COMMON LAW THROUGH THE JURIST'S LENS: TRADITION, CRITIQUE, AND CONTINUITY

Prof. R.K. Murli, Banaras Hindu University

ABSTRACT

This article explores the historical evaluation of the common law system and traces the roots of common law from medieval England. It also highlights how judicial precedents and customs gradually shaped a case-based legal framework. The discussion also turns to legal realist movement, which challenges the formalist notion that judges merely apply pre-existing rules. Instead, realists argue that judges inevitably shape law through interpretations. The article further analyzes the classical opinions of John Austin, Jeremy Bentham and H.L.A. Hart on judicial law making.

Keywords: Common Law, Judge made law, Precedent, Justice.

1. INTRODUCTION –

The world has witnessed a great legal system that stands as one of the most enduring and influential legal traditions in the world known as **The Common Law** system. In the words of Roscoe Pound, *"it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or supersede them."*[1] It is rooted in the historical development of the English legal system and then spread across many jurisdictions including the United States, India, Canada and Australia. It is characterized mainly by judicial decisions and not by legislative codes. Over many centuries, judges have contributed in shaping the legal doctrines through numerous case laws which gave rise to what often called as "judge-made law". The principle of *stare decisis* was mainly adopted by the judges to ensure that court follow the established principles for promoting justice, consistency and allowing evolution in

[1] Roscoe Pound, *The Spirit of the Common Law* (Boston: Little, Brown and Co., 1921), p. 1.

society. This raises many questions pertaining to competency of judges to make law, the separation of power, the legitimacy of judicial creativity and about the flexibility of the systems.

However, this role of judges on law making was subjected to various criticism and philosophical debate. Many thinkers like Jeremy Bentham challenged this legitimacy of the judicial law making while arguing that it undermines the clarity and condemned it as irrational and inaccessible, while John Austin saw judicial creativity as a significant factor of law but confined it to the sovereign's power. Later theorists such as H.L.A. Hart and Ronald Dworkin provided more nuanced perspectives as Prof. Hart accepted judicial discretion within a structured system of rules in difficult cases while Dworkin proposed that judges not only apply law but interpret through the lens of legal principles.

The common law traditions have blurred the distinction between judges as the creators of law or the interpreters of law by allowing the courts to not only resolve disputes but to shape legal principles for future cases. This dynamic has influenced the critique to question about the overreach, inconsistency and lack of democratic accountability. The historical context in which the common law has developed must be understood from its roots to the modern law system and it is essential to take into consideration both its significance and limitations.

In exploring the origin, evolution and critique of the common law system, this paper seeks to understand how judge-made law operates by placing legal history and jurisprudential theory at the center. The study aims to illuminate the role of precedent in shaping legal norms and philosophical debates that surrounded judicial law making.

2. STATEMENT OF PROBLEM-

In common law system, generally judges are traditionally seen as interpreters of the law rather than creators of it. However, the role of judges extends beyond merely applying existing laws to the cases before them. There are ongoing debates over the extent to which judges actually create law and this article explores the extent to which judges contribute to law making, examining the boundaries between judicial interpretation and judicial legislation.

3. RESEARCH QUESTIONS-

1. *To what extent do judges in common law systems engage in law-making through their*

decisions?

2. *What arguments support or challenge the idea of judicial law-making?*

4. RESEARCH METHODOLOGY –

In the present work doctrinal research methodology has been adopted to understand the well-defined problem.

5. SCOPE AND LIMTITATIONS -

This paper is limited to development and philosophical foundation of the common law and the views of Jeremy Bentham, John Austin, H.L.A. Hart on judge made law. This discussion also incorporates insights from the American Legal Realist movement.

6. HISTORICAL ORIGINS AND DEVELOPMENT OF COMMON LAW-

The decline and fall of Rome have given significant rise to the growth of Christianity and Christian Philosophy with the questioning of authority of State as the highest form and the relevance of Christian Church. The origins of the common law can be traced to the early medieval period in England. After the Norman invasion of the British Isles in 1066, *"precise and orderly methods into the government and law of England"* were introduced.[2] Before this the legal system was dominated by the customary laws, tribal laws and community based dispute mechanism varying from place to place and it was mainly oral, unwritten traditions. In the rule of Henry II (1154-1189) a more unified legal system was formed which led the foundation of the common law and he was termed as the Father of the Common Law, however, few consider Henry I with that title.

