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Law Making is the Regime of the Legislator: A Critical Overview of the Partnership Model

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Even though the doctrine of stare decisis tells us that judges make binding laws called precedents, however, it is the job of the legislator to propose, pass, enact and amend laws whereas a judge is to interpret that law and provide remedies accordingly because the constitution, provides for the legislator to make laws and judiciary to provide remedies in case of breach of these rights, obligations, and duties as enacted by the legislature. And to maintain democracy and to respect parliamentary sovereignty as well as the doctrine of separation of power the legislature and the judiciary must have separate tasks they perform. There arise two types of Theories when the question of interpretation arises first is the agency model, which suggests that the regimen of law makes the judiciary subordinate to the legislature. Supported in its claim by “declaratory theory”, which also suggests that judges only declare the law not make it. (As is also evident from the roles they are to play i.e. the judicature is to decide the case upon the infringement of rights so enacted by the legislature). In contrast, the partnership model suggests judges as separate independent lawmakers. Supported in its claim by the constructive theory which allows a judge’s values and principles to be used for deciding cases and making laws (which in its very essence is flawed as it can not only create uncertainty, and chaos but also make the subjects of law (the general public) lose their faith in the government).

Keywords: *legislator, partnership model, declaratory theory, the general public, government.*

INTRODUCTION

Precedents, today the formally accepted source of law was not always in the same position in the past. A very famous & controversial topic of debate amongst jurists was & is even to this date “do judges make laws?” And the arguments of both sides are very strong and logical. This paper intends to cover a few of the arguments provided by Textualists, as well as present some arguments of its own.

LEGISLATION

A judge is not a lawmaker but rather a law interpreter. By reading the topic an obvious question should arise in one's mind as to what is legislation and whose job is it to legislate. The process of creating new laws/ rules by following a proper formal procedure as provided by the constitution (or any other authority), is called legislation. The question as to who makes these laws is an important & significant one & is the topic of discussion here. The constitution provides for the parliament to enact laws according to the legislative procedure provided in it. It delegates the legislative power to the governments. These governments are to be selected by the people and hence ultimately make the voters the lawmakers of the country, making it the democracy it claims to be. At the same time, it also provides for the judiciary to interpret laws.¹ The judicial branch uses various ways to interpret statutes.

THEORIES OF INTERPRETATION OF STATUTES

Before any critical overview of the partnership model, we must first understand the partnership model and agency model & both of these models will be briefly explained here along with their sub-categories. There are two broad classifications in Theories of interpreting statutes

Agency model:

Further sub-divided into Textualism / traditional intentionalism;

¹ Constitution of India 1950

Further sub-divided into:

- traditional intentionalism;
- broadening intentionalism;
- narrowing intentionalism.

New textualism:

Partnership model

Further sub-divided into Independent judicial judgment & Dynamic statutory interpretation.

For this paper, we're going to be focusing on the two broad classifications. The agency model opines that the judiciary is the agent of legislators in the subject of law-making, it's the job of the legislature to make & amend laws & judiciary has to implement those laws and doesn't have a say in if the legislation is faulty or not. The judge doesn't have a free hand while interpreting statutes rather they should interpret laws, their words & their meanings according to what the legislature had intended. Therefore judiciary's functions according to this theory would be:

- To interpret the *words* according to how the legislature used them in-laws and give effect to them (if the words are clear & unambiguous);
- And if there is any ambiguity in the statutes then the judiciary can resort to 3 options according to the different approaches.

Textualism - Textualists make it incumbent upon the judiciary to adhere to the words used by the legislature strictly.

New textualism - The new textualism approach came to save traditional textualism from criticism. As the same suggests it broadens the scope of how the judge can interpret the law. It doesn't limit the judge only & only to the words but rather gives the court 2 further ways to establish the meaning of statutes.

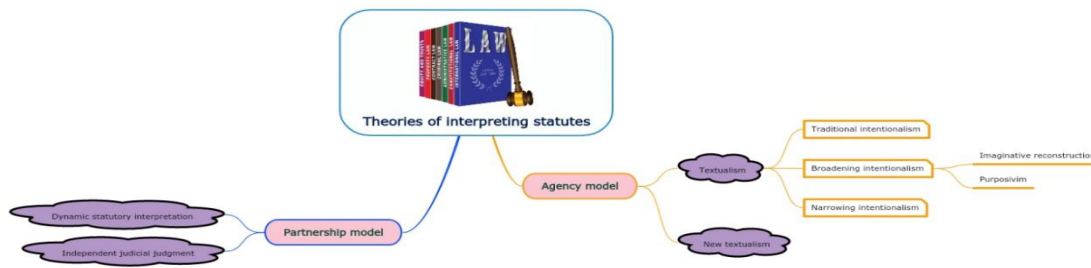
Imaginative reconstruction & Purposivism.

