

# WHO BOTHERS ABOUT THE SUPREME COURT ? THE PROBLEM OF IMPACT OF JUDICIAL DECISIONS

*Upendra Baxi\**

## I

IN INDIA, the hero-worship of Justice Felix Frankfurter began rather early with the making of the Constitution when Sir B.N. Rau and others were persuaded to drop the phrase "due process" from the chapter on fundamental rights. Many interpreters of the Constitution including the justices of the Indian Supreme Court have admired Frankfurter not just for the felicity of his style; they have held his self-restraint with unabashed admiration and converted his work into a kind of judicial role-model of reticence apt for the Indian appellate judiciary.

But just no one has hitherto followed Frankfurter in his harsh self-doubt and agony concerning the impact of the decisions of the Supreme Court on American government and society at large. That he ever did raise such a question had probably more to do with the fact that he was a law professor first and a justice next (a point whose significance for judicial appointments to the Indian Supreme Court has been rather blithely ignored for about thirty long years!). Be that as it may, it was Frankfurter who first raised the question as early as 1954 in the following words :

Does anybody know, when we have a case, ... where we can go to find a light on what the practical consequences of these decisions have been? ... I don't know to what extent these things can be ascertained. I do know that, to the extent they may be relevant in deciding cases, they ought not to be left to the blind guessing of myself and others only a little less uninformed than I am.<sup>1</sup>

Frankfurter's extra-judicial and quite professorial observations have generated in the United States a fairly respectable and fruitful body of

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\*Vice-Chancellor, South Gujarat University, Surat. I have excluded in this paper a review of the literature on quantitative analysis of judicial behaviour. Jurimetric studies of the Indian Supreme Court are already available though Indian students of the court have paid virtually no attention to it (barring notable exceptions). Professor George H. Gadbois' pioneering work has been cited in the references. There is also a little read analysis by Herbert Hirsch and Gene L. Mason, "A Systems Analysis of the Indian Supreme Court", VI *E.P.W.* 2201 (1971). Rajeev Dhavan has made use of quantitative methods, though not rigorously, in his *Supreme Court of India* (1977) and the works cited in the references.

1. *Some Observations on the Supreme Court Litigation and Legal Education* 17 (1954).

literature on the impact of judicial decisions. In India, the Supreme Court has been so busy making both law and constitution that its justices have not had the leisure for self-reflection requisite even to the raising of this kind of doubt and question. And students of the court have blamed it now and praised it then for this or that decision. They have asked the question: "What does this decision mean?" but not the question: "What is the impact of this decision or the line of these decisions?"

Of course, there have been crystal-clear examples of impact of some Supreme Court decisions. Constitutional amendments have been too frequently used to nullify judicial decisions. It is quite clear that certain decisions of the court have led to the supersession of some of its justices. Retrospective amendments and validation Acts are exercises frequently undertaken, with telling all-round political and social results. Legislative reversals of judicial decisions is a recurring experience in many democracies and has not been seen as being at odds with the principle of independence of the judiciary or of judicial review. The frequency of constitutional amendments seeking to nullify the impact of judicial decisions is somewhat distinctive to India but surely, in principle, not quite unknown to mature democracies either.

But when one talks about the impact of the decisions of the Supreme Court one means a lot more than annulment of potential impact of such decisions. One may also want to refer to compliance with the specific decision or a group of decisions; one may speak of impact on the executive agencies in this sense. One might see short or minimal term versus long-term impact (say of *Golak Nath*<sup>2</sup> and *Kesavananda*<sup>3</sup>) or optimal impact and so on. Hence the first task is to identify what could be the range of meanings associated with the notion of impact and what should be its range for the purposes of empirical analysis. The second obvious task is to identify impact-constituencies and the processes (and the effectiveness of these processes) through which impact occurs. The third task is to identify the ways in which impact analysis can be undertaken, together with an identification of its limitations as well. And last but not the least is the question as to why such research has not so far occurred in India and what can be done to promote it, assuming that it is of some relevance to judicial decision-making in India. We now turn to an examination of each of these aspects.

## II

Very broadly, impact may be said to mean effectiveness or the actual result. But this indeed is too broad. This is because in this sense the notion becomes a general one of aftermath or, in other words, of "what

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2. *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

3. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

happened thereafter." But what happens after the judicial decision may be a very large number of events in time and space, not all of which may be relatable to whatever happened when the court held whatever it held!

