ON HOW NOT TO JUDGE THE JUDGES : NOTES TOWARDS EVALUATION OF THE JUDICIAL ROLE

*Upendra Baxi**

"NO DOUBT, there is a limited sense in which in interpreting the law the Judge may make law in the sense of adopting one of two or more alternatives, if such alternatives are open, or evolving a new principle to meet a new or unusual situation. But it is not given to him to write his own theories, likes and dislikes into the Constitution and the law."[1]

"The Constitution of India does not enact Mr. Justice Krishna Iyer's Social Sciences."[2]

I

It is in this vein that H.M. Seervai ends the third volume of his celebrated treatise on the constitutional law of India. Indian law scholars would be more than justified if they altogether ignored all that Seervai has to say. For, Seervai writes and thinks as if there is no worthwhile writing by Indian scholars on the subject of constitutional and administrative law. He also totally ignores reasoned scholarly criticism of his positions and thereby shows that he considers it beneath his dignity to join issues with academic lawyers. Seervai compounds this affront to Indian scholarship by his unmitigated Anglophilism. He has no hesitation in citing the less eminent and more obscure British and American scholars. It is only in India that a person so insular in his approach to indigenous juristic learning and thought can be called a "jurist" and his work hailed as "classic".

Fortunately, Indian academics are not so insular. They take note of Seervai's positions and also acknowledge him as a scholar of public law. Indeed, some of them shower very high praise on his treatise. The purpose of this paper is not adversarial or polemical. Rather, I use Seervai's observations as a starting point for the consideration of the fundamental problem summed up by the question: "How do we judge the judges?" I have elsewhere identified this problem as one of "developing a theory of evaluation of judicial role."[3]

All of us who criticize judges and courts would really be at a loss when we are asked : What *do* we expect from our appellate judges ? What *ought* we to expect from them ? It is relatively easy to criticize a decision or a set of decisions or a judge or a set of judges for doing or not doing this or that or being or not being this or that. But this easier way out

*Vice-Chancellor, South Gujarat University, Surat.

1. H.M. Seervai, *Constitutional Law of India*, vol. 3 at 1878 (2nd ed. 1979).
2. *Id.* at 2029.
3. Upendra Baxi, *The Indian Supreme Court and Politics* 5-10 (1980).

creates many inconsistencies and puzzles. As a result, critics end up being as eclectic as justices they criticize. Seervai's own work is replete with examples where he favours "legalism" now and "activism" then ; the same is very much the case with Indian academic writings on public law which Seervai is convinced, a priori, are worthless. The question we have to ask in these circumstances is : How are we to distinguish juristic critique of judicial process in India from the critiques of jndicial process by lawyers and justices themselves? A search for answers (clearly, there cannot be as yet one answer) to these questions is imperative, even if agonizing, if law scholars are to justify recognition as jurists in the true sense of the term. This is so because attempts to evolve approaches to or theories of judicial role would direct our minds to adjudication as an aspect of Indian polity and society, both of which are in traumatic transition.

II

As an aid to analysis, let us examine the source of Seervai's discontent with Justice V.R. Krishna Iyer. One source of discontent is Justice Krishna Iyer's style and prose. Seervai does not like his use of English language. Everyone reading his opinions at one time or another has had difficulties in understanding him. At times, as Seervai demonstrates, the judge positively shocks people who are even not as fastidious as Seervai. At times, the manner in which he describes in his opinion the crime or the criminal is clearly in bad taste. All this Seervai has demonstrated concisely.[4] But he goes further than exposing the multifarious sins against English language manifest in Justice Krishna Iyer's opinions. He goes indeed so far as to say that the judge "has lost the common touch and cannot communicate" and that

> [I]n a real sense it is he who has alienated himself from the nation ; and not the orthodox judges who adhere to the orthodox judicial norm, for they have not lost the gift of clear expression and close reasoning, leading to firm conclusions. Buffon wrote with insight when he said : the style is the man himself.[5]

In this passage, Seervai must be unconsciously identifying the *elite* of the bar with the Indian *nation*. Clearly, he is unable to cite any evidence of alienation between Justice Krishna Iyer and the people of India. Too few people in India speak English to be alienated by excesses of style by members of the English speaking coterie. Indeed, whether you speak or write good English or bad English, the very fact that you speak or write English itself alienates you from the masses of India. Seervai should have no illusions on this score ; the people of India are no more close to

---

4. See also A.R. Blackshield, "Capital Punishment in India", 21 *J.I.L.I.* 137 (1979).
5. *Supra* note 1 at 2028.

Seervai, who favours Queen's English, or to the "orthodox judges" adhering to "orthodox judicial" clarity.

Second, Seervai's statement that Justice Krishna Iyer has "lost the common touch and cannot communicate" is disproved by his own treatise. He quotes favourably at places, and critically at others, many passages from Justice Krishna Iyer's opinions. Indeed, if his treatise were computerized from this standpoint, one may well find that the judge's (Justice Iyer's) observations are quoted as frequently, if not more, as those of some other judges. But obviously this proposition disproves the charge that the judge cannot communicate. So, all that Seervai must mean is that it is more difficult for him to understand Justice Krishna Iyer than other judges. That, strictly, is Seervai's problem and not the nation's. Brother judges have also expressed reservations on Justice Krishna Iyer's prose;[6] that too is their problem. It is arrogant to think that problems of some judges and lawyers are *national* problems just because they are *their* problems.

Third, the "gift of clear expression and close reasoning, leading to firm conclusions" is not necessarily to be related to orthodoxy and the reverse to judicial activism or innovativeness. Good craftspersonship—and that is all that Seervai means—is equally necessary for the orthodox as well as unconventional judges. And there are many instances where clear expression and close reasoning, even for orthodox judges, produce no firm conclusions. Justice H.R. Khanna's dissenting opinion in *Shivakant*[7] (*Habeas Corpus* case) is one outstanding example of this latter proposition.[8] And Seervai implicitly recognizes this fact when in his monographic critique of this case he consciously avoids any (let alone a searching) analysis of Justice Khanna's opinion.[9] We all ought to realize that clarity of diction is a necessary attribute of good judicial craftspersonship but it is not by itself a sufficient condition of judicial excellence. All appellate law has developed not just out of vagueness of statutory text and context but also out of vagueness and generality of judicial decisions themselves. Surely, if clarity of expression and close reasoning always led to firm conclusions, Seervai himself would not have had to belabour extensively to prepare the second edition, in three volumes, of his treatise on constitutional law!

It is true that Justice Krishna Iyer has his authentic brand of self-expression which frequently violates canons of good English as well as good legalese. He refuses to follow the conventional style of legal writing, preferring lyrical, evocative and summoning style usually thought more apposite to the political platform or evangelist's pulpit. At times his

---

6. Upendra Baxi, "Introduction" to K.K. Mathew's *Democracy, Equality and Freedom* (1978).

7. *Additional District Magistrate* v. *Shivakant Shukla*, A.I.R. 1976 S.C. 1207.

8. *Supra* note 3 at 79-116.

9. H.M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (1978).

effusions border on the sublime; at times they are banal or even worse. The way he proceeds to trivialize historic phrases—Nerhu's "tryst with destiny" or Frost's "promises to keep"—or classic literary expressions, like "consummation devoutly to be wished for" or "little brief authority" or "infirm glory of the positive hour", is indeed quite annoying. In thus departing from the conventional norms of opinion writing, Justice Krishna Iyer must accept the risk of severe criticism and spirited defence.[10] Perhaps, one may go as far, especially if one is a purist, to say as Seervai has said that judgments of Justice Krishna Iyer "are a model of how English ought not to be written."[11] But to say that he cannot communicate is to say that he has a private language which he alone and those initiated can understand. This is just not true. And to quote Buffon ("the style is the man") purporting to essay a total evaluation of the judicial work of Justice Krishna Iyer is nothing short of indulgence in vulgar abuse, unbecoming of Seervai.