Imaginative reconstruction gives the court the hand to infer an imaginary intention of the legislator as according to one of the critiques there's no such thing as a true intention since Firstly, the legislature is not an "it" but rather it's a "they" constituting all the MNAs and MPA, etc. Hence, it's not physiologically possible to know the intention of all the members involved in the process of law-making. Secondly, it is the various pressure groups that exert certain external and internal political pressure that the legislature makes the laws to balance these pressure groups out. But one question that arises here is how can the court "construct an imaginative intention." We get its answer from Aristotle who says that we can construct it by asking two questions:

- What decision would the legislature give if these facts are brought before them?
- Would the legislature legislate this law the same way, had the facts of the current case been in his knowledge?²

On the other hand, purposivism opined that it might not be possible to know the intention of the legislature (which is very specific) but it's always possible to know the purpose and objectives of enacting a law. This purpose cannot be derived from the preamble of The statute but also from the parliamentary debates during the law-making procedure, it tells us what the legislature intended and why was there a need of making this specific law and hence can very effectively be used to give effect to any ambiguity in a statute that is what the legislature ultimately wanted to achieve by enacting that law. Narrowing Intentionalism opines that even after using the imaginative intention and by using the purpose of the legislation if the ambiguity in the law is not clear then the judge being the agent of the legislature should only interpret and give effect to the words of the statute even if it creates absurdity.

² Aristotle A et al., *Aristotle: Nicomachean Ethics* (Oxford University Press 2002)



In contradiction to that, the partnership model says that the judiciary is not an agent of the legislature but rather a partner of the legislature in the subject of law-making. It's further divided into two:

- independent judicial judgement and
- dynamic statutory interpretation.

Independent judicial judgement provides that the court should resort to the general and fundamental principles of law while interpreting statutes. The dynamic statutory interpretation provides that the court should create the meaning of statutes according to the needs of the time and society. As mentioned above there has been a debate amongst jurists & legal writers as to "judge-made law's existence". The coming few paragraphs would highlight some arguments presented by them.

VIEWS OF LEGAL WRITERS & JURISTS

Two theories have been a topic of discussion amongst jurists namely:

- Declaratory theory &
- Constrictive theory

Declaratory theory opines that judges do not make laws they rather only declare the laws or customs that already existed. We can also say that the jurists in support of declaratory theory support the agency model of interpretation. On the other hand, the constructive theory believes

in judicial law-making power that a judge can create laws. Hence supports the partnership model of Interpretation. Many well-known Jurists, including Bacon, Hale, and Blackstone, believed that the role of a judge was only to explain and interpret the law, not to enact it. On the other side great names such as judges like Bentham, Austin, Thurmond, and Sir Denning took the opposite view. The judge makes the law (creative theory). Therefore, there seem to be two theories in the judicial process: declarative and creative.

In today's world, the decisions that are passed by the judges also known as precedents are followed and are binding according to the doctrine of stare decisis however even today we observe that most of the laws relating to various subjects such as the procedure that be followed by the court other in civil or criminal cases, the punishments prescribed for a specific crime, patents, copyrights, taxation, contracts, insurance, sales of goods, etc. are all enacted by the legislature, not by way of passing decisions or setting precedents.

Where the doctrine of stare decisis exists the doctrine of parliamentary sovereignty is also present and both of them in today's world are balanced. The judges respect the parliamentary sovereignty are to give priority to the laws enacted by the legislature over their own sets of principles & values since it's not necessary, That the values that an individual holds are also in the best interest of the whole society at large, the laws that are enacted by the legislature are enacted by keeping in view benefit of the public at large. Usually, the legislature may delegate authority to enact rules regarding the enforcement of the law. These also have the power of law. Courts are also generally obliged to make their decisions subordinate to the decisions of regulatory agencies.³ This view that the judgments passed by a judge are usually and are to be according to the laws enacted by legislature is supported by many writers. A staunch opponent of judges as lawmakers is Justice Antonin Scalia of the US Supreme Court. In "A Matter of Interpretation" his book, he says: "We live in an Age of legislation, and the newest law is statutory law."⁴

³ Solan lawrencem, *The Language of Statutes: Laws and Their Interpretation* (Chicago Series in Law and Society 2010)

⁴ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997)