Perhaps, the notion of compliance is more specific. But it might prove too specific! For example, if we operationalize the notion as mere compliance we may have to ask: How many undertrials have been released upon the recent orders by the Supreme Court? And how many affected undertrials are still rotting in Bihar prisons? Here, our question is with a specific decision or a series of specific orders or "the mandate of the Court with respect to specific named individuals."<sup>4</sup> While it is always important to think small and to find out whether a specific decision has been complied with or violated, the notion of compliance, interpreted to mean compliance to a specific mandate, is perhaps not the best indicator of impact.

Of course, if there is non-compliance interesting questions arise as to possible reasons or motives for non-compliance of court's orders. For example, it has been suggested that compliance presupposes cognition. If, for some reason, the court's ruling is not known to the government or correctly comprehended by it, or by other parties, what we have is evasion but an inadvertent one. But there may also be deliberate evasion because of the fact that "human groups find it difficult to carry out effectively acts for which they have no underlying beliefs."<sup>5</sup> Thus, the Supreme Court may well avail against the inherited incarceratory ethos of the British Raj prisons and prescribe measures for true unfolding of human spirit behind bars, inclusive of the practice of transcendental meditation. But hard-nosed prison administrators may have no underlying beliefs or even supportive ones. With non-compliance, the question moves away from behaviour of official groups to their beliefs. It has been repeatedly pointed out in current literature on impact that compliance with the law generally and judicial decisions specifically, imports a feeling of ethical or moral obligation to what is mandated.<sup>6</sup> In this sense, compliance becomes a rather broader notion, going beyond behaviour to belief and embracing what Professor Julius Stone has called "socio-ethical convictions."<sup>7</sup>

To say all this is not to say that compliance is not relevant to understanding impact. Clearly, compliance is "a subset of impact."<sup>8</sup> But impact may be regarded as something of wider and broader import. Most simply, impact means the effect or the result of a judicial decision or a set of

4. Stephen L. Wasby, "The Supreme Court's Impact: Some Problems of Conceptualization and Measurement", 5 *Law & Soc. Rev.* 41 at 45 (1970-71).

5. Michael J. Petrick, "The Supreme Court Authority Acceptance", 21 *Western Political Quarterly* 5 at 7 (1968)

6. *Supra* note 4 at 47. See literature cited in Wasby.

7. *Social Dimensions of the Law and Justice* 546-74 (1966).

8. *Supra* note 4 at 46.

decisions. But result in what sense? In one sense, it is the expected result. Expected by whom? Here the answer is necessarily complex: It must be the result as expected in the first place by the court but its own expectations when not manifest must mean expectations imputed to it by students of judicial process. When the court, for example, elucidates in a zigzag fashion the requirements of hearing, of duty to give reasons, of conscientious exercise of discretionary powers *etc.*, it can be said that it expects fairness to citizens in administration by the state and that the specific articulations in specific contexts are merely ingredients of that notion of fairness. The general notion of fair-play in action cannot just be developed by courts alone; the systematization and logical clarification also require collaboration of jurists or students of the judicial process.

Thus, when one refers to impact, one refers to the intended or expected results. But unintended results also accompany the intended ones. The 1973 supersession of Supreme Court justices is a dramatic example of the unintended result, and yet it is so important a consequence that one cannot wholly ignore it in any effort to grasp the meaning of subsequent constitutional developments in India. That may be so. But there is merit in keeping the notion of impact to some manageable proportion, and the idea of intended result is a tolerably clear and useful one for the study of impact.

Even as we settle for this rather rough and ready notion of impact, we must tell the purists that underlying this notion is of course some theory or dogma concerning the nature of judicial power and process. And that is simply that the appellate courts do not merely declare the law but make it; that they also unmake the law either through interpretation or invalidation; and that they also make and unmake constitutional amendments. All this in turn presupposes the rather elementary fact (anathema to the purist) that the judiciary is an agency of national government, as much as the executive and the legislature, and that broadly judicial process is a species of political process. Political scientists find all this axiomatic;<sup>9</sup> but to lawmen all this may still have a heretical ring.<sup>10</sup> Heretical or not, no question of studying impact arises unless there is at least (with apologies to poet Coleridge) a "willing suspension of disbelief" in this regard by students of judicial process. One has at least to concede this much that the court is a politically relevant and not a politically neutral institution in order to ascribe it any impact. One reason why the study of impact of judicial decisions has so far not emerged in India may lie in the folklore about the nature of judicial power and process, negating all these truisms. It is rather hard to combine science with folklore.

