates in the Constituent Assembly pointing to the contrary. The court widened the scope of article 21 to include many un-enumerated rights including the right to counsel, which was broader than the guaranty made in article 22(1). Article 22(1) promises a right to counsel *of choice* but article 21 carries a

17 Implicit in the concept of written constitution is that all powers are defined and limited. The American doctrine of implied limitation and lecture delivered by a German professor, Dietrich Conrad on this issue "Implied Limitations of the Amending Power" legitimized the doctrine of basic structure.

18 Constitution of India, 1950, art. 368 grants Parliament the limited power to amend the Constitution. The phrase "*this Constitution*" and "*the Constitution shall stand amended*" makes it sufficiently clear that after making amendment the remainder which is left should be this Constitution which was drafted by the Constituent Assembly. Thus, any stretch of change under art. 368 cannot create a new Constitution. Such an understanding is also sustained by the literal meaning of the word "amendment", which means "a minor change or addition designed to improve a text". Therefore, for an amendment to be constitutionally valid, the Constitution that remains after change must be the Constitution of India with all those essential features which were present at the time of its conception.

19 Constitutionalism is the idea of having limited governmental power *i.e.,* its authority or legitimacy depends on its observing these limitations. Constitutionalism, Stanford Encyclopaedia of Philosophy, *First published Wed Jan 10, 2001; substantive revision Wed Dec 20, 2017. See, available at:* https://plato.stanford.edu/entries/constitutionalism/#:~:text=Constitutionalism%20is%20the%20idea%2C%20often,on%20its%20observing%20these%20limitations (last visited on Nov. 20, 2021).

20 During the emergency period, an unsuccessful attempt was made by the newly appointed CJI Justice A. N. Ray to review the basic structure judgement by setting up the 13-judge bench. However, the bench was dissolved after two days of hearing. See T.R. Andhyarujina, *The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament* (Universal Law Publishing Co. New Delhi, 2013).

21 AIR 1978 SC 597.

much wider right to counsel which encompasses in it the prohibition of deprivation of life and personal liberty in absence of legal assistance.

The Supreme Court not only relaxed the concept of *locus* but radically democratized it.[22] To approach Supreme Court or the high courts, no longer was it imperative to show that one's fundamental right is violated. Now, it would be sufficient to show that one is approaching court for the rights of citizens and persons within India's jurisdiction who are not capable of doing it. The concern for human rights became the order of the day and this concern prompted a creative partnership between active citizens and activist justices.

The Supreme Court synthesized and integrated the Fundamental Rights and the Directive Principles in order to "constitutionalize" social and economic rights which actually played a very vital role in the realization of the Directive Principles, not only as a means to implement Fundamental Rights but also as a legal framework for a welfare state. The right to livelihood in *Olga Tellis*,[23] the right to live with human dignity in *PUDR* v. *Union of India*,[24] the right to balanced and sustainable economic development in *Banwansi Sewa Ashram* v. *U.P.,*[25]and the right to health in *Vincent* v. *India*,[26] gave new dimensions to right to life.

In *Laxmi Kant Pandey* v. *Union of India*,[27] the court articulated an indispensable procedure to be followed during inter-country adoption of Indian children.[28] Judicial law-making in the area of environmental law has also been very intense. In *M.C. Mehta* v. *Union of India*,[29] the court, while rejecting the application of strict liability principle given in *Rylands* v. *Fletcher*,[30] propounded a new principle of absolute liability. It held that: [31]

> [A]n enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.

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22 *S P Gupta* v. *Union of India,* AIR 1982 SC 149.

23 AIR 1986 SC 180.

24 AIR 1982 SC 1473.

25 AIR 1987 SC 374.

26 AIR 1987 SC 990.

27 (1987) 1 S.C.R. 383, 387.

28 *Ibid.*

29 (1987) 1 S.C.R. 819, 843.

30 (1861-73) All E.R. 1 (Ex. Ch.) (Eng.).

31 (1987) 1 S.C.R. 819 at 843.

Recognizing the significance of the right to a decent environment and a reasonable accommodation, the apex court in *Shantistar Builders* v. *Narayan Khimalal Totame*[32] held that:[33]

> The right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body, for a human being it has to be a suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud-built thatched house or a mud-built fireproof accommodation.

The right to education in *Mohini Jain*[34]and *Unni Krishnan*,[35] and the right to food in *P.U.C.L.* v. *Union of India*[36]were other featured judgments of this phase. The first phase of judicial law-making was more or less confined to the evolution of new principles, concepts and liberal interpretation of provisions of the Constitution, especially the fundamental rights. The most significant judicial construct in this phase was the doctrine of basic structure which too was aptly justified on the ground of constitutionalism *i.e.,* all powers under the Constitution is limited whether or not it is expressly itemized.

The Supreme Court however, conceded a very limited power of judicial review in political or policy questions. In cases such as *State of Rajasthan* v. *Union of India,*[37] the apex court observed that the court is concerned with the legal rather than political disputes. Fazal Ali J advanced that:[38]

> The Court does not possess the resources which are in the hands of the Government to find out the political needs that they seek to observe and the feelings or the aspiration of the Nation that require a particular action to be taken at a particular time.

P. N. Bhagwati J., held that the court should not enter into a 'political thicket' "if it is to retain its legitimacy with the people." He also characterized certain decisions as not

32 (1990) 1 SCC 520: AIR 1990 SC 630.

33 *Id.*, para 9.

34 AIR 1992 SC 1858.

35 AIR 1993 2178.

36 Civil Writ Petition no. 196 of 2001.

37 AIR 1977 SC 1361.

38 *Id.*, para 240

being *'judicially discoverable*.''[39] *Later in A. K. Roy* v. *Union of India,*[40] the court commenting on *Rajasthan* case observed that the doctrine had evolved in United States, which has a system of rigid separation of powers unlike India. It further held that the view taken in the *State of Rajasthan* case that courts should not invade into "political thicket" is no longer good law because this observation was made in light of clause (5) of article 356, which is later deleted by the 44th Constitutional Amendment Act. However, in spite of that the Supreme Court declined to issue *mandamus* to enforce an Act which has been passed by the legislature on the ground that this was a policy question.

V Intensifying of judicial law-making

Judicial law making fortified when the apex court snatched from the executive, one of the most vital executive powers *i.e.,* the appointment and transfer of judges in the constitutional courts, and created a new institution called the *"collegium"*. The collegium would recommend the names of judges to be appointed in the Supreme Court and the high courts, and these recommendations shall be binding on the President.[41] The creation of collegium, immensely boosted the confidence of the Supreme Court, and with this it entered into intense judicial law-making.