The textualist approach in no way intends to make it a difficult task for judges to implement the laws. Rather it intends to make it easy for justice to be delivered to its subjects. The textualists intend to reach a result in disputed cases in a way that respects parliamentary sovereignty. The textualist approach gives room to the judges to resort to internal/intrinsic or extrinsic aids to interpret the statute in case the words are creating ambiguity or is unclear. They adopt a rich approach to language that regards context as a key element of the word's meaning itself, this approach can lead the court to decide a way that includes core values such as Separation of powers.⁵ This has been very beautifully explained by John Manning in the following words:

*“Even the strictest modern textualists correctly emphasize that language is a social construct. You ask how a rational person familiar with the relevant social and linguistic practices reads the text in context. This approach recognizes that the literal definition of a word or dictionary definition often does not take into account established nuances or background practices that modify the literal meaning of a language, especially a legal language. I am. In my opinion, accepting this more modern understanding of text interpretation provides a stronger and more legitimate foundation for reducing many problems of absurdity at thresholds.”*⁶ This approach to legal interpretation, reflected in many of Judge Scalia's remarks, includes a context-sensitive perspective on the meaning of words, weakening the range of evidence allowed in the interpretation process, and thereby increasing the importance of the methodology.⁷

JUDICIAL DECISIONS SUPPORTING TEXTUALISM

In *Caminetti v United States*, 1917 the US Supreme Court decision: “It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.”⁸

⁵ Solan lawrencem (n 3)

⁶ Johnson-Laird PN, *Mental Models* (Univ Pr 1983)

⁷ Andrew Goliszek, *In the Name of Science: A History of Secret Programs, Medical Research, and Human Experimentation* (St. Martin's Press 2003)

⁸ *Caminetti v United States* [1917] 242 U.S. 470, 485

In *Tilley v Malvern Nat'l Bank*, it is stated that "The General Assembly creates laws based on its policy decisions..... Judges are supposed to interpret laws. We don't make them."⁹

In *R. v Secretary of State for Transport ex p. Factortame Ltd* [1989] 2 C.M.L. 353 the EEC issue was confronted specifically: "*where the law of the Community is clear . . ., the national court must give effect to it in all circumstances. Any rule of domestic law which prevented the court from, or inhibited it in, giving effect to directly enforceable rights established in Community law would be bad.*"¹⁰

CRITICAL ANALYSIS

Literal meaning:

The two words we're dealing with here are:

- Legislator
- Judiciary

The word legislator Comes from 2 words

- Lex/ legis which means "law"
- Lator means "Proposer" Hence, the legislator is that branch of government that literary proposes the laws. A Legislator is someone who is given the power of creating and passing new laws.

The word judiciary is derived from the Latin word "judicium", Meaning "judgment," which means the capacity of making decisions, based on the interpretation of laws & principles that have been enacted. According to the literal meaning, it is clear what the job of the legislature and the judiciary is. As have been mentioned above the legislature is to propose, make & amend laws whereas the judiciary is to interpret those words and then pass the decisions accordingly. This separation in jobs of the above-mentioned organs of government wasn't always distributed rather they used to be vested in only one person: the king / the monarch.

⁹ *Tilley v Malvern Nat'l Bank* [2019] Ark. 376,590 S.W.3d 137

¹⁰ D. Neil MacCormick & Robert S. Summers, *Interpreting Statutes A Comparative Study* (Routledge 1991)

SEPARATION OF POWER

In ancient times, a monarch had absolute powers to legislate, execute and interpret laws. He could amend these laws as he deemed fit and according to his pleasure. The will of the monarch was supreme and absolute and this resulted in too much power being vested in the same person, which not only caused Uncertainty (as the monarch could change the laws at any time according to his wishes) as well as lead to abuse of this power. As society developed more & more people moved towards the idea of these powers being distributed amongst various institutions instead of this power vested in one person alone as being absurd. According to the theory of separation of powers, the power to legislate, execute and interpret the laws should be divided into various institutions so that all the power does not rest in one institution and hence not cause the abuse of power. According to this theory, three very important parts of any States government are derived including the legislature, the executive branch, and the judiciary.

The legislature is concerned with making and amending laws the executive is merely there to enforce these laws made by the legislature whereas the judiciary is to interpret the laws made by the legislature and to provide remedies where the rights provided by the legislature in the laws are violated and they are to provide these remedies as provided in the laws made by the legislature. The process of lawmaking is the job of legislature and legislature only, judges do not have any say in this regard they cannot oppose or give a decision against any law that has been passed by the legislature however a question that arises here is that if the judges do not make laws, then what are Precedents? The answer to that is Precedents that is followed by various courts are not actually laws rather they're just an interpretation of the laws that have been made by the legislature, and the binding nature of precedent is merely to maintain uniformity in the legal system so that the whole legal system follows the same kind of interpretation and as a result not pass contradictory judgements.