### III

The effect of Supreme Court's decisions presupposes what I might call impact-constituencies (IC). These may be quite varied. In the arena of

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9. *Supra* note 4.

10. Upendra Baxi, *The Supreme Court and Indian Politics* (1980).

fundamental rights, the IC may be all agencies of the executive and all legislatures. In the field of federalism, the IC may be all federal units. Administrative law may embrace IC of a large number of groups holding public powers, regardless of the fact that they exercise quasi-judicial or other powers. In matters involving enforcement of law, many agencies besides law enforcement authorities and personnel may be the relevant or functional IC. And (without being exhaustive) all courts in India, under article 141 of the Constitution, may be the relevant IC for whatever the Supreme Court decides from time to time. In other words, impact-constituencies are human groups whose behaviour is sought to be influenced in a definite manner by the court through its explicit decisions.

Obviously, the identification of IC is essential at the threshold. Those who talk about "judicial process and social change" or the "impact of the court on the national development" are bold souls, who prefer the paradise of platitude to the earth of enquiry. Macro-generalizations about the court's role and impact are only useful as summoning or pre-judicial devices. They are useful ways of evoking political responses. But impact analysis, worth its name, has to be far more painstaking than demagoguery.

But identification of IC is only one of the concrete steps involved. It is not to be blithely presumed that just because the court intends to address an audience, there is in fact an audience or constituency. As Professor Stephen L. Wasby has pointed out, one very important component of judicial power lies in the ability of courts to communicate with groups whose conduct they seek to influence or change. What is needed is an extended social communications network, including mass media by which its decisions enter "the political milieu."<sup>11</sup> Some general awareness of what the court is doing is absolutely vital for creation or sustenance of IC. More precise knowledge of what the court has done or is doing may of course enhance the impact of its work (or resistance to it).

One would think that in India, as distinct from the United States, the communication networks, including public media, are by and large feeble. The primary agents involved in communication process are the law reporting agencies. But these serve only one organised IC, namely, the legal profession, which in turn has so far made precious little effort to transform itself into a general informational agency concerning the communication of law to the affected constituencies. Since 1977 there is some welcome sign that public media, including radio and television, are orientated to spreading greater legal information. Studies of impact of judicial decisions, unusual though it may seem, have still to begin with vaults of old newspaper files and programme content of television and radio networks rather than with law reports. And the court too, if it is responsive

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11. *The Impact of the United States Supreme Court : Some Perspectives* 47 (1970).

to innovative ideas, has to take the unusual but socially worthwhile decisions concerning how best it could foster communication of its decisions to affected groups. The Indian Supreme Court in its pursuit of social relevance not merely needs catalytic justices but also a team of efficient public relations officers. Parliament has its spontaneous media coverage. The executive has at its disposal not just the government media and the free press, but also departments of publicity and information. Only the judiciary, the third major arm of the national government, has to do without specialized services of this kind. Extra-judicial utterances (speeches), which are now on the increase, do some public relations work for the court. But these are a poor substitute for specialist efforts at building the necessary communications networks. Lest all this might be regarded as merely some kind of administrative innovation, it must be immediately said that more is at stake than this. What is at stake is the potential for impact of the decisional output of the court.

Our earlier point regarding imputation of expected result of a judicial decision or a course of judicial decisions also becomes important in this context. And that is that commentators must serve as important agencies for amplification of the court's message. The more they shut themselves in ivory towers and the more they dedicate themselves to specialist analyses, the more also they weaken the impact potential of the court in terms of the general diffusion of awareness of its work and the role.

Professor Wasby and his colleagues do not have to make this kind of detour when talking about impact analysis, since they can more or less presume tolerable, if not adequate, media and related communication of the judicial output as well as the contribution of the academic community to this process. But it would be thoughtless to assume that what is true about America is also true about India—an attitude which too often creeps into our thinking about the judicial role.