A.M. Ahmadi J and M. M. Punchhi J while writing their dissenting notes in the *second judges'* case accepted the fact that the Constitution of any country is an organic document and cannot be read in a narrow, pedantic or syllogistic way. The provisions of the Constitution should be construed broadly in order to facilitate it to address the need of a rapidly-changing society. It may be allowed to give an extended and liberal meaning to the words and phrases used in the Constitution. It may also be permitted to mould the provisions and in some extreme cases stretch the meaning and if required bend it forward to better serve the societal needs. But in the name of interpretation, it would certainly be not permissible to break it, replace it and re-write it.[42]

The new mechanism for the appointment of judges of Constitutional courts was reinforced by *third judges transfer* case[43] when the Supreme Court issued detailed guidelines clarifying and modifying the law laid down in *second judges transfer* case.[44]

In *M. C. Mehta* v. *State of Tamil Nadu*,[45] the court created a new mechanism to ensure compliance with the Child Labour (Prohibition and Regulation) Act of 1986 with

39 Surprisingly, in *Minerva Mills Ltd.* v. *Union of India*, Bhagwati J viewed that only because a question has a political appearance will not be a ground for the court to abdicate its duty under the Constitution, if issue otherwise involves a substantial question of law.

40 AIR 1982 SC 710.

41 (1993) 4 SCC 441.

42 *Ibid.* (M. M. Punchhi J)

43 *In Re Presidential Reference,* AIR 1999 SC 1.

44 *Supreme Court Advocates on Record Association* v. *Union of India* (1993) 4 SCC 441.

45 (1996) 6 SCC 756.

additional obligations for offenders and duties for statutory authorities."[46] The nine-judge bench of the apex court in *S. R. Bommai* v. *Union of India*[47] laid down vital guidelines to curb the centre's power to dismiss a state government by invoking article 356 of the Constitution. Overturning its earlier *Rajasthan*[48] ruling and relying on the Sarkaria Commission report on centre–state relations,[49] the Supreme Court conscripted the situations where the exercise of power under article 356 could be proper or improper.

In *Kumari Madhuri Patil* v. *Additional Commissioner Tribal Development,*[50] the apex court framed guidelines for the issuance of social status certificates, their scrutiny and approval. The above decision was subsequently challenged in the case of *Dayaram* v. *Sudhir Battham,*[51]mainly on the ground that, whether the directions given in the *Madhuri Patil* case were impermissible being legislative in nature?[52] The apex court while answering the question, cited Benjamin Cardozo*, "the power to declare the law carries with it, the power and within limits the duty, to make law when none exists"*[53] and held that the direction 1-15 issued in the *Madhuri Patil's* case, in exercise of power under the articles 142 and 32 of the Constitution, are valid as they were made to fill the vacuum in the absence of any legislation, to ensure that only genuine schedule castes and scheduled tribes candidates secured the benefits of the reservation.

The CJI J.S. Verma as in *Vineet Narain* v. *Union of India*[54] indulged in judicial law making by creating a new concept of "continuing mandamus" and making prime investigating body accountable to the court. The court held that:[55]

> The Central Vigilance Commission (CVC) shall be given statutory status and the selection for the post of Central Vigilance Commissioner shall be made by a Committee comprising of the Prime Minister, Home Minister and the Leader of the Opposition from a panel of outstanding civil servants and others with impeccable integrity to be furnished by the Cabinet Secretary. The appointment shall be made by the President on the basis of the recommendations made by the Committee. This shall be done immediately.

46 (1996) 6 SCC 756.

47 (1994) 3 SCC 1.

48 AIR 1977 SC 1361.

49 The Sarkaria Commission was established by the Central Government to make recommends to improve the centre-state relationship. The Commission submitted its detailed report in the year 1988.

50 (1994) 6 SCC 241

51 (2012) 1 SCC 333

52 *Ibid.*

53 *Ibid.*

54 (1998)1 SCC 226.

55 *Id*., para 58.

The Supreme Court in *D. K. Basu* v. *State of West Bengal*,[56] formulated specific guidelines for the police to mandatorily follow while making arrests or detentions till legal provisions are made. The court further ordered that the failure to comply with these guidelines will result in contempt of court. In addition to this the court directed that:[57]

> The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every Stare/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public.

The CJI J.S. Verma led bench in *Vishakha* v. *State of Rajasthan*[58] not only issued a 12-points set of detailed and intricate guidelines for safeguarding women again sexual harassment at workplace but also directed the government to make law at the earliest on this subject. The court observed that:[59]

> the Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in the Private Sector. Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

In *M. C. Mehta* v. *Union of India,*[60] noting the harmful consequences of vehicular pollution on the general health of people, the court ordered the implementation of directions to restrict plying of commercial vehicles, including taxis which were 15 years old, and restrictions on the plying of goods vehicles during the daytime.[61] This was followed by a relentless spate of directives, including the order for conversion of a city bus fleet in New Delhi to a single mode of CNG'" and an introduction of Euro-I and Euro-II norms.[62]

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56 (1997) 1 SCC 416.

57 *Id.*, para 39.

58 (1997) 6 SCC 241.

59 *Id.* at 254.

60 (1998) 6 SCC 63.

61 (1998) 6 SCC 63, para 2.

62 *Ibid.*

VI In pursuit of complete justice

The traditional assumption that the judiciary is the least powerful branch of the state, is now no longer true. Judiciary now wields more powers than it was conferred with by the Constitution. There was clear and convincing evidence that the power of the courts have increased across the world at an exceptional pace and the Indian judiciary has been a frontrunner in this race. Article 142 was another provision which was used by the Supreme Court to expand its authority as a *super legislature* and *super executive*. Article 142(1) visualizes that the Supreme Court in the exercise of its jurisdiction may pass such enforceable decree or order as is necessary for doing *'complete justice'* in any cause or matter pending before it. However, the exercise of this power too was not consistent. The initial use of this power was confined to the understanding that it cannot be adverted to, to defeat statutory provisions.[63] But, later the Supreme Court viewed this power as untrammeled by any statutory limits.

In order to provide substantive relief to the victims of the Bhopal gas calamity, the Supreme Court in the *Union Carbide* case deviated from the existing legal framework, and exercising the powers under article 142, awarded a compensation of 470 million dollars to the victims. The court however avowing its extraordinary power to do complete justice also observed that, "prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142."[64] But soon, another bench of the Supreme Court in *Supreme Court Bar Association* v. *U.O.I.*,[65] clarified that article 142 could not be used to oust the existing law, but only to supplement the law. The court observed:[66]

> The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statues. These powers are of very wide amplitude and are in the nature of supplementary powers.

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63 *See, Prem Chand Garg* v. *Excise Commr. U.P. Allahabad,* AIR 1963 SC 996 where Supreme Court while explaining the scope of art. 142 observed: "An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws." This view was ratified by the Apex Court in *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* AIR 1967 SC 1*, A.R. Antulay* v. *R.S. Nayak,* AIR 1988 SC 1531*,* and *Arjun Khiamal Makhijani* v. *Jamnadas C. Tuliani* 1989 SCR, Supp. (1) 380.