QURANIC PERSPECTIVE

Once we have established the fact the power should be distributed amongst various institutions of any States government then if we see the current topic from a Quranic perspective, Verse 21:22 of the Quran says *"If there had been in them any gods except Allah, they would both have certainly been in a state of disorder."*

Although the legislature is not a god however we can derive from the ayah that if there is more than one legislature in the country with the same amount of power & the same functions such that both are independent of each other that would cause a clash between both and the result would surely be a disaster. Then how can we make two separate institutions completely independent of each other as partners & make them equal in the same subject matter? If that is the case it can cause a clash & hence disorder in the laws. E.g., if we take the stance of a partnership model with us, we will see such a situation: the legislature passes a law on defamation where it makes it a crime and the judiciary being the legislature's partner and equal passes a law that legitimizes defamation. This can create a lot of confusion & chaos among the citizens. This is the reason that all the institutions are given their respective subject matters on which they're to work. The legislature is to make laws & the judiciary is to interpret them & provide remedies accordingly. No one has any say in what the other does & how it does it.

CONSTITUTIONAL PERSPECTIVE

The constitution provides parliament to enact laws according to the legislative procedure provided in it. It gives legislative power to the government. These governments are to be selected by the people and hence automatically make the voters the lawmakers of the country (hence establishing the Democracy). Had the constitution intended for the judiciary to enact laws it would've provided a procedure for it to enact laws too but that is not the case since that is not how it was ever supposed to be.

Similarly, if any law is to be amended it is to be amended by the legislature since the constitution provides for a procedure to change various kinds of laws. This clearly shows that the organ of government, the judiciary, was never supposed to enact or amend laws because nowhere does

the constitution provide any method so that the judiciary could follow that procedure to enact or amend the laws. Even after that if one stays persistent that the judiciary is to make laws then that means that there's no purpose in providing the procedure in the constitution whereas it is a set principle that "no word is redundant in law". Then are we suggesting that the words used in the constitution are redundant?

DEMOCRATIC PERSPECTIVE

Additionally, in a democratic government, the organ of the government being chosen by the people of the state should be the ones enacting the laws. If we see that in today's perspective, it is the legislature that is being chosen by the general public whereas the general public has no say when it comes to choosing judges. The main subjects for whom the laws are to be enacted are those people hence to balance out the powers vested its incumbent upon lawmakers to keep the public's happiness as their priority as a result of which they can continue their government in the next tenure as well. But that's not the case if we talk about judges, they're not chosen by the people, and hence giving them a completely free hand to enact laws on people will give them unchecked powers. Hence giving the lawmaking power to the judges not only defeats the purpose of democracy but also vests unbridled powers in the hands of judges.

COLLABORATION AND RESPECT IN DIFFERENT ORGANS OF GOVERNMENT

Rights duties and obligations are provided to a person by the different laws enacted by the legislature and based on those laws once a right is violated (as was provided), the claimant brings forward his case. If these laws based on which the Person is bringing the claim aren't respected & followed by the judiciary (to whom they resort for getting a remedy for the violation of their rights) then that would only be a disaster as both organs will then clash amongst each other. Therefore, a balance must be maintained between all the branches of government.

The different organs of government are to work in collaboration with each other, if these organs start disrespecting each other's work then how can a government function properly? A court/judge is not a subordinate of the legislature generally, it has the supreme authority to provide remedies and to expound on laws enacted and they derive this power from the

constitution. But “there’s the general rule there’s always an exception as well “only in the regime where the parliament in the laws enacted by it delegates various powers (e.g. power to make rules under this law is vested in high court) is where the agency of court to legislature applies. Generally, the Judiciary is independent and has its primary functions as provided in the constitution.

The subjects of the state get their confidence in various organs of the government only if it is made sure that the powers that they have are absolute and uninterrupted. But if one organ of the government will not respect the other organ of the government not only both organs will enter into a clash but also lose the confidence of the subjects. In addition to that any law enacted by the legislature tells the people about their rights, duties, and obligations. The judiciary can only pass a law (if we suppose they do) after a claim is brought before it & that too is based on the law as enacted by the legislature. Then it means that the court to decide that case in the first place should respect the legislature-enacted laws.

CONCLUSION

The declaratory and constructive approaches are two extremes of a double-edged weapon. The agency model & the partnership model aren’t as different as they theoretically are shown to be. The agency model with its flaws does give judges the space to interpret the laws according to the purpose for enacting the law. It only requires him to stay within the ambit of legislative wordings & intent to not let the decision of a single person (judge) or even a group (in case of full bench cases) defeat the very purpose of enacting laws in the first place (if he passes a judgement opposing the law).