Important in all this of course is the nature of communication or the message. It is quite commensal that "greater clarity" of judicial decisions "would bring increased compliance."<sup>12</sup> The greater the ambiguity the lesser the impact. Students of Indian Supreme Court have to carefully examine the judicial style and diction when they seek to study impact of court's decision, with the above hypothesis in view. It is clear that differential interpretation of what the court holds will minimize the potential for change for the target IC. The Indian Supreme Court justices tend towards "grandiloquence."<sup>13</sup> Profusion of American authorities in *Sunil*

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12. *Id.* at 45.

13. Krishna Mohan Sharma, "Judicial Grandiloquence in India : Would Fewer Words and Short Oral Arguments Do", 4 *Lawasia* 192 (1973); R. Jethmalani, "Judicial Gobbeledygook", 2 *J.B.C.I.* xx *et. seq.* (1973); K.B. Nambayar, "Mr. Jethmalani and 'Judicial Gobbeledygook'", 1 *S.C.C.* (Journal Section) 68 (1974); Upendra Baxi, Introduction to K.K. Mathew's *Democracy, Equality and Freedom* (1978).

Batra<sup>14</sup> is apt to bewilder jail officials; the all too frequent reliance on the wisdom of the Nine Old Men in *Nandini Satpathy*<sup>15</sup> is not going to register on station house officers as many counterparts of Ramiza Bee in India since then show. Activist justices of the Supreme Court, in these and a very large number of major decisions, have to choose between self-indulgence and social impact when they write their opinions. But then much here depends on the intended IC. If the intended IC is the legal profession, legislators, higher echelons of the bureaucracy, the media looking for pungent and spectacular turns of phrase, judicial flamboyance has at least a *consciousness-raising impact*. And for all that one knows this kind of exercise may, in the stream of time, prove more valuable than crisp "dos" and "don'ts" against the exploiters of the people. Students of impact analysis should not be swayed by an ideal-type model of judicial style and diction. Their job rather is to empirically investigate the grandiose judicial style in terms of its intended (or imputed) objective of consciousness-raising; again a phenomenon not quite relevant to American models of impact analysis.

Ambiguity in the Supreme Court's decisions might also have another social function to serve. Professor Wasby puts it thus: "The second possible result of ambiguity is that it forces people to come back to the courts to ascertain what was meant, *thus increasing the Court's control over the policy making process.*"<sup>16</sup> Or as Lowi puts it, a "strong and clear ruling ...leads to significant decentralization of caseload and a good deal of self-administration by lower courts and counsel."<sup>17</sup> In other words, the problem is between centralization and decentralization of power. Strange but true, ambiguity is an instrument of judicial power. As such, we climb altogether the wrong tree when we complain about grandiloquence! If so, a new light is also shed on the so-called problem of arrears in the Supreme Court. So-called because the court might seem to have greater potentialities of impact when its caseload is centralized rather than when it is decentralized! Available empirical studies indicate that more than half of the court's workload is special leave matters under article 136 of the Constitution.<sup>18</sup> Structurally, one better appreciates in this light the increase in separate concurring opinions and even what appears to be a higher frequency of dissenting opinions<sup>19</sup> so that in the Indian situation an

14. *Sunil Batra v. Delhi Administration*, A.I.R. 1980 S. C. 1579.

15. *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025.

16. *Supra* note 11 at 46.

17. Cited in Wasby, *supra* note 11 at 46.

18. Rajeew Dhavan assisted by P. Kalpakam, *The Supreme Court under Strain: The Challenge of Arrears* (1978) (Indian Law Institute).

19. See George H. Gadbois, Jr., "Supreme Court Decision Making", 10 *Ban. L.J.* 1 (1974), and "Selection, Background Characteristics and Voting Behavior of Indian Supreme Court Judges: 1950-59", in Glenden Schubert and David Danelski (Eds.), *Comparative Judicial Behavior* 227 (1969).

analyst of impact of Supreme Court's decisions has also to examine the structural-functional aspects of ambiguity, arrears, and authority of the Supreme Court—something for which there exists no direct parallels in American studies.