III

From his evaluation of other Supreme Court judges, it is clear that Seervai would have been less critical of Justice Krishna Iyer's style and prose had these been only confused and confusing. What enrages him is the activist posture and frank reliance on social science data in Justice Krishna Iyer's opinions. He does not like use of social science data in judicial decisions except by way of expert testimony; judges of the Supreme Court must strictly proceed on the materials and arguments placed before them, no matter how *vast* the personal reading, learning and research of a judge is and how *petty* is that of counsel. And this norm of judicial function is reinforced by the total outlook on judicial role that Seervai has. This has been expressed in the first quotation at the beginning of this paper. Seervai's model of judicial role has the following components:

(*a*) Judges must do justice in accordance with law;

(*b*) if the law allows scope for two or more alternate interpretations, judges are free to choose;

(*c*) when judges exercise their choice, they do perform some kind of legislative function; but this function is essentially interstitial;

(*d*) judges may "evolve a new principle to meet a new and unusual situation";

(*e*) in doing the jobs mentioned in the three preceding propositions judges must not violate the first Seervai commandment: they ought not

---

10. See R. Jethmalani, "Judicial Gobbledygook", 2 *J.B.C.I.* xx *et. seq.* (1973): Krishna Mohan Sharma, "Judicial Grandiloquence in India: Would Fewer Words and Short Oral Arguments Do?", 4 *Lawasia* 192 (1973); K.B. Nambyar, "Mr. Jethmalani and Judicial Gobbledygook", 1 S.C.C. (*Jour.*) 68 (1974).

11. *Supra* note 1 at 1877.

to write their own theories or likes and dislikes into the Constitution or the law ;

(*f*) judges should also observe the second Seervai commandment : they ought to avoid social science data unless it is brought to them as expert evidence at bar ;

(*g*) the third commandment is : judges ought to formulate their opinions in the following manner—statement of facts, statement of arguments, analysis of arguments in light of authorities, analysis of arguments thought to be acceptable and clear and concise statement of the final holding or decision.

Whatever may be said of this position, it must be acknowledged at the outset that Seervai has at least clearly articulated his conception of judicial role and function. The essence of his conception is that judges merely declare and interpret the law ; but insofar as they "make" it through interpretation they do so interstitially. Many intelligent, rational and well meaning people in India and elsewhere hold these as eternal truths concerning the nature of judicial process. The fact that they emanated in the era of horse and buggy days does not diminish their relevance in the era of concorde and space flights. The essence of judicial function, they believe, does not change, even if all else changes. And, one suspects that underlying all this is an inarticulate theory or ideology concerning the nature of law, authority and state.

Seervai's model of adjudication, if one can so call it, seeks to confine the appellate judicial function within a straitjacket. The legislator and the lawyer prescribe jobs that a judge may perform. The legislator does so by prescribing rules, standards, principles and policies. The lawyer does so by fixing the parameters of argumentative materials beyond which a judge may not travel. A judge, in addition, must follow literary discipline which the bar, from time to time, expects of him. Finally, even when performing interstitial legislative function, he may follow the likes and dislikes of legislators and lawyers, and the theories advanced at the bar and immanent in the law. But judges themselves are not to introduce their *own* predilections, prejudices or theories. The judge is thus a servant, albeit intelligent, of the legislator and the bar. He may follow the dictates of both. But it is against public interest for him to lead, even occasionally. It is for this reason that the bar is often said to be the best and even the only judge or judges. It must be a consequence of this model that Seervai excludes commentation by Indian academics on judicial performance. Judging the judges is a natural right of the bar. Representatives of the people and politicians as well may also not entrench on this innate endowment of the legal profession.

It is clear that the model of judicial role espoused by Seervai is not a fully worked out philosophical or analytical model. Were it so, we would have had from him more than the terse propositions we now have. An analytical or philosophical model would include considerations of the

nature of language, problems of discretion, problems of justification of judicial decision, and indeed a theory of adjudication, law and state. But Seervai is no jurisprudent ; indeed, he takes pride in the fact that he is not a theorist. This is shown by the fact that in discussing the fundamental question of constituent power, he is able to say that "the reader will have noticed that in considering the correct interpretation of Art. 368, we have not drawn on theories of sovereignty, or on political and juristic writings on the nature and function of the State, *because they are not permissible aids to interpretation, and because a correct interpretation tacked on to a theory might be rejected if that theory is rejected.*"[12]

The approach thus is not just atheoretical but antitheoretical. But even so, Seervai must have a very special notion of what is a theory or philosophy since much of his third volume (to take one massive example) devoted to a critique of the Supreme Court during the emergency period is based on clear and deep commitment not just to certain basic values but also on typical paradigm of bourgeoisie liberal legalist ideology. Every man, remarked Aldous Huxley, has a metaphysic of his own good or bad ; only some are conscious of it and others are not.

Be that as it may, Seervai's model embodies his preference for a role obligation set for Indian appellate judiciary. He is simply not bothered to justify, to reason out, why the judicial role is to be thus perceived and it may not be perceived in any other way. Since this is so, his criticism of Justice Krishna Iyer's activism and his use of social science data is only based on his authority as an eminent lawyer and a jurist. Undoubtedly, Seervai's treatise has considerable influence on the bar, the bench and the academics and is frequently cited in judgments of the Supreme Court. It is possible that many lawpersons, already inclined to think in the same way, feel reinforced by the weight of Seervai. All this is unfortunate. To propound and to accept a model of judicial role which is basically no more than a "say-so" of eminent persons is to acknowledge intellectual lethargy, if not juristic bankruptcy. It is therefore important to seek to demonstrate in what precise respects the Seervai model is flawed and by that process to suggest alternate models of judicial role in contemporary India.

IV

Seervai's model is not just theoretically underdeveloped. But it is also misleading as a description of the appellate process. Further, it is fraught with very grave, indeed dangerous, political and social implications. The model is descriptively misleading for the following reasons.

First, the statement that "judges have to decide in accordance with positive law" obscures the important fact that determination of what that positive law is, its range and meaning, is invariably in issue calling for

12. H.M. Seervai, *Constitutional Law of India*, vol.2. at 1576 (2nd ed. 1975-1976). Emphasis added.

appellate determination. If the positive law were to be clear to those who are affected by it (bearers of rights and obligations) or to those who handle the law (lawyers, bureaucrats) nothing would arise by way of appellate determination.

Second, the proposition that where the positive law allows two or more lines of interpretation judges may choose one of these, is also misleading. No doubt to a certain extent legislative law provides for its own interpretation through definition or interpretation clauses, illustrations or general clauses Acts, and through specific clarificatory amendments in response to disfavoured judicial interpretations. But all these devices, as we all know, are themselves subject to interpretative efforts. In a system which structures governance through a relatively autonomous appellate judiciary, a laissez faire legal profession, and a relatively free access to appellate courts and tribunals, the legislature just cannot settle in advance the course of interpretation that its enacted laws may receive, in course of time, through appellate courts. The only way the legislature can disallow exigencies of diverse and multiple interpretation is to oust the jurisdiction of appellate courts altogether. Even here, as the Indian experience so richly illustrates, the validity and scope of such ouster of jurisdiction ultimately depends on what interpretation appellate courts place on the legislative texts from time to time. The point simply put is this : given the type of legal system we have, the question of legislative law disallowing judicial interpretation just does not arise.