64 In *Bonkya* v. *State of Maharashtra* (1995) 6 SCC 447, a Bench of two judges held that the latitude of power under art. 142(1) of the Constitution is not conditioned by any statutory provision. However, power should not disregard the relevant statute in the name of complete justice. This view was reaffirmed in *Keshabhai Malabhai Vankar* v. *State of Gujarat* 1995 Supp (3) SCC 704, where apex court observed that this power is unrestrained by any statutory limits.

65 (1998) 4 SCC 409.

66 *Id.* at 431.

The Supreme Court while interpreting the principle *"actus curiae neminem gravabit,"* which means that an act of the court shall prejudice no one, created a new concept of *"curative petition."*[67] The purpose behind this was the prevention of the abuse of the process of law and to cure the lapses in the existing system of justice. Upon reading article 32 with article 142,[68] it becomes necessary for the judiciary to perform its constitutional obligation where there is no legislation in that particular field and implement the rule of law. The apex court in *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*,[69]emphasized that article 142 of the Constitution endows the Supreme Court with the authority to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of specific legislations. The apex court reaffirmed that it has the power to issue directions in order to fill the legislative vacuum, and it will be law of the land under article 141 of the Constitution. In *Prakash Singh* v. *Union of India*,[70] the Supreme Court bench led by Y. K. Sabarwal J., held that article 32 and 142 of the Constitution vests in it the power to issue such directions as it deem necessary for doing complete justice. Article 144 further mandates that all authorities will act in aid of the orders passed by the court. The apex court's ruling in *Vineet Narain* clarifies that cases where guidelines and directions to be observed, were issued in absence of law and will be implemented till appropriate legislature makes law.

VII Judicial law making through abstractionism

The new political regime came to power in 2014 and introduced a National Judicial Appointment Commission (NJAC) to replace the collegium system. A constitutional bench of the Supreme Court in *Supreme Court Advocates on Record Association* v. *Union of India*,[71] while declaring that the judiciary cannot risk being caught in a *"web of indebtedness"* towards the government, declared the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment Act "unconstitutional and void." The Supreme Court stating the new mechanism as unconstitutional and void, paved the way for a new round of confrontation which impacted the decision making process in the apex court.

Later, in this phase, the Supreme Court resorted to an abstract principle such as '*constitutional morality'* to test various legislative and executive actions. For Ambedkar, constitutional morality was an aspiration – a hope that citizens would inculcate a love for the rule of law which would make it difficult for the Constitution to be obliterated

67 *Rupa Ashok Hurra* v. *Ashok Hurra* (2002) 4 SCC 388.

68 Constitution of India, 1950, art. 142 provides that "the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it…"

69 (2004) 7 SCC 528.

70 2006 (8) SCC 1.

71 *Supreme Court Advocates on Record Association* v. *Union of India* (2015) 5 SCC 1.

by the political powers of the day.[72] Neither B. R. Ambedkar nor George Grote who originally used this concept, intended constitutional morality to be used by the courts to test the validity of governmental action. But various benches of the apex court used this doctrine to garner vast powers while exercising jurisdictions under article 32 and article 142 of the Constitution.

A Constitution bench of the Supreme Court in *Manoj Narula* v. *Union of India*,[73] treated 'constitutional morality' in its traditional sense of respect for the rule of law.[74] The Bench hearing a public interest litigation seeking the removal of stained ministers from the cabinet did not provide any remedy to the petitioner but used constitutional morality to put a moral pressure on the Prime Minister and the chief ministers to not to select any person with criminal charges as ministers. The bench observed that in a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility." The bench observed:[75]

> The framers of the Constitution left many a thing unwritten. They also expected that the Prime Minster would act in the interest of the national polity of the nation-state. He (PM) has to bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust,
>
> the principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. Commitment to the Constitution is a facet of constitutional morality. Institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure.

While dealing with the constitutional validity of the practice of *'talaq-e-biddat'-triple talaq,* the five judge Constitution bench of the Supreme Court, by a 3:2 majority held the 1937 Act[76] to be within the meaning of the expression "laws in force" under Article 13 of Constitution, thereby being void to the extent of inconsistency with the

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72 Abhinav Chandrachud, "Is 'Constitutional' Morality A Dangerous Doctrine", *Bloomberg Quint,* (Dec.19, 2019).

73 (2014) 9 SCC 1.

74 The *Manoj Narula* case is the second instance wherein the concept of 'Constitutional Morality' was used. The first judgement, *i.e.*, the *Kesavananda Bharti* case was limited to the idea of 'Constitutionalism' but Manoj Narula went a step forward and made it in similar line with Fuller's Aspirational Morality.

75 *Supra* note 73., para 98.

76 The Muslim Personal Law (Shariat) Application Act 1937.

provisions of Part III. Triple talaq was further held to be against the tenets of constitutional morality. Furthermore, since the Constitution of India is a living instrument with capabilities of enormous dynamism that can keep pace with the changing needs of the society Ambedkar believed that the Constitution can only grow on the bedrock of constitutional morality, and commitment to the Constitution, is a facet of constitutional morality.[77] Citing the Constituent Assembly debates, it was held that: [78]

> The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the Rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building…

The Constitution bench in *Common Cause (A Regd. Society)* v. *Union of India*,[79] in the absence of any legislation to deal with the cases of passive euthanasia, made a moral reading of the Constitution. It also clearly spelt out the obligation and significance of constitutional morality in cases where there is no law to solve the issue at hand. The use of constitutional morality in this case was also in line with Justice Cardozo's "Judicial Discretion" wherein he says that the judges need to break the shackles and fashion the law where none exists so that justice can be served.[80] The significance of such a term, in the absence of any law, becomes manifold and more prominent to provide justice within the framework of the Constitution.

But, later this device was used to decriminalize homosexuality by striking down section 377 of the Indian Penal Code, 1860 in *Navtej Singh Johar* v. *Union of India*.[81] The Supreme Court in that case, placed the individual at the heart of the constitutional scheme and consolidated the court's 'right to choice' jurisprudence which began with *Common Cause* v. *Union of India,*[82] was expanded in *Puttaswamy* case[83] and cemented in *Shafin Jahan*[84] and *Shakti Vahini*.[85] The bench observed:[86]

77 *Id.,* para 36.

78 *Ibid.*

79 (2017) 10 SCC 1.

80 *Ibid.*

81 (2018) 10 SCC 1. In this context, it is pertinent to mention the criticism of Attorney General K. K.Venugopal who views constitutional morality as a *"dangerous weapon"* which may vary as per personal predilections of judges. "Use of constitutional morality can be very, very dangerous and we cannot be sure where it will lead us. Unless it dies the former Prime Minister Pandit Jawaharlal Nehru's fear of the Supreme Court becoming the third chamber of the Parliament may come true."

82 (2014) 5 SCC 338.

83 *Justice K. S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

84 2018 (4) SCALE 404.

85 (2018) 7 SCC 192.

86 *Supra* note 81 at 298.

> A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.