Other variables in the process of impact can be stated in a more straightforward manner, following the impact analyses in the United States. These include

- (1) the case by case nature of the legal system;
- (2) the characteristics of the case itself and the variables of content and context;
- (3) the *existing political, economic and social situation*;
- (4) the geographical scope of the decision;
- (5) the follow-up of the decision by higher political authorities;
- (6) the relative power of those responding to a decision, both in terms of political action for and against the decision;
- (7) the relation of dominant interests to the content of the decision;
- (8) the belief systems or political culture;
- (9) the characteristics of the community or of the IC;
- (10) the expectations people (or IC) have of the court.<sup>20</sup>

One might in addition want to develop some sort of typology of impact. A start in this direction has been made at long last in the study of American Supreme Court. Professor James P. Levine identified four major types of impact. First, there is the specific implementation or compliance with the mandate of the decision itself. Second, and quite important, is the notion of impact as a kind of hierarchical control by the Supreme Court of the judiciary in general. The third kind of impact is political impact, that is, we refer here to the responsiveness of governmental authorities and agencies to the new legal obligation entailed in the judicial decision (s).<sup>21</sup> The fourth kind of impact is plainly social. Here we have the identification of at least five types of consequences. Social impact may include (i) regulation of behaviour; (ii) allocation of costs and benefits of specific activities; (iii) symbolic effects (iv) second-order consequences (unrelated and sometimes incongruent social changes), and (v) feedback, that is "communications which enable decision-makers to constantly correct and modify their behaviour so that goals might be achieved more efficiently." (This typology is based on the degree of causal distance of an instant decision and the overall consequences). A moment's reflection on all this would show that one has to identify the types of impact one wishes to study; both the universe and the tools of enquiry may change with the type of impact under view.

20. *Supra* note 11 at 42-56.

21. "Methodological Concerns in Studying Supreme Court Efficacy", 4 *Law & Soc. Rev.* 583 at 584-86 (1969-70).



Implicit in this notion of causal distance is the key element of time. "All impact", says Wasby," is not immediate."<sup>22</sup> Obvious, you would say; and yet much of social science clarification at analytical levels is reiteration of the obvious. This is because we tend to overlook the obvious. Justice Holmes has well reminded lawmen that sometimes the education in the obvious may be the most important kind of education! Sometimes decision having no immediate, short-run impact may turn out to be quite crucial in the long run. *Marbury v. Madison*<sup>23</sup> is often cited to prove this point. On the other hand, some long-run important looking decisions might exhaust their impact in the short run. But time dimension is absolutely a vital notion for the study of impact. This is particularly vital in approaching decisions which are truly seminal or creative (e.g., the recent bunch of decisions on prison justice or *Moti Ram*<sup>24</sup> on bail law or *Maneka*<sup>25</sup> or *Kesavananda*<sup>26</sup>—which I termed in 1974 as the Indian Constitution of the future—or *Govind*<sup>27</sup> on the right to privacy). Judicial styles become here quite important, particularly what I have elsewhere termed "juristic activism."<sup>28</sup> Even a nodding familiarity with impact analysis should equip the traditional, blackletter law researcher with some idea of relevance of time dimension in any attempt at appreciation of judicial decisions.

Of course, there are some problems. If by impact we mean intended result (and not incongruent second-order consequences) we have to explore judicial subjectivities in order to arrive at a suitable time-span for proliferation or impact. How do we determine that span of time? Not all justices consciously speak to the future, though increasingly Indian Supreme Court justices tend to write opinions addressed to the posterity. If we were to overlook the subjective dimension, it may also be equally difficult to prescribe or to postulate an optimum time-span for the effect of judicial decision. We all know that "with all deliberate speed," in the American Supreme Court jargon, has meant twenty or so long years for worthwhile impact on educational desegregation in the states. There are surely parallel Indian examples. The short point is that cut-off periods for measuring the time necessary for generating or proliferating impact are of necessity going to involve some hard, but ultimately, arbitrary decisions. The more explicitly this kind of thing is stated in the design of impact studies the better it is for scientific understanding of the judicial process. It should also be noted that the time-dimension might vary with

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22. *Supra* note 4 at 54.

23. 5 U.S. (1 Cranch) 137 (1803).

24. *Moti Ram v. State of Madhya Pradesh*, A.I.R. 1978 S.C. 1594.

25. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

26. *Supra* note 3.

27. *Govind v. State of Madhya Pradesh*, A.I.R. 1975 S.C. 1378.