Henry II established a system of royal courts that would travel across the country for centralizing the legal authority and for the promotion of the uniformity which is known as *the assize system.* The main function of these royal courts was to hear disputes and resolve them according to the prevailing customs that appeared to be "common" across England. The development by the Christian Church through its ecclesiastical courts and canon law exerted influence during medieval period and the Biblical texts, papal decrees and decision of church

[2] Theodore F.T. Plucknett, *A Concise History of the Common Law*, (5th ed., Boston: Little, Brown and Co., 1956) p.11.

governed many matters related to marriage, inheritance etc. These church courts operated alongside royal courts often competing for jurisdiction.

The Common Law was developed independently of the Roman law which was highly influenced by the civil law system. The study of canon law was widespread and some principles like the notion of a trust or equity even influenced common law doctrines. However, unlike the civil law traditions, England did not codify Roman or Canon Law into main legal framework.

In the 12th and 13th century distinct royal courts emerged with specialized jurisdiction as the English monarchy continued. These were –

i. **Court of Common Pleas** – This court dealt with land disputes, debt or contract related suits and was mainly established to resolve civil cases. This court allowed commoners to bring their disputes before the crown's judges without the king's direct involvement. It has provided more predictable form of civil litigation and also helped in lessening the burden of king's personal court.[3]

ii. **Court of King's Bench** – The King's Bench was established to resolve criminal matters and matters which breach the king's peace. It was associated with the sovereign and its jurisdiction was more flexible including overruling decisions of certain courts. It also handled appeals and the King's Bench played a significant role in development of criminal and constitutional law.[4]

iii. **Court of Exchequer**- The main function of Exchequer was to manage royal revenue and dealing with fiscal disputes involving the Crown. The unpaid debts owed to the king or tax collection was mainly done by exchequer and it also took a limited jurisdiction on civil matters particularly related with finance. Sometimes litigants manipulated procedural fictions to avoid the delays of Common Pleas by bringing the suit in the Court of Exchequer.[5]

These three courts formed the backbone of the common law system although they overlapped each other's jurisdiction leading to complex procedural rules. The need for clarifying and

[3] Baker, J.H., *An Introduction to English Legal History*, pp. 85-92
[4] Holdsworth, W.S., *A History of English Law,* (vol. 1, Sweet & Maxwell, 1923) pp. 195-211.
[5] Ibid, pp. 231-241.

rationalizing became significant over the period of time and all three courts were merged through **The Judicature Acts of 1873-1875** into the modern High Court of Justice.

7. ROLE OF PRECEDENT AND LEGAL REPORTING –

The decisions of the royal justices were not binding precedents in the early stages of its growth but served only as a persuasive authority which was considered as a reference rather than a rule. Judges were not obligated by the earlier decisions but consulted them for guidance.

The decisions made by these royal courts was recorded and cited as authoritative from 13th century onwards and these written books which were called as *Year Books* laid down the groundwork for doctrine of precedents. This development of Year Books marked a turning point and the unofficial records of the court proceedings was compiled by law students and practitioners for capturing the legal reasoning of the judges in detail. The judges relied on the previously decided cases to ensure consistency and predictability in the law formalizing the principle of *stare decisis*- the corner stone of common law.[6] According to F.T. Plucknett, the practice of basing decisions upon precedent did not come about because it was the best rule to follow in decision making, but because it enabled all existing courts to function with a minimum of trouble.[7]

During 16th and 17th centuries especially under the influence of erudite jurists like Sir Edward Coke, the use and application of precedent became more popular. Justice Coke served as Chief Justice of the Common Pleas and later of the King's Bench. He emphasized on the relevance and significance of the past decisions as expression of legal principle and argued that the common law derives authority from reason[8] and experience[9] rather than solely from legislative command. His reports and writing helped elevate earlier decisions for having more authoritative status.