Third, it is clearly wrong to think in our system that positive law means only the law enacted by the legislature. Every lawyer knows that in order to advance his client's cause at the appellate level he must use in addition to the statutory text other types of authoritative legal materials. No lawyer can hope to succeed in his task were he only to rely on the text of the law as the sole basis of his forensic strategy. He must use in addition prior decisions (precedents). He must also invoke the relevant rules of statutory interpretation. In addition, if the case requires it, he must also be ready to invoke the goals and ideals of the legal system, whether manifest in terms of preambulatory statements of values pursued by the Constitution and the laws or in terms of policies, principles, precepts, standards, and doctrines of the law in a given area. Last (without being exhaustive) he should also use, if the occasion warrants, not just the persuasive foreign precedents but also general principles of international law and jurisprudence manifest either through international custom or treaty. As Roscoe Pound long ago stated, all these form a part of authoritative legal materials for the lawyer and the judge.[13] If we were to only focus on the legislative products and identify only these as positive law, it would be simply impossible to understand and

13. See Roscoe Pound, "Hierarchy of Sources and Forms in Different Systems of Law", 7 *Tul.L.Rev.* 475 (1933) ; repr. Jerome Hall, *Readings in Jurisprudence* 551 (1933) ; Roscoe Pound, *Jurisprudence*, vol. III (1959).

accurately describe appellate judicial process. An analyst or observer of appellate judicial process cannot neglect the many forms and types of authoritative legal materials, even if for some reason or the other he wishes to reserve the label "positive law" only to legislative law.

Fourth, it is important to note the implications of the fact that lawyers and judges regularly employ doctrine of precedent and rules of statutory construction in exercising their choice as to which interpretation the law should bear at any given time. Firstly, lawyers themselves exercise discretion (choice) in selecting relevant precedents and rules of statutory interpretation. Secondly, judges may choose one of the two preferred lines of interpretation urged at the bar ; but they too have the discretion to choose an amalgam of components out of the rival lines of interpretation or to choose an altogether new pattern of interpretation. Thirdly, what are called precedents and rules of statutory interpretation are themselves nothing more than institutional practices evolved by judges and lawyers over long periods of time as a part of their daily operations. Fourthly, both these types of authoritative materials become and remain authoritative so long as judges and lawyers adhere to them and support them. Fifthly, precedents and rules of statutory interpretation are usually justified by reference to allied forms of authoritative legal materials. That is to say, what are compendiously referred to as precedents and rules can be described, understood, analyzed, modified and justified only by references to the precepts, principles, standards, doctrines, ideals and values of the law and constitution as perceived from time to time.

Thus, the rule that penal statutes must be construed strictly or that wills and contracts should be as far as possible be read so as to respect the intentions of parties and testators or that an absurdity or impossibility may not be attributed to a statute may be seen as authoritative by litigants and public at large because the judges say so. Statutory interpretation rules, principles and maxims may be seen, from an outsider's standpoint, as assertions of judicial fiat. But lawyers and judges in arguing and deciding cases perceive these as manipulable body of ideas which need justification for their application in the case at hand. And justification cannot be had at that moment merely through fiat. Reasons suppporting reliance on rules of statutory interpretation have to come from appeal to principles, precepts, standards, doctrines, ideals and values of the law as a whole.

The same must be said concerning precedents. Although the myth that every case has one binding *ratio* still holds, every lawyer and law student must know that it is only a myth. Julius Stone has shown, irrefutably and for all times to come, that a case has many *rationes*, and that one can find as many *rationes* as one wants by reading a decision at several levels of generality![14] Each judicial decision provides several

14. *Legal System and Lawyers' Reasonings* (1964) ; "1966 and All That! Loosing the Chains of Precedent", LXIX *Colum.L.Rev.* 1162 (1969).

"leeways of choice" for judges and lawyers. Were it not so, appellate law would lead to its own demise. After a period of time the *rationes* of given cases will, more or less, automatically decide all future cases !

Clearly, this is not the case. What prior decisions have decided, and the relevance of this decision to the instant case, are matters for determination not for the "precedent court" (that is the court which purported to lay down the binding rule) but for the "instant court" (that is the court seized of case or controversy in which prior binding rules are invoked).

Similarly, both the precedent and the instant courts need to justify their decisions. The precedent court has given its own reasons for deciding. The instant court also has to give its own reasons for accepting as binding the prior decisions or distinguishing or everruling prior decisions. This reasoned elaboration of decisions often requires judges to explain why prior decisions are or are not to be followed. And in doing this, they quite often refer to authoritative legal materials. This also includes references to underlying legal ideals and ideologies which they perceive in the law and constitution.

Fifth, all this has some implications for describing judicial lawmaking. Precedents and rules of statutory interpretation are clearest examples of judicial law making. And these two species of judicial law making have in turn their own law making potential in substantive domains of law. How is it that we keep on parroting Holmes' trite saying, *a la* Seervai, that judges make law but they do so interstitially ? To say that they make law interstitially is to suggest that they do so in episodic, minor, subservient or negligible way. There are many who believe that this is how judges ought to make law. But this is beside the point. The fact is, and we must honestly concede this at a descriptive level, that precedents and rules of construction are major domains of judicial law making. We may believe that this ought not to be so ; but it cannot change the facts as they are just as all the wrath of evangelists could not change the finding that man did not appear on earth sui generis as God's creation but rather evolved from apes.

We do not proceed further at this stage to the argument that judges make law. There is overwhelming empirical evidence to show that they do, as even a careless student of Indian law having the most cursory familiarity with administrative and constitutional law would know.[15] To call this kind of law making interstitial or molecular is contrary to known facts in India, as in all common law countries. And the opinion of Justice Holmes about the nature of judicial law making cannot change this fact. One feels sorry for those who quote it ad nauseam without either understanding the facts of appellate law or the mind and thought of Justice Holmes.

One may add that legislative draftspersons, at least those who are conscientious, know full well that judges make law and know also that

15. See *supra* notes 3 and 6.

were they themselves to deny this fact much of their professional work and career will go awry. Anyone who has familiarity with article 31 (2) of the Constitution and its mutations from 1950 to 1975, would know that if draftspersons did not take precedents and rules of interpretation seriously their work may be nullified in course of time. They must know, to take another example, how judges look at distinctions between a codifying, consolidating and amending statute (or ouster clauses or repeal and saving) if they are at all going to be able to do and retain their jobs.

Sixth, we must accept the fact that judges cannot help bringing in their subjectivities in decision making, even though the professional legal culture may set limits to types and overtness of intrusions of subjectivities. Judges try, as a matter of fact, to be as objective as possible in applying and evolving principles and propositions of law, whether through precedents or rules of statutory interpretation. They also, and this too is an observable fact, conscientiously admonish themselves and their bretheren to follow the rationality of law. But all said and done they do bring in their subjectivities : values, theories, dogmas and likes and dislikes in their decisions. And some have the remarkable honesty to acknowledge it. For example, Chief Justice Chandrachud has said :

> Statutory interpretation, with conflicting rules pulling in different directions, has become a murky area and just as a case-law digest can supply an authority on almost any thinkable proposition, so the new editions of old classics have collected over the years formulae which can fit in with any interpretation which one may choose to place. Perplexed by a bewildering mass of irreconcilable dogmas, courts have adopted and applied to cases which come before them rules which reflect their own value judgments, making it increasingly difficult to define with precision the extent to which one may look beyond the actual words used by the legislature, for discovering the true legislative purpose or intent.[16]

We may disregard the last portion of the above quoted passage, which indicates that when all else fails the judge can somehow find answers to problems of subjectivity in interpretation by looking at the legislative text and context with a view to determine the purpose or intention of the legislature. When judges purport to discover the legislative intent or purpose they are not *discovering* it but rather *inventing* it.[17] For a whole variety of reasons, judges end up ascribing intention and purpose to legislation. The real question always is "not so much what the legislator intended but what intention the judges ought to *impute* to legislators in a

---

16. *Union of India* v. *Sankalchand Himatlal Sheth*, A.I.R. 1977 S.C. 2328 at 2336.