28. Baxi, *supra* note 13.

each type of impact or each category of impact. For example, the category or type of impact (i) to (iii) identified above may take relatively lesser time than the categories (iv) and (v).

#### IV

Measurement of impact poses its own set of problems. Professor Wasby has raised some pertinent issues. What, he asks, can we "use as measures?":

Where do we begin to look? For example, do we measure the impact of the school desegregation decisions in terms of the percentage of Negro students attending classes in previously all-white schools? Or in terms of the percentage of school districts with some Negroes in integrated classes? Or in terms of the movement of whites to the suburbs from the core cities of metropolitan areas? In the area of criminal procedure, does one look at impact of decisions in terms of alleged increases in the crime rate? In terms of the number of cases which go to trial? In terms of convictions obtained? In terms of changes in police methods? In terms of the growth of interest groups, e.g., of policemen, which arise in opposition to the decisions? Or in terms of the number of cases brought to the courts to test the applicability of what the Supreme Court has declared? An easy, but unsatisfying answer for the present is that perhaps all of these, individually or in combination, might be legitimate operationalizations.<sup>29</sup>

There is then a further overriding difficulty posed by the need to isolate discrete causal relations. Or to put it less technically there is the question:

If several factors are operating in the same direction, how does one separate the impact the Court's decision has by comparison with other elements of the situation?<sup>30</sup>

This is quite an important question both for the doctrinal researcher in law as well as for an empiricist. The importance of the overall context before, during and after each event of judicial choice-making can be ignored only at the risk of both maturity and wisdom. Doctrinal scholars are accustomed to doing precisely this, for most of them in India at any rate the world begins and ends with the document called "judgment" in the pages of the All India Reports. But, as I had occasion to point out,

29. *Supra* note 4 at 54. See also *supra* note 21, and Theodore L. Becker and Malcolm M. Feeley (Eds.), *The Impact of Supreme Court Decisions* (1st ed. 1969).

30. *Supra* note 4 at 49.

the "All India Reports consciousness" of the law is far too blinkered in its perception of the law as a social process.<sup>31</sup>

There are other problems related to design of research studies on impact and the problem of methods. There is, for example, the problem of controlling plausible rival causal hypotheses and of methods to be used. The problems of "before-after" research designs and of the technique of time series analysis pose problems of some magnitude. There are solutions to these as well, but they are not such as could be fruitfully explored in this rather generalized account of impact analysis.

## V

Is impact analysis of the Supreme Court necessary and desirable? I think it is for reasons so far indicated. It is desirable that the court should have some feedback on the overall results of its activities in major areas of judicial law-making. It is desirable, also through this process, to develop a body of knowledge relevant to planning social change through the legal processes and institutions. It is necessary and desirable also for its incidental fallouts on the general state of legal research in India, which is, by and large, doctrinal to a fault. It is desirable and necessary not just as what Julius Stone has termed "paradigm of reduction of justices" referring to my introduction to Justice Mathew's book<sup>32</sup> but also as providing a similar paradigm for reduction of the appellate bar in India. Above all, such research will contribute to an enhanced sense of social relevance of the court as an agency of national government and may itself, after some cumulation of knowledge, become an ingredient of greater efficacy of the court's direction of national affairs.

The "costs", if these can be called such, will involve re-location of the court in the wider environment. This may mean that the court may not be seen as an epicentre of all major social developments but merely as one among the many key institutions of Indian society. This must involve some, if not considerable ego-sacrifices on the part of the court, the bar, and law scholars. Moreover, and by the same token, the broadly political role of the court will have to be conceded while tracing the multidirectional exchange of impacts and influences between the court on the one hand and institutions of the formal and informal politics on the other. The mystique of a neutral adjudication embodied in the blindfolded Dike (the Greek goddess of justice) may be slightly eroded through impact studies. This need not result in any denigration of the judicial process or salient role of the court in national affairs. If anything, I

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31. Upendra Baxi, "What Can the Convicts of Rajamundry Prison Teach Us?" (paper presented at All India Law Teachers Conference at Hyderabad, 1977, *mimeo*).

32. Baxi, *supra* note 13.

would like to think that both these will enhance by continuing impact studies.