The same doctrine invited severe criticism[87] *when a Supreme Court Bench with 4:1 majority used principle of* constitutional morality and allowed the entry of women of all ages into the Sabarimala temple. Amazingly, both majority and minority opinions referred to constitutional morality to justify their views. The majority led by CJI Dipak Misra held that the restriction enforced upon women in age group of 10-50 years was against the constitutional morality while Indu Malhotra J., in her dissenting opinion found that the "constitutional morality will require that every single individual would have the right to his own faith and nobody can interfere with it. The courts should not interfere with what is the matter of faith.

While writing a strong dissenting note in *Aadhaar* case,[88] D.Y. Chandrachud J., observed that the Aadhaar Act was unconstitutional from the very beginning of the phase of its enactment because of the procedure involved in passing the said legislation that is, passing the Act as a Money Bill.[89]Since, the Aadhaar Act created a statutory framework for obtaining a unique identity number, which can be used for several purposes including availing benefits, subsidies and services for which expenses are incurred from the Consolidated Fund of India is just one purpose provided under section 7 of the Act,[90] it will not succeed to be a Money Bill. Further, other provisions of the Act dealing with several aspects relating to the Aadhaar numbers also do not fall within the ambit of sub-clauses (a) to (g) of article 110(1). Therefore, even if, section 7 may have a remote nexus to the expenditure incurred from the Consolidated Fund of India, the other provisions of the Act do not fall within the realm of article 110(1). D.Y. Chandrachud J., observed that: [91]

> The decision of the Speaker of the Lok Sabha in certifying a Bill as a Money Bill is liable to be tested upon the touchstone of its compliance with constitutional principles. Nor can such a decision of the Speaker take leave of constitutional morality.

That, the government in power must work within framework of the Constitution and abide by the principle of constitutional morality.[92]

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87 *Indian Young Lawyer Association* v. *Union of India* (2019) 11 SCC 1.

88 *Justice K. S. Puttaswamy* v. *Union of India* (2019) 1 SCC 1.

89 Any Bill to be certified to be a Money Bill, must specifically contain provisions mentioned in sub-clause (a) to (g) of art. 110 (1) of the Constitution of India.

90 *Supra* note 88, para 787 (3).

91 *Id.,* para 518.

92 *Id.,* para 547.

On September 27, 2018, a five-judge constitutional bench, headed by CJI Deepak Mishra in *Joseph Shine* v. *Union of India,*[93] unanimously declared section 497 of the Indian Penal Code *i.e.,* adultery, as illegal, arbitrary and unconstitutional as it *'treats a husband as the master'* and provides the husband with the license *'to use the woman as chattel'*. The court also held that this archaic law has long outlived its purpose and doesn't square with 'constitutional morality.'[94] The Constitution aims at creation of a just and egalitarian society which involves questioning and sometimes asking the women questions or application of feminist legal method[95] which section 497 didn't abide by and hence became antithetical to constitutional morality. Further, allowing women to be the slave of the husband is a reflection of societal morality and such societal/ public/majoritarian morality cannot guide the law, it has to be constitutional morality, which requires courts to implement the constitutional assurances of equality before law, non-discrimination on the ground of sex and dignity which are adulterated by section 497.

In *State (NCT of Delhi)* v. *Union of India*,[96] the question before the Bench was "whether Delhi should be treated like a Union Territory with the Lt. Governor as its administrative head or as a special state where the Lt. Governor is bound by the advice of the Chief Minister?"Chief Justice Dipak Misra once again trusting his favoured doctrine observed that the Courts must construe constitutional provisions in the light of the spirit of the Constitution. Misra J., explained "constitutional morality" as the morality that has inherent elements in the constitutional norms and the conscience of the Constitution."[97] The Supreme Court in the *NCT of Delhi* case held that the constitutional validity of a Government's actions can be scrutinized not only by observing the formal provisions of the Constitution but also by confirming that actions do not disturb the "spirit", "soul" or "conscience" of the Constitution. He further cited the case of *Krishnamoorthy* v. *Sivakumar*[98] wherein the relationship of Democracy and Constitutional Morality was explained as: [99]

> Democracy, which has been best defined as the Government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance.

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93 2018 SCC OnLine SC 1676.

94 *Id.,* para 81.

95 Katharine T. Bartlett,"Feminist Legal Methods" 103(4) *Harvard Law Review* (1990).

96 (2018) 8 SCC 501.

97 *Ibid.*

98 (2015) 3 SCC 467.

99 *Ibid.*

In short, CJI Dipak Misra concluded that the concentration of the power in the hands of the Lt. Governor instead of the democratically elected representative would result in tyranny, which is antithetical to the idea of constitutional morality in a democracy. The bench held that chief minister is the executive head of the National Capital Territory Government and the Lt. Governor is bound by the aid and advice of the Council of Ministers on all matters where the Legislative Assembly of Delhi has the power to legislate.

Chandrachud J., in his concurring opinion held that the mere text of the Constitution is not enough to protect the democratic values in India, hence constitutional morality provides such responsibilities to the people and its representatives. Chandrachud J., outlined some features of constitutional morality in the context of this case.[100]Lastly, Justice Chandrachud added that one of the important components of constitutional morality is the collective responsibility of the Council of Ministers which reflects the constitutional ethics and ensures their accountability to the legislature and the electorate. Thus, the proviso to article 239AA (4) must be operated and applied in a manner that facilitates and does not obstruct the governance of the NCT. Further, the elected representatives should not be reduced to a cipher and the concentration of power should not lie in the hands of the Union Government.[101] Thus, the significance of the term 'constitutional morality' in the *NCT Delhi* case, includes, reiterating the supremacy of the people in a democratic setup, preventing democratic institutions from becoming tyrannical and controls the rise of 'majoritarianism' and preventing 'Mobocracy'.

VIII Selective wisdom of benches to interfere in the legislative domain

The aforementioned case laws make it abundantly clear that the judiciary in India does not confine itself to mere interpretation of laws. Judges do make the law, but it depends on the selective wisdom of the specific benches of the Supreme Court. The *prudentia* developed is bizarrely erratic, unpredictable, and, on many occasions, constitutionally unwarranted. Even during the initial phase of judicial law making, the Supreme Court Benches on some occasions in their selective wisdom demonstrated respect for the separation of power principle. In *Maharshi Avadhesh* v. *Union of India*,[102] the Supreme Court declined to issue a writ of mandamus against executive to enact a uniform civil code for all citizens of India. The Bench also declined to declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as being void, arbitrary and discriminatory

100 Constitutional Morality holds liberal values that helps in arriving at just decisions consensually (para 286). Constitutional morality includes the basic rules of the Constitution which deter institutions from turning tyrannical (para 289). Constitutional morality controls the rise of 'Majoritarian Morality and prevents an upsurge in mob rule (para 289). Constitutional morality highlights the importance of preserving the trust of the people in the democratic institutions (para 291).

101 *Supra* note 98, para 414.