17. Gerald C. Mac Callum, Jr., "Legislative Intent", in *Essays in Legal Philosophy* 237 (Colin Summer ed. 1968), reprinted from 75 *Yale L.J.* 754. (1965-66).

given litigious situation?[18] Justice Mathew acknowledged this in 1975 when he said in *Navalakha*[19] that judges often find it necessary to attribute a purpose to the legislation.

It is not necessary to elaborate further the recognition of the fact that judges cannot be value neutral. They themselves, or at least the more conscientious of them, recognize in their work the role of subjectivity (likes and dislikes).[20] And it is strictly nonsensical to prescribe to the judges that they abstain from importing their theories and ideologies into the task of interpretation when almost every person concerned with law may freely do so, whether he is a constitution maker, legislator, drafts-person, counsel, jurist or citizen. Is any effective advocacy of important appellate matter possible without subjective value commitments and biases? Is any evaluation of judicial decisions possible without subjective factors? Indeed, as Jerome Hall has demonstrated (such truths still need demonstration) even positivistic theories of law have a component of subjectivity of their authors. Even the very conception of value neutrality of law (or judicial role) brings with itself certain value preferences. In this respect, positivistic theories of law share with natural law theories a good deal of subjectivism : Jerome Hall describes the matter sharply when he speaks of "subjectivist legal positivism."[21] Indeed, pretensions to objectivity have been long unmasked in the thirties and forties in relation to social theory, history, epistemology, pure natural sciences and even theology.[22] Arthur S. Miller and Ronald F. Howell have transferred this learning to constitutional adjudication as far back as 1960;[23] and the realists did so in relation to law much earlier. So, for Seervai to counsel the Supreme Court judges to become disembodied and inhuman eminences is to betray a fundamental ignorance of decision making and scientific understanding of knowledge including legal knowledge. In any case, one can say as a matter of fact that judges do bring in their likes and dislikes, theories and ideologies, routinely and regularly.

For all these and related reasons, we must conclude that the Seervai model of appellate judicial process is misleading if it was offered as true at a descriptive level. Shortly put, it flies in the face of facts, and therefore

---

18. Upendra Baxi, "Goodbye to Unification? The Indian Supreme Court and the United Nations Arbitration Convention", 15 *J.I.L.I.* 353 and 367 (1973). Emphasis added.

19. *Superintendent and Remembrancer of Legal Affairs* v. *G.K. Navalakha*, (1975) 4 S.C.C. 754.

20. See, for further support for this factual position, *supra* note 3.

21. *Foundations of Jurisprudence* (1973); Upendra Baxi, "The Shaking of Foundations: Some Thoughts on Jerome Hall's *Foundations of Jurisprudence*", 4-5 *Del.L.Rev.* 180 (1975-76).

22. See, *e.g.*, Bridgman, *The Way Things Are* (1959) ; M. Polyani, *Personal Knowledge* (1956) ; G. Myrdal, *Value in Social Theory* (1958).

23. "The Myth of Neutrality in Constitutional Adjudication", 27 *U.Chi.L.Rev.* 661 (1959-60).

does not make sense. It may make sense, perhaps, at a prescriptive level. We now turn to this level.

V

At a prescriptive level, it certainly makes sense to say that things ought to be otherwise than they are. The fact that things or state of affairs are what they are is no argument against a view that they ought to be otherwise. Ethical, normative evaluation would be impossible if propositions about what *is* forbade propositions about what *ought* to be. Accordingly, it is perfectly proper for anyone to say that no matter what the appellate judges are doing they ought to be doing otherwise. If, as a matter of fact, they are making law, we may still say that for a variety of reasons they ought not to do so or ought to do it in this way or that or only on some occasions or others. This indeed is the gist of Seervai's position. Unfortunately, he neglects to perform the all important task of justifying his position. But a jurist is no more entitled to rule by fiat than a judge. What lawyers typically call the duty to give reasons applies as much to matters of law as to moral discourse.

There are many good reasons why some people might say that judges ought not to make law. The phrase "make law" has to be clearly understood at the outset. Hans Kelsen has seminally reminded us that all judges, trial as well appellate, create specific individual norms by their decisions. Specific individual norms directed to persons [*e.g.* X is hereby denied bail; marriage between X and Y is hereby annulled; P is the implied term of a contract etc.) do not and cannot pre-exist a judicial decision. Such norms come into being only when a judge decides in accordance with the higher norm, which is concretized by that decision. In other words, the process of concretization of general and abstract norms always results in creation of new, individuated and specific norms. In this sense, the distinction between norm creation and norm application is not an absolute but a relative distinction.[24]

If this is conceded, much of the futile controversy concerning whether judges ought to make law or not is silenced. And by the same token it is focused on the more meaningful question : How should judges make law ? In other words, judges have choices to make in the matter of concretization. How ought they to exercise their choice making discretion ? Answers to these questions are also answers to questions concerning how one ought to appraise judicial decisions and their justifications. The normative justifications we prescribe for judges to reach their decisions also then become the standards by which we ought to evaluate their performance. A prescriptive theory of judicial discretion is thus also a prescriptive theory of evaluation of judicial role.

One general answer is that in making choices judges ought to follow

24. Hans Kelsen, *General Theory of Law and State* 113-14 (1961).

the will of the legislature as embodied in the statute. They ought to do so, because in a democracy the will of the elected representatives of the people who are accountable to the people, should be respected by judges who do not (ordinarily) possess this representative character and are not politically accountable as are the legislators. Many of the rules of statutory interpretation are based on this premise. The familiar idea that judges declare or discover law through interpretation is also anchored on the secondary and auxiliary status assigned to judicial choice making. Since judges primarily declare pre-existing law, it is also accepted that their decisions are retroactive in character.

But this idea that judges are to enunciate the will of the legislators very often breaks down in practice. Judges do enunciate new rules, principles, standards, doctrines and even ideals, and in doing so either fill gaps in law or transcend whatever might be the will of the legislator. Very often, such decisions in hard cases generate new bodies of law. As Ronald Dworkin has felicitously put it, when "judges make law, so the expectation runs, they will act not only as deputy to legislators but as deputy legislators." That is to say, they will still act as subordinates to legislature and proceed to make law "in response to evidence and arguments of same character as would move the superior institution if it were acting on its own."[25]

A good example of this kind of reasoning is provided by the recent decision of the Supreme Court in *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha.*[26] In deciding the question whether a private arbitrator appointed by parties to an industrial dispute under the Industrial Disputes Act 1947 was a tribunal within the meaning of the Act when sections 2(*r*) and 11A specifically confined the definition of tribunal only to industrial tribunal, Justice Krishna Iyer (for himself and Justices Bhagwati and Desai) proceeded to reason as "deputy legislator". He conceded that the Act in terms excluded arbitrators from the scope of the definition of tribunal. He referred to the pre-history of section 11A and pleaded surprise that in this section any reference to arbitrator was missing. He then decided to read that section as if it were always there and sought to justify the decision in the following words :

> Was this [omission] of deliberate legislative design to deprive arbitrators, who discharge identical functions as tribunals under the Industrial Disputes Act, of some vital powers which vested in their tribunal brethren ? For what mystic purpose could such distinction be ? Functionally, tribunals and arbitrators belong to the same brood. The entire scheme, from its I.L.O. genesis, through the Objects and Reasons, fit in only with arbitrators being covered by Section 11A, unless Parliament cheated itself and the nation by proclaiming a great purpose essential to industrial justice and, for no

25. See Ronald Dworkin, *Taking Rights Seriously* 82 (1977).

26. A.I.R. 1980 S.C. 1896.

> rhyme or reason and wittingly or unwittingly, withdrawing one vital word. Every reason for clothing tribunals with Section 11A powers applies a fortiori to arbitrators. .. Could it be syncopic omission which did not affect the semantics because a tribunal, in its wider connotation, embraced every adjudicatory organ including an arbitrator ? An economy of words is a legislative risk before a judiciary accustomed to the Anglo-Saxon meticulousness in drafting.[27]

If we take the judicial rhetoric seriously, all that the Supreme Court here is saying and doing is akin to what a "deputy legislator" ought to be saying and doing.