In what major areas can we begin impact analysis for the Supreme Court? Each scholar and each institution will have its distinctive sets of priorities. But in the present opinion it is necessary in framing any order of priorities to have regard for the grassroots rights of the people rather than the superstructure rights.<sup>33</sup> If we have limited budget and scarce manpower, as is the case with empirical research in law, it is better to start off in the direction of grassroots rights. By the latter, I mean the ordinary statutory rights and privileges of the ordinary people, including the poor and vulnerable groups. These may or may not involve high constitutional controversies but nevertheless affect, for bad or worse, the concrete life situations of thousands of hapless people. We may thus accord priority to those decision areas of the Supreme Court's work which affect such groups. From this point decisions of the court relating to administration of criminal justice command priority. It is necessary to commission impact studies of decision affecting (i) bail, (ii) capital punishment, (iii) sentencing discretion, and (iv) prison justice.

There are other advantages in starting off in this direction as well. One of these is the fact that these areas will provide us also with an understanding of impact as "hierarchical control" as identified by Levine. In other words, we will be able to ascertain the extent to which courts below the Supreme Court in the judicial hierarchy interpret and apply these decisions and how much impact/ineffectivity is generated by what kind of structural factors as well as flaws in the communication process. One would thus hope to better understand the impact of the Supreme Court on the rather immediate impact constituencies of other courts in the system. If the impact is lacking or is differential over various areas, causes of these will have to be ascertained and a re-examination of the structural arrangements and working habits of the Supreme Court and other courts will emerge. Impact analysis is thus an ideal vehicle to understand (or, if you will, unmask) the structure of the judiciary in India.

Equally importantly, we will also be able to highlight the political impact/ineffectivity of the court from empirical determinations concerning the responsiveness to demands of legality and justice by the government. Impact analysis furnishes a telling model of verifying the claims to political legitimacy often urged in the title of the rule of law and justice by the governing elites. This is particularly relevant in the present post-emergency phase of the Supreme Court where the court has been increasingly preempting legislative initiatives from the government and Parliament.<sup>34</sup>

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33. *Supra* note 10 at 198.

34. *Supra* note 10; Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 7 & 8 *Del. L. Rev.* (1979-80) (to be published in a revised form in essays in honour of Justice V.R. Krishna Iyer, edited by R. Dhavan and S. Khurshid).

I am not inhibited from saying that impact analysis will have also distinctive political role in this area, by generating or reinforcing media and public interest on issue of administration of criminal justice and criminal injustice. In this sense, impact analysis will contribute vitally not just to the clarification of the legal state of affairs in the area of criminal justice but it may also contribute to the politics of human rights at the grassroots levels.

Another area of some pressing importance where it would be equally rewarding to pursue impact analysis is that of administrative law. The Supreme Court has built a magnificent edifice of principles designed to ensure fairness in pursuit of efficiency in administration. It has enunciated a large number of principles regarding the exercise of discretionary powers. It would be rewarding to find out how precisely its holdings are communicated, interpreted and applied by administrative authorities. What, for example, is the impact, if any, of *Gullapali* cases<sup>35</sup> on executive and ministerial decision making in India? How is the duty to give reasons elaborated in *Barium Chemicals*<sup>36</sup> followed? What, if any, is the impact of the court's rulings on estoppel against administrative authorities? How is the duty to apply one's mind and avoidance of acting "mechanically and without due care" interpreted by executive and administrative authorities? There are a host of related questions. Once again this is an area which directly affects citizens in numerous aspects of day to day existence. If administrative jurisprudence is to make more than normative breakthroughs, it is essential that the court has access to the impact/ineffectivity of the edifice of decisional law so painstakingly built by it over the years.

## VI

Yet another area for impact analysis is provided by what I have called "epistolary jurisdiction", whereunder the Supreme Court justices convert letters written by social action groups on behalf of the victims of governmental lawlessness, administrative deviance and social tyranny.<sup>37</sup> Social action litigation (SAL) has vigorously flourished since 1979.

The impact of SAL in terms of compliance is as yet hard to assess simply because most of it is at interlocutory or interim order stages.<sup>38</sup> While the *Hussainara* undertrial cases have led to spectacular release of undertrials,<sup>39</sup> the impact in terms of *compliance* is still hard to measure as

35. *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*, A.I.R. 1959 S.C. 308; *Gullapalli Nageswara Rao v. State of Andhra Pradesh*, A.I.R. 1959 S.C. 1376. See also Upendra Baxi, "Introduction" to I. P. Massey, *Administrative Law* (1980).