In the 18th century the doctrine of *stare decisis* started gaining importance and by the 19th century, particularly with the Judicature Acts of 1873-1875, the English legal system placed greater emphasize on the precedents by formally consolidating its courts. In the case of **London**

[6] Theodore F.T. Plucknett, *A Concise History of the Common Law,* (5th ed., Boston: Little, Brown and Co., 1956) p.324-331.
[7] Ibid. p. 343.
[8] Coke, Edward, *The Reports of Sir Edward Coke,* vol. 6, p. 154-171.
[9] Ibid. p. 82

Street Tramways Co. v. London County Council (1898)[10], the House of Lords (now the Supreme Court of the United Kingdom) established that its past decisions were binding which marked a significant consolidation of *stare decisis.* Lord Halsbury, in giving the judgment said–

"My Lords, it is totally impossible, as it appears to me, to disregard the whole current authority upon this subject, and to suppose that what some people call an 'extraordinary case' an 'unusual case', a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify a rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience-the disastrous inconvenience-of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions."[11]

Today, *stare decisis* played a significant role and is central to the common law traditions including implications in Canada, United States, Australia and India. It functions as a safeguard against arbitrary judicial decision making and also as a mechanism of legal consistency. The courts usually uphold the doctrine despite criticisms like it can entrench outdated or unjust ruling etc. In total, the doctrine of *stare decisis* have evolved over centuries from custom based persuasive practice to a sophisticated hierarchy of binding precedent and reflects the development of common law in both tradition and adaptability.

8. NATURE AND FEATURES OF JUDGE MADE LAW-

Judge made law also known as the case law mainly refers to those legal principles that emerge from judicial decisions particularly from higher courts. It is not like statutory law which is enacted by the legislature but it evolves through a course of time by the doctrine of precedent where courts follow principles established in earlier decisions. As we have discussed that the foundation of judge made law lies in the common law which was developed in 12th and 13th centuries.

[10] (1898) AC 375. (1898) UKHL 1.
[11] (1898) AC 375 at p. 380.

However, whether judges actually make law or not continues to provoke debate among legal scholars and practitioner and perhaps it is almost impossible to truly answer this question. On the surface, it appears that judges apply existing legal rules to the facts of a case but in doing so they often create new legal principles particularly when there is no clear statue pertaining to the case in hand. This blurs the line between creating and interpreting. Although, the doctrine of precedent suggest that judicial decisions shape the law moving forward, yet, the judges do not claim to make law as doing so challenge the traditional view of separation of powers. In this way, the idea that judges "make law" is not that easy to be understood and perhaps can never be resolved but it depends on the legal theory and philosophical and constitutional interpretation of what law is.

The extent to which judges can make law has subject to various debates and proponents of judicial activism argues that court must enter in for fulfilling legislative gaps especially when legislature fail to do justice like the landmark judgment of **Donogue v. Stevenson,** where Lord Atkin articulated the modern law of negligence.[12] There was no statutory law for the duty of care and the development was done through judicial reasoning by recognizing the duty of care in this case.

Many decisions exemplify how courts can bring significant social change like in **Brown v. Board of Education**[13] the Hon'ble Supreme Court of America on an appeal from United States District Court (Kansas) ended racial segregation in public schools by overruling **Plessy v. Ferguson's**[14] "separate but equal" precedent. The Court concluded that *"in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"*.

The principal of separation of power[15] often argued that judicial overreach can destabilize the constitutional balance between legislative, judiciary and executive by excessive law making risks in democratic process as judges are not directly accountable to the people. The critics argue that there should be limitations on judiciary for only interpreting laws rather than crafting new ones.

[12] *Donoghue v Stevenson* [1932] AC 562 (HL).
[13] Brown v Board of Education 347 U.S. 483 (1954)
[14] Plessy v. Ferguson, 163 U.S. 537 (1896)
[15] See, Montesquieu, C.L. (1748). *The Spirit of the Laws*.

According to declaratory doctrine of common law, judges do not make law.[16] The **declaratory theory** of law suggests that judges do not craft any new law but declare what the law has always been. The main proponent of this theory was Sir William Blackstone who argued that the judge's role is to "discover and declare" existing legal principles and not invent them anew. He observed that the judges are the depositaries of the law and *the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.* He further said that *the judicial decisions are the principal and most authoritative evidence, that can be given of the existence of such a custom as shall form part of the common law.*[17] According to him the doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust. He believes that an absurd or unjust decision is not a bad law but no law at all.