102 1994 Supp. (1) SCC 713.

and in violation of articles 14, 15, 38, 39, 39-A and 44 of the Constitution of India and rejected pleas to direct the respondents to not enact the Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection."[103] The Supreme Court dismissed the petition by observing that "these are all matters for the legislature and the Court cannot legislate on these matters.

A seven-judge bench in *P. Ramachandra Rao* v. *State of Karnataka*[104] observed that "Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon the field of legislation, properly meant for the legislature." In *Union of India* v. *Deoki Nandan Aggarwal* [105] the Bench observed that:[106]

> It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities.

But when we see Supreme Court's pro-active rulings as a super executive on National Eligibility-cum-Entrance Test (NEET) *i.e.,* single test for admissions in medical courses, filling up the judges' post, reform in the game of cricket etc. we find it difficult to reconcile the earlier stand taken by the Supreme Court with its present stance. The recent verdict of the Supreme Court concerning reforms in the Board of Control for Cricket in India (BCCI) without declaring it as a state under article 12 invited much criticisms. The Supreme Court not only appointed the justice to find the defects in the working of the BCCI[107] but also appointed the committee to implement the sweeping reforms suggested by it, including the auditing of the accounts by the CAG.[108] This

103 *Ibid.*

104 AIR 2002 SC 1856.

105 AIR 1992 SC 96.

106 *Id.*, para 14.

107 See *BCCI* v. *Cricket Association of Bihar* (2015) 3 SCC 251.

108 The Supreme Court also approved a new constitution of BCCI and appointed former CAF Vinod Rai, chairman of the SC- Committee of Administrators (CoA) that will implement the reforms.

not only raises questions of judicial law making or judicial intervention in executive function but also judicial inconsistency.[109]

The case of *Manoj Narula* v. *Union of India*[110] raised an important question about legality of appointment of individuals with criminal background, and/or charged with offences involving moral turpitude as ministers in the central and the state government. The court held that the judiciary is not the appropriate body for framing the guidelines and therefore, the legislature needs to look into the necessity of such guidelines.

A legitimate expectation was created when Public Interest Foundation,[111] a non-governmental organisation filed a petition in the Supreme Court and prayed that when the trial court is *prima facie* satisfied with serious criminal charges against an accused and consequently charges have been framed against such accused, keeping such person out of the electoral process would be in the larger public interest. The Bench acknowledged the growing tendency of criminalization of Indian politics as being distracting to the very ethos of constitutional jurisprudence and that it struck at the very root of our democratic edifice.[112] But, the judgement of Supreme Court in *Public Interest Foundation* case[113] is just another addition to its long list of judgments where the Court despite upholding the constitutional values and principles, has actually failed to give effective and substantive relief.

Looking at these pronouncements one cannot help but conclude that though the Supreme Court has exhibited judicial law making in a plethora of cases, the fact remains

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109 A curious question regarding legal status of BCCI, the controller of cricket in India came for consideration in many cases *viz., Mohinder Amarnath* v. *BCCI* CW.NO.632/89, *Ajay Jadeja* v. *Union of India* 95 (2002)DLT 14 and *Rahul Mehra* case. The significant amongst them was famous *Zee Telefilms Ltd.* v. *Union of India* (2005)4 SCC 649 where apex court elaborately discussed about the position of BCCI as an instrumentality of State under art. 12 and the majority held that the Board is a society registered under the Tamil Nadu Societies Act and hence not state under art. 12. The majority relied on the fact that Union of India made a categorical statement before the Parliament as also in its affidavit in the case of Rahul Mehra before the High Court of Delhi wherein it is accepted that the Board is not under the control of the Union of India nor there exist any statutory rules to regulate its functioning. Though, a dissenting opinion of progressive nature was recorded by S. B. Sinha J in *Zee Telefilms Ltd.* v. *Union of India*, where judge writing for himself and S.N. Variava J., strongly argued for the wider meaning of phrase *'other authorities'* due to the fact that Board of Cricket Control for India (BCCI) discharges a public function and has been conferred monopoly to regulate cricket in India.

110 (2014) 9 SCC 1.

111 *Public Interest Foundation* v. *Union of India,* Write Petition (Civil) No. 536 of 2011, decided on 25 Sep. 2018.

112 *Id.,* para 2.

113 In another setback to people's legitimate expectation, the Supreme Court in *Lok Prahari* v. *Election Commission of India* while relying on its previous decisions in *Ravi Kant Patil* and *Lily Thomas,* avowed its stand that upon the stay of a conviction by appellate court under s. 389 of the Cr. P. C., the disqualification under s.8 will not operate.

that it is still unable to actually pierce the veil of political thicket as was referred to in the *Rajasthan* case.[114] Which just goes on to show that judicial law making, entirely depends on the selective wisdom of the Benches, which in turn are influenced by many variables.

IX Power of benches to direct the legislature and the executive to make laws: Another dilemma

A pertinent question which arises in the light of the discussions so far is, whether the judiciary can issue directions to the government or the legislature to make laws? The directions issued by the Supreme Court in *Vishakha* case[115] and *Vineet Narain* case[116] have given the impression that it can do so. Nevertheless, it is against the principle of separation of powers. In the case of *Union of India* v. *Prakash P. Hinduja* [117]a bench of the Supreme Court led by G. Mathur J., elucidated that under our constitutional scheme, the Parliament is entrusted with exclusive power to make laws and no other authority can direct it to enact a law on any specific subject. The Bench relied on decision of Supreme Court in *Supreme Court Employees' Welfare Association* v. *Union of India*[118] and *State of J and K* v. *A. R. Zakki.*[119]

In *A.K. Roy* v. *Union of India*,[120] an important question was raised. The Government of India, through a notification, brought into force all the sections of the 44th Amendment Act, except section 3 which guaranteed certain safeguards to person detained under any preventive detention law. The question before the Bench was whether the court could issue a writ of mandamus, directing the Central Government to bring into force section 3 of the 44th Amendment Act. The Bench led by the then CJI Y. V. Chandrachud, held that a mandamus cannot be issued in this situation.

The question whether the court would be justified in issuing a direction in the nature of mandamus to the Central Government to bring section 30 of Advocates Act, 1961 into force was raised in *Aeltemesh Rein* v. *Union of India.*[121] The Supreme Court bench relying on the *A. K. Roy* 'judgement observed that:[122]

> It is not open to the Court to issue writs in the nature of mandamus to the Central Government to bring a statute or a statutory provision into

114 *See State of Rajasthan* v. *Union of India*, AIR 1977 SC 1361.
115 (1997) 6 SCC 241.
116 (1996) 2 SCC 199.
117 (2003) 6 SCC 195.
118 (1989) 4 SCC 187 (para 51).
119 AIR 1992 SC 1546.
120 AIR 1982 SC 710.
121 (1988) 4 SCC 54.
122 *Id.,* para 6.

> force when according to the said statute, the date on which it should be brought into force is left to the discretion of the Central Government.