36. *Barium Chemicals Ltd. v. A. J. Rana*, A.I.R. 1972 S.C. 591.

37. "Taking Suffering Seriously. . .", *supra* note 34.

38. *Ibid.*

39. Upendra Baxi, "The Supreme Court under Trial: Undertrials and the Supreme Court", 1 S.C.C. (Journal Section) 35 (1980).

cases still come up from Bihar involving undertrials languishing in prisons for as long as three decades.

If it is too early to measure impact (as compliance), it is certainly not too early to measure normative and ideological impact of SAL. Buried under a mass of interim orders in SAL lies the beginning of new constitutional interpretation which alters the nature and scope of rights radically. Identification of the new constitutional jurisprudence, thus emergent, is necessary as the Supreme Court of India is for the first time in its history becoming the Supreme Court *for* Indians.

Another latent or unintended impact of the growth of SAL has been accentuation of factionalism on the court, which has, like wildfire, contributed to decomposition of the court as a supreme judicial institution. This is the general impression, nurtured by public speeches by leading justices.<sup>40</sup> Students of impact analysis might wish to measure the contribution of SAL to the dis cohesion of the court—an undoubtedly difficult task even if in no small measure facilitated by public articulation of discord by senior justices. A study of public utterances read closely with SAL decisions and directions, aided by reconstruction of biographics of justices, could assist such impact analysis.

Yet another direction in which impact analysis could move is furnished by members of the Supreme Court bar. Not merely only a miniscule number of Supreme Court lawyers espoused SAL but also a large number of them have moved from indifference to articulate, and outspoken, criticism of the court. SAL has, as it were, drawn blood. To what extent is there a real ferment in the bar? To what extent by opposing the SAL is the legal profession reorientating itself to the performance of role-obligations which it has successfully neglected so far? What concrete alternatives to the conduct of SAL do the lawyers propose? Alternatively, what retaliatory strategies lurk beneath their public criticism, and often condemnation, of the SAL?<sup>41</sup> These are undoubtedly crucial questions which need to be carefully examined as an aspect of the impact of the SAL on a most important IC of the SAL.

Political responses to the SAL furnish another dimension of impact analysis of the SAL. A senior advocate, who is also a member of Rajya Sabha (Council of States) has, infructuously, moved motions aimed at constricting the scope of the SAL.<sup>42</sup> Do political actors have any serious grasp of the wider political significance of the SAL? Do they perceive it as an aid or as a threat to their legitimation? An understanding of their responses could indicate the actual and potential impact of the SAL. In the immediate future, judicial appointments to the apex court might be

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40. Upendra Baxi, "Judicial Terrorism: Some Thoughts on Justice Tulzapurkar Pune Speech", 21 *Mainstream* 11 (1 January 1983).

41. "Taking Suffering Seriously...", *supra* note 34.

42. *Ibid.*

weighted in favour of traditional, and, therefore, anti-SAL approaches. If so, this would in a way constitute perhaps a negative and unintended result of the SAL.

Equally crucial to the impact analysis of the SAL is the perception of socio-legal activists who invoke the epistolary jurisdiction. What, clearly, are they seeking to accomplish by this? How do they plan, if they plan at all, the SAL strategies? What do they perceive as sources of strength and weakness in the SAL? How do they radiate the message of the SAL to its real beneficiaries, and with what results?

In exploring the impact of SAL, we have two choices: One, to nourish it; another, to nip it in the bud, as it were. Much depends on the value-frame or the ideology of the researcher. This is true of all impact analysis, in fact, in my opinion, of all social science research. One has to be clear from the outset concerning one's own ideological premises in setting and concretizing one's research priorities and agenda. Either you are self-conscious about your values or ideologies or they rule you from the subconscious. This is as much a fact about yourself as researcher which needs to be explored as social facts that you proceed to explore in your research.

In other words, the *impact of impact analysis* is also a part of the problematic impact analysis process. The possible and probable types and degrees of the impact of impact analysis should agonize the researcher as much as the problems of research design and method, and of grants and publication.