Such type of statements raises a question that whether judges really make law or not? or there is something behind it or beyond it which give it authority and force. Some critique argues that it is custom that form the basis of judicial precedent and that is why James Coolidge Carter went on to say emphatically that *"a precedent is but authenticated custom"*[18]

Bentham was an English Philosopher, jurist and social reformer best known in the entire world for founding the **doctrine of utilitarianism,** i.e. greatest happiness to greatest number of people. Although Bentham contributed a lot in making the law a descriptive science and to separate the law from morality for utilitarian reasons, he has very scathing view for the common law[19]. He viewed the English common law with deep suspicion and as an irrational system that serves the interest of lawyers rather than interest of public. According to him judges are unpredictable and the system of common law is retrospective rather prospective.

Bentham was a staunch supporter of codification and his main criticism was the absence of codification. He believes that a legal system must outlines rights and obligations on written codes and argued that judges cannot make law as judicial decisions and giving importance to unwritten traditions give too much power to judges which ultimate results in arbitrary rulings. He calls common law as 'the cobweb materials of ancient barbarism'[20]. It is the legislator who

[16] Lord Esher MR in *Wills v. Baddeley* (1892) 2 QB 324,325.
[17] William Blackstone, *Commentaries,* vol. I, secs. 82-81.
[18] James C. Carter, *Law: Its Origin, Growth, and Function* (New York, 1907), p. 65.
[19] See Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986) pp. 263-301.
[20] Bentham to John Glynn, Dec. 3, 1770, published in David Baumgard, *Bentham and Ethics of Today* (Princeston University Press, 1952), pp. 551-554, at 552.

are in a position to make the law. He saw that lawyers generally maintain a legal monopoly over legal knowledge and use it arbitrarily to confuse the lay person. This, he thought is against the principle of utility as it made law less accessible to needy people and difficult to obey which will increase the pain of larger number of people.

He throughout his life argued for rational legal system which should be comprehensible to general public in order to guide their behaviour effectively. He looks at the trials by jury and adversarial litigation as inefficient and biased favouring only those who are rich and educated. So, for him codified legal system would make not only judicial law making but probably **judicial interpretation of law** unnecessary and inappropriate and he contends that rational law could be constructed only by purposive legislation, not by judicial pronouncements arising from the **accidents of litigation.**[21] He believes that only legislator looks to the future and judges are only concerned about the present as their work only arises when there happens a case which he termed only as an accident. In summary, he viewed common law as unscientific, outdated and unjust system and argued for codified system of law to bring transparency and utility driven reform.

John Austin legal philosophy view that the law is a set of commands issued by a sovereign and backed by sanction and the approach of him discarding the basis of morality for identifying law and separating what law is from what law ought to be stood in contrast to the common law tradition which derived authority not from a single legislator but from precedents and customs. He argued that the common law should be seen as positive law only if it was authorized or tacitly accepted by the sovereign despite its reliance on precedents and customs. Austin has some more respect than Bentham pertaining to the claim that judges make law by contending that judges not formally as legislator but effectively create law when they fill gaps in the legislation provided that sovereign permits it.

He believed that customs could only become law when it is adopted or enforced by sovereign authority and dismissed the idea that common law could exist independently of sovereign command. Although, he accepted that judges do create rules in practice by arguing that such rules only become law when sovereign permits or tolerates it (expressly or tacitly) and judge law is valid not because judges have authority to make law but because sovereign implicitly

[21] Roger Cotterell, *The Politics of Jurisprudence, A Critical Introduction to Legal Philosophy,* (Oxford: Oxford University Press, 2003) pp. 71.

allows it. However, Austin does not believe that judges are only mechanical and he observed that *"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated…"*[22].

He understood that judges law making has many demerits like it is made in haste, it is retrospective, it doesn't exist in clear expression and it is vague and make statue law imperfect but it also has some merits also. Austin adopted a more practical approach and accepted Bentham's approach of codification as necessary but he also accepted common law as necessity.