However, the court observed that it can issue a writ in the nature of mandamus to the Central Government to consider whether the time to bring the provisions of the Act has arrived or not. But, it seems surprising that the notification of amendment in article 22 of the constitution which was question before the Supreme Court in *A. K. Roy* has not yet been notified even after 45 years. In *State of Jammu* and *Kashmir* v. *A. R. Zakki*,[123] the Supreme Court once again reiterated that a writ of *mandamus* cannot be issued to the legislature to enact a particular legislation, and the same rule will apply to the executive when it exercises the power to make rules. The Supreme Court bench observed:[124]

> A writ of mandamus cannot be issued to the legislature to enact a particular legislation. The same is true as regards the executive when it exercises the power to make rules, which are in the nature of subordinate legislation..... This power to frame rules is legislative in nature. A writ of mandamus cannot, therefore, be issued, directing the State Government to make the rules in accordance with the proposal made by the High Court.

It is undoubtedly clear that the court cannot issue writ or order in the nature of writ of *mandamus* directing the parliament or rule making authority to bring into force a particular enactment. It is for the legislature or the executive, who are authorised to enforce the enactment to decide the question.

In *Divisional Manager, Aravali Golf Course* v. *Chander Haas*[125] a Bench of the Supreme Court observed that: [126]

> Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State-the legislature, the executive and the judiciary- must have respect for the others and must not encroach into each other's domains.

However, all of the above narrated principles of wisdom and separation of power seem to vanish when the Supreme Court directed the appropriate government to enact a law by June 30, 2011 in the case of *Gainda Ram* v. *Municipal Commissioner Delhi*.[127] This

123 AIR 1992 SC 1546.

124 *Id*., para 11.

125 (2008)1 SCC 683.

126 *Id.* at 689.

127 (2010) 10 SCC 715.

was a case concerning the legal framework for regulation of hawking in Delhi. In it, the bench not only recognised that there is an urgent need to enact a legislation to regulate hawking, and the rights of street vendors; but also directed the appropriate government to enact a law on the basis of the Bill already prepared but not laid before Parliament.

The Supreme Court in *Swaraj Abhiyan-(I)* v. *Union of India*,[128] directed the Ministry of Agriculture Government of India to not only update and revise the Drought Management Manual but also to set up a National Disaster Mitigation Fund within three months. This ruling was strongly resisted by Union Government on the ground that it is difficult to construct a third fund beyond the National and State Disaster Response Fund considering the fact that the Appropriation Bill is being passed.

In the recent *Shayara Bano* v. *Union of India,*[129]the Supreme Court Constitution Bench gave two contradictory opinions. Justice Kurian Joseph while agreeing with the majority that instant triple talaq is unconstitutional, observed that a reconciliation between religion and constitutional rights is possible, but the process of synthetisation of diverse interests falls within the legislative realm and to be used within the constitutional parameters and without wounding the religious freedom safeguarded under the Constitution. It is not for the courts to direct for any legislation. However, CJI Justice Khehar, while writing the minority opinion in *Shayara Bano* held that:[130]

> We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see at IX – Reforms to 'personal law' in India), even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance……..till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process

128 In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (CIVIL) NO. 857 of 2015, decided on May 11, 2016, *available at* (last visited on Dec. 10, 2021).

129 (2017) 9 SCC 1.

130 *Id.* at 298.

> commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate.

The ruling of the court raises another important question. Who will be held responsible for contempt of court if no law is made as per the court's direction? Can the Supreme Court hold the speaker of the Lok Sabha or the Chairman of the Rajya Sabha in contempt for not enacting a law by a specified date? Or, can the Supreme Court hold other government officials in contempt for not enacting the law within the specified time period? The government in any case does not have all the powers to enact a law. The practicalities of passing a law must also be taken into consideration by the court. It may so happen that the government does not have the numerical majority to pass a law, say for example, due to lack of support to the law by its coalition partners. In such an event, how will the court ensure the enactment of a law directed by it?

In a Westminster model of governance, the executive and legislative branches of the government are intermingled. The "fusion" of the executive and legislative branch, and the dependence of ministers on legislative confidence led to concerns that while the legislature notionally controls the executive, the relationship often in practice works the other way around.[131] In common parlance, the term "Westminster model" is widely associated with centralized executive power and an acquiescent legislature.[132] In other words, the majority government can introduce any law in the Parliament and get its nod. In this situation it is almost similar to issue direction to government or the Parliament to make law. The Supreme Court would no more be justified in saying that, it has issued direction to government and not the legislature. Issuing directions to the government to make the law may be equivalent to issuing directions to the legislature. This may be said to violate the basic principle of *"separation of powers"* which states that the executive, legislature and judiciary should function independently of each other. It is therefore, important to remember that under the Indian Constitution, the Supreme Court and the high courts have the power to protect fundamental rights and to interpret law, but the Constitution does not give power to courts to direct the framing of a law.

X Smaller benches deliberating upon constitutional questions

The Constitution of India under article 145(3) provides that a case which involves a substantial question of law as to the interpretation of the Constitution will be decided

131 Meg Russell and Philip Cowley, The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence, *available at*: https://onlinelibrary.wiley.com/doi/pdf/10.1111/gove.12149 (last visited on Dec. 20, 2021).

132 *Ibid.*

by a five-judge bench only. Subject to this, the power was delegated to the Supreme Court to make rules for constituting smaller benches. The Supreme Court Rules vest the power in the CJI to constitute benches. This means that the Supreme Court can frame rules to fix a minimum number of judges to sit in a case without violating the mandate of clause (3) of article 145. But, a brief survey of Supreme Court cases reveals a precarious trend where smaller benches not only interpreted constitutional questions but also made significant changes in the understanding of the Constitution.

A division bench of the Supreme Court in *State of Andhra Pradesh* v. *Balram*[133] reflected on the issues of reservation to socially and educationally backward classes under article 15(4) and upheld the identification made by the Andhra Pradesh Government on the basis of caste. A bench of three judges in the famous *Bandhua Mukti Morcha* v. *Union of India*[134] case discussed the meaning of *"letter addressed by a party on behalf of persons belonging to socially and economically weaker sections complaining violation of their rights under various social welfare legislations*" and whether it can be treated as a writ petition under the purview of *"appropriate proceedings."*[135] In this process the bench brought a significant change to the understanding of article 32. Another two-judge bench[136] in the notable *Mohini Jain* v. *State of Karnataka*[137] case discussed several issues which involved a substantial question of law as to the interpretation of the Constitution.[138] Here too, the Bench made a significant contribution by expanding the scope of the article 21 by including the right to education within its ambit.

A three-judge bench of the Supreme Court in *Selvi* v. *State of Karnataka;*[139] discussed several questions of law as to the interpretation of the Constitution,[140]and held "narco-

133 See *State of Andhra Pradcsh* v. *Balram* AIR 1972 SC 1375. (Vaidyalingam and Mathew, JJ.)

134 (1984) 3 SCC 161.