Or, we may vary the metaphor and say that judges have certain delegated legislative powers, just as the executive has. Judges, we might say, ought always to be aware that they derive their powers of making law, either implicitly or explicitly, from the legislature or the constituent body. For example, article 141 of the Constitution proclaims : "The law declared by the Supreme Court of India shall be binding on all courts within the territory of India." If we construe the word "declared" in Kelsenite terms, it would implicitly extend to norm creation as well. But legal system can embody the idea of delegated legislative power quite explicitly as is done by article 1 of the Swiss Civil Code "which requires the judge to decide, where the law is silent, as if he himself were legislator..."[28]

Or, further still, one may envisage the judicial role essentially as a bureaucratic role, as Rajeev Dhavan seems to have suggested ("seems" because it is not clear whether he is providing us with a descriptive or prescriptive model of judicial choice making). He classifies governmental institutions as "politically active" and "transmitting" agencies. The paradigm instance of the former type is the legislature, and of the latter are administration and judiciary. These latter receive "instructions" from the politically active agencies which they further transmit to people. Of course, there are marked differences between administration and adjudication : the "judiciary, while different from other bureaucracy, is nevertheless a bureaucracy."[29] Prescriptively put, the role expectation here is that when carrying out legislative instructions requires filling of gaps, judges ought to go about their tasks as intelligent bureaucrats seeking to emulate what their superior would have done were he (the superior) to be confronted with the same new, unexpected or unparalleled situation.

Implicit in these formulations is the basic theme both of separation of powers and division of functions. The separation of powers idea

---

27. *Id.* at 1918-19.

28. *Legal Systems and Lawyers' Reasonings, supra* note 14 at 113.

29. Rajeev Dhavan, *Judicial Decision-Making* (1979) (mimeo, being a course of lectures delivered at the University of Delhi).

entails the proposition that making of laws is the pre-eminent and primary domain of the legislature; their implementation (and to some extent their initiation) the primary function of the administration or the executive and their interpretation and application in dispute *inter partes* the pre-eminent and primary domain of the adjudicators. The doctrine of separation of powers has been frequently affirmed by Indian judges, indeed to a point where the Supreme Court held in *Indira Nehru Gandhi* v. *Raj Narain*[30] that even the constituent power cannot be exercised to perform judicial function. Provisions of the Constitution (Thirty-ninth Amendment) Act 1975 purporting to decide the election dispute were accordingly declared void.[31] But of course, as Julius Stone has aptly reminded us, the doctrine of separation of powers "is no longer generally seen as a legal straitjacket for each branch of government, or an absolute pre-condition of liberty. It is mainly translated into a precept concerning the distribution of functions to be *respected by the self-restraint of each kind of organ rather than enforced upon it.*"[32] The translation of the separation of powers doctrine into a division of functions carries with it an idea that judges ought *not*, even if they can (and can get away with it), to perform a truly legislative role and that they ought to find answers to hardest of hard cases from within the authoritative legal materials, rather than legislate afresh or anew. The doctrine of judicial self-restraint prescribes that judges ought not to behave as if they were full fledged legislators; they really ought to behave as bureaucrates or at best as "deputy legislators".

This kind of approach enables us to formulate the following propositions concerning how judges ought to perceive and perform their tasks :

(*i*) Judges ought to be aware of the fact that in applying general norms to specific situations they are always creating specific, concrete, individuated norms of law which were previously not existent;

(*ii*) judges ought to faithfully apply the will or carry out the instructions of legislatures;

(*iii*) in doing so, they ought to respect the legislator's will since that will is ultimately expressive of the will of the people at large expressed through periodic elections conducted under the law;

(*iv*) judges ought to realize that in clear cases, "an antecedent legal rule uniquely determines a particular result;"[33]

---

30. A.I.R. 1975 S.C. 2299.

31. See Upendra Baxi, "Some Reflections on the Nature of Constituent Power", in Rajeev Dhavan and Alice Jacob (Eds.), *Indian Constitution : Trends and Issues* 122 (1978). See also D. Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution : A Critical Reconsideration", 6 & 7 *Del.L Rev.* 1 (1977 & 1978).

32. *Social Dimensions of Law and Justice* 667 (1966). Emphasis in original.

33. H.L.A. Hart, "Problems of the Philosophy of Law," *Encyclopedia of Philosophy*, vol.6 at 264 (1967).

(*v*) judges ought also to recognize that in hard or indeterminate cases, problems of discretion arise whenever the applicable precepts provide not one but several choices;

(*vi*) judges ought, even in hard cases, to leave certain matters to other organs of government most suited to decide them efficiently, even if they may at times feel that they could decide them more efficiently and even wisely; in other words, they must follow the canon of self-restraint.

VI

So far, so good. But how to articulate difference between legislation and adjudication ? Or, in other words, what does the doctrine of division of functions tell us concerning how judges ought *not* to exercise their discretion ? The canon of self-restraint itself pre-supposes that certain functions more appropriately belong to legislatures and not to courts. But the meaning of this proposition is scarcely self-evident.

Two notable efforts have been made to answer this question. Lon L. Fuller (through his thesis of adjudication as a form of social order) and Dworkin (through his distinction between policy questions and questions of principle) have tried to answer the question : How judges ought not to exercise their discretion ? While we personally cannot persuade ourselves to believe that there is or ought to be a universal theory of judicial role, a theme to which we return at the end of this essay, it is still worth looking briefly at these two pioneering attempts.

Lamented Fuller sees adjudication as a distinctive form of social order. It is so because it marks "the influence of reasoned argument in human affairs." In the pure form, adjudication is a process initiated by parties, backed by reasoned advocacy on both sides, and culminating in a judicial opinion based on reasoned elaboration. Reasoned elaboration involves judicial reasoning not so much in the sense of empirical or deductive reasoning. Rather, its role is, in essence, to "trace out and articulate the implications of shared purpose." The importance of reasoned elaboration lies also in the fact that it is based on participation of parties affected, and the decision is shaped not just by pre-existent law and usages but by arguments. In this sense, adjudication is based primarily upon the dignity of argument.

This means that adjudication, on this pure model, is best suited to matters which yield "either-or" answers. But when questions involved raise a "multiplicity of variable and interlocking factors, decision on each one of which presupposes a decision on all the others," the matter is not fit for adjudication but apt for legislation. Fuller termed such matters (following Polyani) "polycentric". Polycentric matters, he suggested, fall more adequately within the realm of legislation. Such matters involve negotiation and trade-offs between a variety of social interests, and are best left to politically representative institutions rather than to judges.

To give illustrations in Indian terms, polycentric disputes or matters would involve the determination as to whether certain specific forms of concentration of wealth or community resources are to the common detriment or promote common good or the question whether a citizen should be granted standing and stay of governmental action authorizing atomic implosions or explosions.