H.L.A. Hart, a central figure in 20th century legal philosophy influenced the understanding of law and legal system to a great extent especially the analysis of the nature of law, limits of legal rules and judicial discretion. He explores the practical aspect of law especially in unforeseen circumstances and acknowledged the reality that judges not only apply existing rules but provide guidance in majority of cases, there are many instances when already made law i.e. statue or the precedent is silent or do not clearly determine and outcome. In such situations, judges effectively "make law" and for him it is not a defect but a natural consequence of human decision making and the way language operate.[23]

Hart distinguished between the "core" and the "penumbra" of legal rules, the core area straightly applies to uncontroversial cases and the penumbra area deals with the interpretation by judges to extent the law. He views this as necessary and legitimate function of the judiciary even if it is not according to strict interpretation of law. He argued that judicial discretion is a significant component and recognized that statues cannot anticipate every scenario. Perhaps his insight of the "open texture of law"[24] based on the limitation of language and unpredictability of future points that legal language is general and it is not possible to see every circumstances.

David Hume offers us a way of understanding two key underpinning of the common law i.e. experience and tradition for survival against the idea of development of law as the instrument of rational command. He argues for claims of experience and tradition to survive and be

[22] See, Austin, *The Province of Jurisprudence Determined,* (Library of ideas ed. 1954).
[23] H.L.A. Hart, *The Concept of Law,* (2nd ed., Clarendon Press, Oxford University Press, 1961) pp. 272-273.
[24] Ibid, pp. 124.

'rationally defended'.[25] But the American Realist Movement was hostile to the so called British Empirical School derived from Hume, and to which Bentham, Austin and Mill adhered.

The American Realism believes that law is a human-made institution based on experience, context and social force rather than a set of abstract immutable principles. It claims that judges play an active role while exercising their discretion; they are not neutral automatons who only apply rules. The realist tried to make law highly empirical by claiming that judges not only discover or apply the law but create it and the law could not be understood without considering the real-world outcomes, human behavior and societal needs. Justice **Oliver Wendell Holmes,** famously stated that *"that the life of the law has not been logic; it has been experience."*[26] He emphasized on the **predictive theory of law** whereby law is derived from prediction of what courts will do in practice. He challenged the view that legal reasoning was purely deductive or based on abstract principles by contending that judges bring their own intuitions, experience and understandings of society. He also argued that the law should be viewed from the standpoint of **"bad man"**[27] and the law is what courts say it is, making judges the creators of law. He discarded the significance of statues by arguing that the statues are tools rather than constraints which only guides but cannot determine judicial outcomes.

Jerome Frank took a more radical position by saying that the legal phrases and concepts alone do not get us to a decision, and we are fooling ourselves and the public if we claim that they do.[28] He contends the traditional concept of mechanical judge by arguing that personal biases, subconscious influences and other psychological factors also play a vital role in legal reasoning. He distinguished Realists between Rule Skeptics, those who doubted the determinacy of legal rules and Fact Skeptics, those who doubted the objectivity of fact-finding in court. He says that *"No one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision (judgment, order or decree) with regard thereto."*[29] For him law should not be understood as a science because the human process is unpredictable and he himself was fact skeptic who asserted that the demeanor of witnesses and accused, the time, the day and many other factors influence the psychology

[25] Wayne Morrison, *Jurisprudence from the Greeks to Post Modernism, (*London: Cavendish Publishing, 1997*) pp. 105. See also,* Hume's *Treaties of Human Nature.*
[26] Holmes, Oliver Wendell Jr., *The Common Law*, (Boston: Little, Brown, and Company, 1881) pp. 1.
[27] Holmes, Oliver Wendell Jr., "*The Path of the Law",* at 460-461.
[28] Jerome Frank, "*Are Judges Human?*", (University of Pennsylvania Law Review 17, 1931), pp. 80.
[29] Jerome Frank, *"Law and Modern Mind", pp. 100-117.*

of the judge and in this context judges not merely discover law but actively create it.

Karl Llewellyn brought and sociological lens to legal realism by emphasizing that law should evolve to meet the changing social needs and law should be understood by looking at how it operates in practice. One of his key contributions is distinguishing between "paper rules" and "real rules".[30] The paper rules are rules which are found in statues and casebook, on the other hand real rules are those rules which judges actually apply in real life. The distinction helped in understanding that legal outcomes are often shaped by some extra-legal considerations like economic policies, societal norms, personal value of the judges and many other. He supported the idea that judges make law but argued that judges should be guided by the ultimate aim of improving law's service to the society.