135 Consititution of India, 1950, art. 32(1): The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

136 Kuldip Singh J and R. M. Sahai J.

137 (1992) 3 SCC 666.

138 The Bench reflected on four important questions. First; whether right to education is guaranteed under the constitution of India; second; whether practice of capitation fee by educational institutions is unjust, arbitrary and hence violative of art. 14; third; whether permitting private medical colleges to charge capitation fee through impugned notification is illegal in pretext of fee regulation and fourth; whether the notification is *ultra-virus* to the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984? *See Mohini Jain* v. *State of Karnataka* (1992) 3 SCC 666.

139 (2010) 7 SCC 263.

140 Four significant questions were raised before the Bench. First; whether the involuntary administration of the disputed techniques violates art. 20(3) of the Constitution? Second; whether use of the impugned techniques used by investigating agencies increases possibility of incrimination? Third; whether statements received from the alleged methods amount to 'testimonial compulsion' and hence against art. 20(3) and fourth; whether the administration of alleged techniques without consent constituted a reasonable restriction on 'personal liberty'?

analysis test" as being violative of the right against self-incrimination, which was embodied in article 20(3) of the Constitution. It is striking to mention here that to clarify similar concerns an eleven-judge bench had been constituted in the past.[141] A two judge bench[142] of the Supreme Court in *U. P. Power Corporation Ltd.* v. *Rajesh Kumar*[143] held that the state must demonstrate backwardness, inadequacy of representation and maintenance of efficiency before providing reservation in promotions. This question was previously discussed by a constitutional bench[144] in *M. Nagraj* v. *Union of India,*[145] but what *U.P Power Corporation* case did for the first time, was to strike down reservation in promotions for not meeting these criteria.[146] Perhaps this was in violation of a clear constitution mandate *i.e., a substantial question of law which involves interpretation of the constitution will be decided only by a constitutional bench*.[147]Similarly, a two-judge bench[148] while interpreting the law making power of the Parliament on members of the legislature convicted of offences, invalidated Section 8(4) of the Representation of Peoples Act,1951.[149] Likewise, we have seen division benches prescribing the national policy for disposing of all public resources by public auctioning in 2G Spectrum case;[150] laying down the law for disposing of clemency petitions by the President in capital punishment cases[151] and decriminalizing homosexuality under Indian Penal Code, 1860[152] in spite of fact that all of these cases involved substantial question of law as to interpretation of the Constitution, and should have thus, been decided by larger benches.

XI Smaller benches modifying the decisions of larger benches

Another perilous prudence developed by the Supreme Court Benches is the dilution of the hierarchical discipline which requires a bench of two judges to follow the

141 See *State of Bombay* v. *Kathi Kalu Oghad,* [1962] 3 SCR 10.

142 Dalveer Bhandari J and Deepak Mishra J.

143 See *U. P. Power Corporation Ltd.* (decided on Apr. 27, 2012.)

144 Y. K. Sabharwal, K. G. Balakrishnan, S. H. Kapadia, C. K. Thakker, P Balasubramanyan JJ.

145 AIR 2007 SC 71.

146 See Anup Surendranath, "Wining the case for promotion quotas", *available at*: http://www.thehindu.com/opinion/lead/winning-the-case-for-promotion-quotas/article3863068.ece (last visited on Dec. 20, 2021).

147 Constitution of India, 1950, art. 145(3).

148 See *Rajbala* v. *State of Haryana* Writ Petition (Civil) No. 671/2015.

149 Experts have raised doubts whether this verdict would stand the test of law as a Constitution Bench of the Supreme Court, on Jan. 11, 2005, in the *K. Prabhakaran* v. *P. Jayarajan case* had stated that: "The persons falling in the two groups [those who are convicted before the poll and those convicted while being MP/MLA or MLC] are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved."

150 *Centre for Public Interest Litigation* v. *Union of India* (2012)3 SCC 1.

151 *Shatrughan Chauhan* v. *Union of India* (2014)3 SCC 1.

152 *Suresh Kumar Kaushal* v. *Naz Foundation* Civil Appeal no. 10972 2013.

judgement of three judges or larger benches and so on. The five-judge bench in *Islamic Academy Education* v. *State of Karnataka*[153] did find incongruities and doubts in the eleven-judge bench's findings in the *Pai Foundation* case[154] and found that the process of interpretation justified rewriting of some portions of the judgment. It was soon realized that even this constitutional bench could not resolve all the issues raised in the *Pai Foundation* case and therefore the frequency of litigation increased due to non-clarity of these issues and inconsistencies in it. In view of this, a new seven-judge bench was constituted in *P. A. Inamdar* v. *State of Maharastra*[155] which not only interpreted the *Pai judgement* but also modified it. Similarly, the five-judge bench of *Rameshwar Prasad* v. *Union of India*,[156] while accepting the ratio laid down by the nine-judge bench in *S R Bommai*[157] choose not to implement it.

The recent *NJAC judgement,*[158] which struck down the National Judicial Appointment Commission Act too highlights this trend. The genesis of the collegium system was laid down by a nine-judge bench in the *second judges transfer* case[159] and it was further modified by another nine-judge bench in the *third judges'* case.[160] However, the 93rd Constitutional Amendment Act which eventually tried to replace the collegium system was heard and finally struck down by a bench of five judges.[161] This was in contrast with previous practice of the Supreme Court. After the eleven-judge bench decision in *Golak Nath* v. *State of Punjab*,[162] the Parliament enacted the 24th Constitutional Amendment Act. The sole reason of this amendment was to remove the difficulties created by the eleven-judge bench. This amendment was challenged and a thirteen-judge bench was constituted in *Kesvanand Bharti* v. *State of Kerala.*[163] But in the *NJAC* case, the Supreme Court did not find any substance in it.

A division bench of the Supreme Court in *Devidas Ramachandra Tuljapurkar* v. *State of Maharashtra*[164] devised a new parameter of obscenity for historically respectable

153 (2003) 6 SCC 697.

154 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.

155 AIR 2005 SC 3226.

156 (2005) 7 SCC 625.

157 *S. R. Bommai* v. *Union of India* (1994) 3 SCC 1.

158 *Supreme Court Advocates-on- Record Association* v. *Union of India* W.P. (C) No. 13 of 2015. Decided on Oct. 16, 2015. [Popularly known as the 'Fourth Judges' case].

159 *Supreme Court Advocates on Record Association* v. *Union of India* AIR 1994 SC 268. [Popularly known as the 'Third Judges' case].

160 *In Re: Special Reference No. 1 of 1998* (1998) 7 SCC 739. [Popularly known as the 'Third Judges' case].

161 It would be pertinent here to mention that surprisingly this matter was allotted to a three judge bench.

162 AIR 1967 SC 1643.

163 (1973) 4 SCC 225.