Of course, Fuller is not saying that courts are necessarily incompetent to adjudge each and every kind of polycentric dispute. He concedes that adjudication can effectively extend to such disputes, but he insists that it ought not to. One reason for this is that adjudication when it so extends will have to be parasitic, that is, it will derive its strength, to the extent it succeeds, from other forms of social order. This ought not to happen.[34]

This attempt is interesting but not successful. This is so because the distinction between bipolar and multipolar (either-or and polycentric) is not really viable. The pure type of adjudication is only a model, an ideal type. Issues do come before the courts, which are polycentric in nature. Again to give Indian illustrations : Was the issue in the *Dissolution* case[35] an either-or or a polycentric one ?[36] Or was a challenge to the validity of the Constitution (Forty-second Amendment) Act 1976 either on the ground that there was no valid proclamation of emergency in subsistence or on the ground that the amendment was invalid, an either-or issue or a polycentric one ? Of course, judges who evade the question by invoking the doctrine of political questions might genuinely be persuaded that these are legislative or executive matters best left there. The political questions doctrine is one manifestation of the canon of judicial self-restraint. But important questions can be raised (and have been raised concerning desegregation and busing and apportionment cases for example in the United States) whether judges can, with justification, invoke this doctrine at the cost of sacrificing rights, ideals and values of constitutional and legal systems. Indeed, whatever course judges may adopt in relation to polycentric questions, "the 'form of social order' kind of analysis cannot dispense us from the much wider and more difficult questions of evaluative choice, whether we call them questions of 'policy', 'justice', 'social philosophy' or 'ideology' (And indeed, even if we close our eyes and refuse to see these questions at all)."[37]

Ronald Dworkin has over the past 15 years argued brilliantly but, in our opinion, unsuccessfully that the nature of justification of decision ought to vary fundamentally in adjudication as different from legislation.

---

34. See Lon L. Fuller, "The Forms and Limits of Adjudication" (mimeo ; delivered to Association of American Law Schools at Jurisprudence Round Table Seminar, 1959) ; "Collective Bargaining and the Arbitrator", *Wis.L.Rev.* 3 (1963).

35. *State of Rajasthan* v. *Union of India*, A.I.R. 1977 S.C. 1361.

36. Baxi, *supra* note 3 at 127. See also Alice Jacob and Rajeev Dhavan, "The Dissolution Case : The Politics at the Bar of the Supreme Court", 19 *J.I.L.I.* 355 (1977).

37. *Supra* note 32 at 655.

The core of his argument is that while both legislative and judicial decisions are broadly political in nature, the legislature ought to justify its decisions in terms of policy, while the court ought to do so in terms of principles. The court ought to "justify a political decision by showing that the decision respects or secures some individual or group rights." On the other hand, arguments from policy "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."[38] Dworkin maintains that legislation is better suited to handle arguments of policy and courts are better suited to handle arguments of principle. Indeed, he maintains that courts ought to proceed only with arguments of principle.

Dworkin maintains that judges do not have discretion to choose even in hard cases because there is always to be found in authoritative legal materials standards and principles which the judge ought to follow. He maintains that judges are always constrained to follow the law; for "all practical purposes", he says, "there will always be a right answer in the seamless web of law."[39]

Decisions based on principle protect individual or group rights ; decisions based on policy advance community goals. If a judge is conscientious, he would always be able to ground his decision even in a hard case on some principle protecting group or individual rights. He ought only to justify his decision this way and not by reliance on goals. Goals are non-individuated whereas rights are individuated. Goals "encourage trade-offs, benefits and burdens within a community to produce some overall benefit for the community as a whole." Rights, while they can be weighted against other rights, have by definition certain "threshold weight" against ordinary routine goals and can only be defeated or overcome by the goal of special urgency. Decisions on principle furthermore demand an articulate consistency ; in other words, judges as political officials must make such decisions on enforcement of rights "as they can justify within a political theory that also justifies the other decisions they propose to make." Intuitionistic decisions are thus precluded in enforcement of rights. This demand of articulate consistency does not apply in the same measure to decisions on policy because policies are thought to be "aggregative in their influence and it need not be a part of responsible strategy for reaching the collective goal that individuals be treated alike." In other words, principles entail "distributional consistency from one case to next;" principles forbid the idea of "unequal distribution of benefits". A good example of "articulate consistency" is as follows:

> If, for example, the principle that none has the duty to make good remote or unexpected losses flowing from his negligence is relied

38. *Supra* note 25 at 82-88.

39. "No Right Answer?", in P.M.S. Hacker and Joseph Raz (Eds.), *Law, Morality and Society : Essays in Honour of H.L.A. Hart* 58 at 84 (1977).

upon to justify a decision in *Spartan Steel*,[40] then it must be shown that the rule laid down in other cases, which allows recovery for negligent misstatements, is consistent with that principle; not merely that the rule about negligent misstatements is different from the rule in *Spartan Steel*.

The "rights thesis" of Dworkin is fascinatingly complex but what has been said so far makes clear that it forbids judges from making decisions and justifying them on policy. They ought always to ground their decisions on principles, and their reasoned elaboration must satisfy the demands of articulate consistency. If rights are to be taken seriously, judges ought not to mess around with goals and weigh rights with goals, excepting where goals of special urgency are involved.

An Indian jurisprudent has undoubtedly much to learn from the "rights thesis"; but he has also much to offer as grist to Dworkin's philosophic mill. For example, how are the Indian Supreme Court judges to justify a decision that validates a constitutional amendment which deletes fundamental right to property from the guaranteed rights in part III of the Constitution? Can this ever be satisfactorily done without reference to goals? Dworkin has himself stated that the distinction between principles and policies can be collapsed by "construing a principle as stating a goal" or by "construing policy as stating a principle."[41] If so, the fine distinctions drawn by him are after all not all that helpful as they promise to be. But even if we are able to maintain the distinction between principle and policy decisions, in one way or another, the "rights thesis" does not eliminate judicial discretion as it seeks to do. This is because while principles and rights have certain threshold weight as against goals, this aspect is not dispositive of the problem of judicial discretion.

Judges have still choices to make. A principle justifying rights may still have to yield place to goal of special urgency and principles and rights may conflict with other principles and rights. In both situations, judges have to choose. Dworkin says at this point that judges ought to have "a coherent political theory" recognizing a "wide variety of different types of rights, arranged in some ways that assigns rough relative weight to each."[42] But can we have a coherent political theory which will perform this task without at the same time moving back and forth from principle to policy and vice versa?

R. Sartorius in an attempt to tide over these difficulties and in grappling with the problem of competing principles has ultimately been able only to offer us the following solution : "In any case...the obligation of the judge is to reach that decision which coheres best with the total body of

40. *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, (1973) 1 Q.B. 27.
41. Ronald Dworkin, "Is Law a System of Rules?", in *supra* note 17 at 35.
42. *Supra* note 25 at 92-93.

authoritative standards which he is bound to apply."[43] He elaborates this point as follows :

> The correct decision in a given case is that which achieves "the best resolution" of existing standards in terms of systemic coherence as formally determined, not in terms of optimal desirability as determined either by some supreme substantive principle or by the judge's own personal scheme of values....[I]t is the distinctive feature of the institutionalized role of the judiciary, in contrast to the legislature, that it may not directly base decisions on substantive considerations of the value of competing social policies.[44]

However well intentioned, this kind of prescription for judicial role is indeed vacuous. What does this demand for coherence really mean ? Does it mean following precedents ? If so, we must all accept that the demand for coherence really amounts to formal as well as substantive matters. How do we measure and determine systemic coherence ? Does *Gujarat Steel Tubes*[45] or *Minerva Mills*,[46] to take random examples, manifest such coherence ?[47] How should judges articulate such coherence ?

VII

We find at the end of the road that a prescriptive judicial role theory which denies to judges a less law creating role is indeed difficult, if not impossible, to maintain without much internal strain and confusion. As Lord Lloyd has put it, the "democratic ideal that adjudication should be as 'unoriginal as possible', that judges should not be 'deputy legislators' seems as much violated by Dworkin's theory as by the theories of those whom he attacks."[48]

Unless a coherent theory satisfactorily preempting creative role for judges is available, it seems to me that we ought frankly to accept that judges, as political decision makers, do legislate. Judges do decide to create new norms of law and act prescriptively rather than descriptively, when they so decide. Professor H.L.A. Hart is right when he asserts :

> The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.[49]

---

43. "Social Philosophy and Judicial Legislation", 8 *American Philosophy Quarterly* 151 (1971).