The doctrine of **judicial precedent** ensures that judges through interpretations and rulings create binding legal principles and judicial decisions are not commonly application of existing rules but also fill gaps, resolve ambiguities and adapt laws according to new societal conditions. Sometimes judicial decisions may effectively expand the meaning of any statue or change it by creating new legal standards especially in the constitutional law where courts apply liberal interpretation and adapt various contemporary issues such as right to health, privacy, livelihood, healthy environment etc. withing the scope of law.

9. ADVANTAGES AND CRITICISM OF JUDICIAL LAW MAKING –

Judicial Law making allow courts to fill the legislative gaps and helps in adapting the law which evolve according to societal change and standard, but it also draws criticism on various grounds including the legitimacy, democratic principles and judicial overreach.

There are many advantages of judicial law making and one of the primary advantages is its responsiveness to social change. The court interprets the statues and precedents by taking into consideration the contemporary value and ensures that law is dynamic and relevant. The best example is the evolution of tort law in which judicial decisions played a progressive role and provided many claims without legislative intervention. Another advantage is filling of legal lacunae as it is contended that legislatures are not able to foresee every possible situation and the Courts, address such unforeseen situations by interpreting the law or by creating new legal

[30] Karl N. Llewellyn, *"A Realistic Jurisprudence- The Next Step", (Columbia Law Review 30, 1930)* pp. 431-465.

standards to be followed in the future. This role is mainly seen in areas like contract law where commercial practices evolve faster.

In countries where rule of law is followed judicial law making also serve as check on legislative and executive actions by striking down those actions which contravene the constitutional norms. The court plays a vital role in upholding the rule of law by protecting the interest of individuals who are in minority or whose rights have been violated. In some way, judicial law making also promotes legal certainty and independence of judiciary as the decisions based on reason ensures a stable yet evolving legal structure.

Despite having these advantages, judicial law making faces many criticisms. One of the major criticisms is related with democratic legitimacy of unelected judges making laws. As we have known that the legislator is answerable to the electorate but judges are answerable to none and judges might impose their personal values under the guise of interpretation. Also, law created by judges through judicial decisions is limited to specific cases and may not provide broader contexts and result in legal uncertainty. The decisions of the court are not predictable and can cause confusion among various groups of the society.

Legislator conduct in depth studies while making the law, they do public consultation and debates before passing of any law but Judge made law lack such institutional tools and judges decide cases on the basis of facts before him without the scope of public input and this can result in laws may not be well suited to address complexities of society. However, without prejudice to such criticism some jurists defend the judicial law making as significant and necessary in situation where legislation have gaps in the legal system.

10. CONCUSION

In conclusion, the common law system's rich historical foundation and the doctrine of stare decisis highlight unique role of judges in law. While usually the law originates from the statues, judges play a significant role in interpreting and applying past decisions to new cases. This process allows the law to adapt over time in accordance with societal changes and new challenges. The significant question of whether judges have the authority to make law or not lies at heart of debates in jurisprudence and different school thought that the issue has diverse interpretations according to the definition and nature of law and its relationship with social order and morality. By examining the perspectives of some jurists of Analytical Positivism and

the proponents of American Realism we can better understand this complex multifaceted role of judges in law making process. In sum, the debates based on judicial law making reveals a spectrum of understanding where Bentham's utilitarian critique warns the danger of judicial law making, Austin's strict positivism denies creativity, confining it to sovereign's commands, Hart's legal positivism allows for judicial law making in "hard cases" with a structured system of rules and finally, the American Realism proclamation as an unavoidable and essential part of legal process.

Therefore, the answer to this question can never be answered in simple yes or no, rather, it depends on one's philosophical stance. In common law system, judges effectively shape and develop law through decisions and judges also interpret, fill gaps and adapt laws effectively made by legislature. Ultimately, the recognition of judicial role in lawmaking helps in understanding law as complex social institution shaped not only by rules but also by human judgement.