164 (2016)7SCC221.

personalities ignoring well settled principle in *Ranjit D. Udeshi* case.[165] In *Subramanian Swamy* v. *Union of India*[166] a division bench while upholding the constitutional validity of criminal defamation not only ignored the ruling of the coordinate bench judgment of *R. Rajagopal* v. *State of Tamil Nadu,*[167] concerning the different standards in civil and criminal law of defamation, but devised a mythical doctrine of "constitutional fraternity" to reason out its ruling. Similarly, in the contentious *National Anthem* case, a division bench disregarded the binding precedents of nine-judge bench in *Naresh Mirajkar case* and five-judge bench in *Rupa Ashok Hurra*.

XII Dilution of the bench hierarchy principle

Judicial propriety mandates that a Bench of the Supreme Court must follow the decisions of larger Benches or Benches with equal strength. In case, judges find it difficult to agree, they can only refer the matter to the CJI with a request to constitute a larger Bench to resolve the conflict. The basic principles of judicial propriety was laid down in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*:[168]

> (a) Law laid down by a larger Bench of the SC is binding on any subsequent Bench of lesser or co-equal strength.
>
> (b) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum, and in case of doubt all that the Bench of lesser quorum can do is to request the CJI to place the matter before a Bench of larger quorum than the Bench whose decision has come up for consideration.
>
> (c) It will be open only to a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength.

The Supreme Court decision making process has a long history of conflicting opinions. In an interesting case concerning conflicting opinions, the same five-judge Bench took one position on the definition of 'State' in *Sukhdev Singh* v. *Bhagat Ram*[169] by holding ONGC, LIC, and Industrial and Finance Corporations as 'State.' The same Bench took a different position in another judgment delivered on the same day in *Sabhajit Tewary* v. *Union of India*[170] by refusing to hold Council of Scientific and Industrial Research (CSIR) as state under article 12.

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165 AIR 1965 SC 881.

166 (2016)7SCC221.

167 AIR 1995 SC 264.

168 AIR 2005 SC 752.

169 AIR 1975 SC 1331.

170 AIR 1975 SC 1329.

Under new land acquisition act (2013), it was provided that if land was acquired (under previous law)[171] five years or more prior to the commencement of the new (2013) Act, and compensation is not paid then the acquisition would lapse. The purpose was to ensure a better deal for the farmers under the new law. On January 24, 2014, a three-judge Bench in *Pune Municipal Corporation* v. *Harakchand Misirimal Solanki*[172] unanimously decided that "paid" would mean compensation offered or rendered, and deposited in Court. On February 8, 2018, another Bench of Supreme Court[173] with 2:1 majority in *Indore Development Authority* v. *Shailendra (Dead) through*,[174] held that the judgment in *Pune Municipal Corporation* was *per in curiam*.[175] The Bench observed that once compensation had been unconditionally offered and declined, it would satisfy the legal prerequisite of payment. On February 21, 2018, a Bench of Lokur, Joseph and Deepak Gupta JJ, was amazed to learn that a three-judge Bench had declared a decision of an earlier three-judge Bench (of which Justices Lokur and Joseph were part) *per incuriam*.[176] Now, Lokur's J, Bench stayed hearings in related matters in various high courts and requested other benches of the apex court to wait considering the fact that whether the matter is required to be referred to the CJI for the constitution of a larger bench. Lastly, on February 22, two separate benches led by Adharsh Goel and Arun Mishra JJ, referred the matter to the CJI. On February, 24, it was notified that a five-judge Bench led by CJI[177] would hear the matter and resolve the conflict between the 2014 and 2018 orders of the court.[178]These two incidents clearly demonstrate the problem of conflicting opinions of coordinate benches of the Supreme Court.

XIII Conclusion

The *bancusprudence* in India has produced several progressive verdicts either by issuing guidelines in the absence of any specific legislations or by evolving new principles and doctrines such as reasonable classification, doctrine of arbitrariness, doctrine of basic structure or using abstract principles such as constitutional morality. Judicial law making by benches is a reality but they must do so only interstitially.[179] While doing so the benches must go back and weave anew the web of their interpretation around the

171 Land Acquisition Act, 1894.

172 (2014) 3 SCC 183.

173 Civil Appeal no. 887 of 2014, Arun Mishra, A. K. Goel and Mohan M Shantanagoudar JJ.

174 (2018) 3 SCC 412.

175 Faizan Mustafa, Yogesh Pratap Singh, "Key Questions in Disagreement between Supreme Court 3-Judge Benches", *Indian Express*, Mar. 6, 2018.

176 *Ibid.*

177 Civil Appeal no. 887 of 2014, Justices Dipak Misra, A. K. Sikri, A. M. Khanwilkar, D. Y. Chandrachud and Ashok Bhushan.

178 *Supra* note. 161.

179 *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917).

provision of the statute or within its cracks.[180] In that case, the material will be statutory and only its adaptation will be judicial. The notes will be statutory and only their interpretation will be judicial.[181] So, this is beyond any shadow of doubt that judge's discretion is limited and she/he can legislate only between the gaps *i.e.*, a zone of formal legitimacy.

However, the Benches of the Supreme Court time and again have gone beyond the zone of formal legitimacy and coddled in judicial overreach. The recent trend of the court concerning constitutional morality too has received severe criticism on the grounds that this doctrine amounts to judicial overreach and is thereby pitting "constitutional morality" against "societal/popular morality." While several benches of the Supreme Court used constitutional morality in a series of important cases such as *Navtej Singh Johar, NCT Delhi, Sabarimala* case*, Right to Privacy* case and *Passive euthanasia* case, the later Benches ignored this principle in cases dealing with diverse questions in cases such as the *Ayodhya* case, *Rafale case, CAA/NRC* case*, Habeas Corpus in J andK* case*, and the Electoral Bond* case to name a few. Considering this selective wisdom the Attorney General K K Venugopal observed constitutional morality a *"dangerous weapon"* which may vary as per personal predilections of judges. "Use of constitutional morality can be very, very dangerous and we cannot be sure where it will lead us. Unless it dies, the former Prime Minister Jawaharlal Nehru's fear of the Supreme Court becoming the third chamber of the Parliament may come true." The problem is delicate. A judge must himself choose what weight to give to the several contemplations. It is but normal that the judge's weltanschauung constructed upon his personal knowledge and judicial philosophy will eventually tilt the scales but where the scales are balanced, it is best to uphold precedent.

Finally, the bancusprudence developed by the Benches of the Supreme Court has not been consistent rather it is done in its selective wisdom of different benches. The Supreme Court sitting primarily in smaller benches has made it a poly vocal court crammed with ambiguity and inconsistency. Undoubtedly, a larger bench would bring better legitimacy and greater precedential value. The idea of having a National Court of Appeal with four regional benches to hear appeals from various high courts may possibly relieve the Supreme Court to hear only matters of great constitutional and public importance.

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180 Landau, Rule and Discretion in Law-Making, *Mishpatim* 292 (1968).

181 *See* Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 *Columbia Law Review* 1259 (1947).