44. *Id.* at 156-59.

45. *Supra* note 26.

46. *Minerva Mills Ltd.* v. *Union of India*, A.I.R. 1980 S.C. 1789.

47. *Cf.* Lord Lloyd of Hampstead, *Introduction to Jurisprudence* 848-49 (4th ed. 1979).

48. *Id.* at 846.

49. *The Concept of Law* 149 (1961).

Indeed, although the observation specifically confined to "most fundamental constitutional rules", it admits of much wider application. Professor Hart further maintains, and quite rightly, that the question here involved concerns the power and authority of courts and judges rather than one of morality. "Nothing succeeds like success" is a maxim which does not stipulate that success need be a morally justified and justifiable one. There is thus no necessary connection between law and morals, even at this point. At best, such a relation would be a contingent one. It is "folly to believe", says Hart, "that where the meaning of the law is in doubt, morality always has a clear answer to offer."[50]

Students of Indian appellate judicial process should be more at home with Hart's insight. Indian judges, especially the Supreme Court judges, are quite accustomed to get their authority to decide constitutional and legal questions after "the questions have arisen and the decision given." And the quantity and quality of such bootstrap operations are quite impressive. The techniques used are also varied and flexible. One such technique is what we have elsewhere identified as juristic activism.[51] Activist and not-so-activist judges have through massive use of observations, not relevant to arguments at the bar or issues at hand, invited litigation and law. Everyone knows, for example, that the seeds of *Golak Nath*[52] were sown by the anxious observations concerning the future of fundamental rights in *Sajjan Singh*[53] by Justices Hidayatuallah and Mudholkar. Justice Mathew adopted the juristic activism strategies almost consistently[54] and other activist judges have found this technique quite congenial. Notable among them are Justices Bhagwati and Krishna Iyer. But the style and strategy of juristic activism spread widely, even if indifferently, in the post-emergency Supreme Court during the period 1977-80.[55]

Second, there has been a deliberate and considered rejection of the doctrine of *stare decisis*. We have noted earlier that this doctrine does not foreclose judicial law making discretion but indeed provides a convenient vehicle for its exercise. There is a growing lack of precedent-consciousness[56] on the part of the Supreme Court. Activist and restraintivist judges have shown, particularly in the last decade or so, judicial amnesia and many have not even bothered to cite, let alone distinguish or overrule, troublesome precedents.[57]

---

50. *Id.* at 200.
51. *Supra* note 6 at xxviii.
52. *I.C. Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
53. *Sajjan Singh* v. *State of Rajasthan*, A.I.R. 1965 S.C. 845.
54. *Supra* note 6.
55. *Supra* note 3.
56. See Rajeev Dhavan, *The Supreme Court of India : A Socio-Legal Critique and Its Juristic Techniques* (1976). See also Upendra Baxi, "The Travails of Stare Decisis in India", in A.R. Blackshield (Ed.) *Legal Change : Essays in Honour of Professor Julius Stone* 34-51 (1982).
57. *Supra* note 6 at *ii-vi*.

Third, many judges have found congenial the rather unusual strategy of retroactive dissent and retroactive amplification of their past opinions. Justice Beg, for example, continued amplifying his decisions in *Kesavananda*[58] and *Indira Nehru Gandhi*[59] in cases like the *Dissolution of Karnataka*[60] which raised no cognate problem justifying this excursus.[61] The most notable example is the performance of Justice Khanna who took special trouble in *Indira Nehru Gandhi* to clarify that in his *Kesavananda* opinion he had not held that fundamental rights were not a part of basic structure. He also clarified that secular nature of the Constitution, and particularly article 15, was held by him to be a part of basic structure. *Indira Nehru Gandhi* raised no issues calling for this type of clarification. And yet Seervai who rejects the idea that the *Kesavananda* "summary" of nine judges can be a binding statement of the *rationes* has no hesitation in taking these observations of Justice Khanna to be authoritative as against whatever evidence his own original opinion in *Kesavananda* manifests! Of course, he does this partly because it assists him to camouflage the change in his own positions: an ardent critic of *Golak Nath* and votary of parliamentary supremacy in to the sphere of constitutional amendment, he now uses Justice Khanna's explanation in *Indira Nehru Gandhi* to justify his new found acceptance of the basic structure! Justice Bhagwati in *Minerva Mills* also places heavy reliance on Justice Khanna's subsequent amplification of his *Kesavananda* opinion as suitably modified; although he too rejects the argument that the summary in that decision has any binding force. Judicial collectivism is a welcome and strong plank of Justice Bhagwati's opinion in *Minerva Mills*. But while reliance on principle of collectivism forbids him to take the *Kesavananda* summary as binding, it does not preclude his reliance on retroactive explanation by one of the thirteen judges, who seeks to put gloss in 1975 to something he said in 1973!

Fourth, in increasing number of cases matters are finally disposed of on concessions or undertakings given by the governments, Union or state (or the other side), and yet very detailed decision is rendered. *Maneka Gandhi*[62] is a magnificent example of this. Excepting Chief Justice Beg, other judges refused there to strike down the impounding order on the basis of the undertaking given by the Attorney-General. Yet reasoned elaboration logically required them just to do what Justice Beg favoured doing. In a recent case, the supersession of the New Delhi Municipal Committee was declared illegal on the ground of denial of fairplay, or arbitrariness. And yet no practical consequence flowed because counsel on behalf of the corporators had made a concession that *status quo ante* might not be restored.[63]

58. *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.
59. *Supra* note 30.
60. *State of Karnataka* v. *Ranganatha Reddy*, A.I.R. 1978 S.C. 215
61. *Supra* note 3 at 127-51.
62. *Maneka Gandhi* v. *Union of India*, A.I.R. 1978 S.C. 597.
63. *S.L. Kapoor* v. *Jagmohan*, A.I.R. 1980 S.C. 136.

In Fifth, these tendencies have also proliferated into the advisory jurisdic-
fu[illegible]t. In the reference on special courts, the Supreme Court went manifestly
Pr[illegible]ond the question of the validity of the proposed bill and made sugges-
inv[illegible]s for changes proposed by the court. These suggestions were accepted
[illegible] the Attorney-General on behalf of the government, and the bill, as hypothetically amended, was declared valid ! And Chief Justice Chandrachud also opined that the advisory opinion should be held binding on High Courts on the ground that it was based on "almost everything that was urged !"[64] (The consequences there envisaged out of this holding did not, providentially, arise).

Sixth, there is a growing tendency on the part of the Supreme Court since 1977 towards judicial affirmative action. Such tendency characterized the work of some High Courts, *e.g.* Gujarat, and notably with Justice D.A. Desai in the matter of winding up petitions, where the court virtually took over the management of some companies and restored them to health, thus obviating distress for workers. In situations of affirmative action, courts do employ their powers beyond deciding the validity of the exercise of discretionary power. They, instead or in addition, ask the administration to do certain things or act in a specific manner. Courts thus proceed beyond ordaining norms for the exercise of power or discharge of duty; rather, they take over, in big or small ways, the general pattern of oversight and superintendence from otherwise autonomous institutions in the title of "fairplay and justice". When this happens courts enter more directly "the area of *governance* rather than *adjudicaiion.*"[65]

What is more, through the development of what we have called "social action litigation" (commonly miscalled "public interest litigation"), the Supreme Court *of* India has at last become the Supreme Court *for* Indians. The device of converting letters written by citizens and social action groups into writ petitions thus creating epistolary jurisdiction, unknown to contemporary judicial history of humankind, has assisted remarkably the struggle of the victim groups against governmental lawlessness, administrative deviance and social tyranny. The Supreme Court and appellate courts following it have thus given a remarkable demonstration of the necessity of taking *suffering* seriously as way of taking *rights* seriously.[66] This unique development entails reconceptualization of the role of judicial process in at least the Third World societies.

All these facts concerning the apex court and the nature of appellate

---

64. See *supra* note 3 at 220-24.

65. See Upendra Baxi, "Mass Copying : Should Courts Act as Controllers of Examination ?" 6 & 7 *Del. L. Rev.* 144 at 151 (1977&1978). See also S.N. Jain, "Law, Justice and Affirmative Court Action", 21 *J.I.L.I.* 262 (1979); Upendra Baxi, "The Supreme Court under Trial : Undertrials and the Supreme Court", 1 S.C.C. (*Jour.*) 35 (1980),

66. Upendra Baxi, "Taking Suffering Seriously : Social Action Litigation in the Supreme Court of India", 8 & 9 *Del. L. Rev.* 91 (1979 & 1980).

judicial process in India clearly establish the inappositeness of the prescriptive theories concerning the nature of judicial discretion examined in the previous sections. They also raise the more fundamental question : Can we have a universal prescriptive theory of judicial discretion, or even a common law theory or culture of adjudication ?

It appears to us that the answer to this question must be a negative one. For one thing, the total social environment, including the political and economic millieux, vary enormously between a developing common law society and a developed one. Despite similarities in underlying principles of structuring of ways of governance, the manners in which these underlying principles are grasped and actually operate vary enormously. For theorists of judicial process in contemporary England and the United States, the issues of fundamental importance may be those relating to the nature, incidence and function of appellate judicial discretion. For India, and other developing common law countries, the main problems of appellate judicial process may be those of institutionalization of power and authority of the judiciary, and at times even of its survival. Assuming, without further elaboration at this stage, that there is a difference of kind, and not of degree, between relatively stable and affluent societies and those of traumatically changeful and subsistence level developing common law societies, we have to concede that modes of political and social action by judiciary as well as modes of juristic analysis must vary across these societies and cultures.[67] To put it pithily : Lord Denning's problems cannot be the same as Justice Bhagwati's or Justice Krishna Iyer's. Nor are the problems of Professor Dworkin necessarily the problems of Professor Baxi !

But all this merely suggests that a prescriptive theory of judicial discretion is to be contextualized in time and place, and in the circumstance of development. It does not really tell us what the prescriptive theory might be. We have sought to outline a sketch of it in our *The Indian Supreme Court and Politics* (1980). It would be tedious to reiterate, even briefly, its principal theme that judicial process at the appellate level ought to be viewed by judges as well as jurists as political process and adjudication as "essentially a political activity expressed through the medium of legal and jurisprudential language and action." From this standpoint the real question is not whether judges ought to have, and ought to exercise, law making discretion. Rather, the question is : "[W]hat kind of politics ought the Court engage in ? It is not *whether* it should engage in it *at all*."[68] And the general notion of politics is seen as consisting in an activity of conciliating interests without undue violence. In this sense, politics is seen as the "only alternative to tyranny and totalitarianism." And we have maintained that the appellate judicial process, as an aspect of politics in a free society, might involve a wide variety of political activity and decisions

67. *Cf.* G.S. Sharma, "The Future of Western Legal Philosophy in Developing Societies like India", in *Law and the Future of Society* 347 (1979).

68. *Supra* note 3 at 30.

by judges and courts. We have by raising the following questions identified loosely the types of politics that some of us might say courts ought to engage in :

> It is only when we accept that the Court is *doing* politics, in this sense, that the question can arise as to what *kind* of politics it ought to do in a free society : the politics of justice or politics of power ? the politics of order or that of change? the politics of status quo or that of innovation ? the politics of survival or that of aspiration ? the politics of establishment or that of opposition ? the politics of today (the immediate present) or of tomorrow and the day after (the immediate future) ? the politics for the people or politics *against* the people ? the politics of hope or the one of despair ?[69]

Clearly, the foregoing only evocatively describes the varieties of political activities and processes from which judges ought to choose. And the meanings of various types of political activity are not self-evident. Much of our book is an attempt to illustrate and operationalize what we understand by some of these evocative labels.

The problems so far discussed in the preceding sections of this paper, more or less, disappear on this approach rather than worrying about the problem of the nature and scope of judicial power and function, quite explicitly. Similarly, adjudication, and understanding of it, is not any longer "parasitic on what legislators do all the time." Rather, legislation and adjudication appear as relatively autonomous modes of social organization and political action. Both legislation and adjudication are now perceived as political organs of a civil society. Both are relatively autonomous power and authority systems, each providing the environment of decision and action for the other. Both together seek to preserve and promote the legitimation of the formal polity of a state; and both provide defence mechanisms against exercises in delegitimation of the preferred order when these are of sufficient magnitude. In general, both legislators and courts make law; and in India, Parliament and the Supreme Court together wield constituent power as well.

Of course, like Parliament, the Supreme Court also has its functional equivalents of "lobbies" and "constituencies".[70] Clearly, however, the modes of initiation of judicial activity and the modes of reasoned elaboration through which decisions are expressed set apart, in some respects, the legislative from the judicial process. But it is a mistake to think that these differences in the manner, style and occassion of judicial function are fundamental enough to justify a sharp distinguishing of legislation from adjudication. In substance, they are political processes, involving exercise

---

69. *Id.* at 28.

70. See, for elaboration, *supra* notes 6 and 31, and see, for a total incomprehension of the notion of constituency, *supra* note 1 at 2027.

of power and authority through reason as well as fiat. And they ought to be so.

On the other hand, the very removal of difficulties promised or achieved by our approach create new ones in turn. First, assuming that both adjudication and legislation (and indeed administration) deal in substance with politics (in the stipulated sense), the question arises what is the relative political role of each of the major institutions of government ?[71] Second, how do we distinguish good politics from bad politics ? And how do we evaluate judicial political activity as good or bad ? These are difficult questions, suggesting a variety of possible answers which cannot be pursued in this paper.[72] But it is sufficient to point out that cogent answers are possible, for example, through a development of the ideal types of adjudication—the Kantian and utilitarian—proposed by Bruce A. Ackerman.[73]

But this much is quite clear. Judges ought to accept their political role. They also ought to accept that choices they make, from case to case, have substantive implications for design and direction of social transformation in India. Critics of judicial process also ought to accept this; further, they ought to develop evaluative criteria which they ought explicitly to apply in assessing whether the operation bootstrap or use of judicial political power to further aggrandizement of it by courts is good or bad politics in the current conditions of India, and for future paths of development. A continuing dialouge on this kind of issues between jurists and judges, law persons and laypersons promises deliverance from the *development of underdevelopment* of Indian jurisprudence. Critical jurisprudential thought in India will not arise through digestion or dissection of cosmopolitan learning, especially that kind of jurisprudential learning which thrives on jet-borne, paperback, Anglo-American dogmas concerning the nature of judicial role and discretion. Critical thought is more likely to sustain itself in India if cosmopolitan learning is itself seen as problematic, rather than as custom-made solution to Indian jurisprudential problems and puzzles.

VIII

Since this paper began with Seervai's denunciation of Justice Krishna Iyer, it might be apt to end on the same theme. And this fortunately can be shortly put. One should remind Seervai that the same Justice O.W. Holmes, who said in *Lochner*[74] that the Fourteenth Amendment "does

---

71. Indira Jaising, "Two Faces of Judiciary : Review of Upendra Baxi's *The Indian Supreme Court and Politics*", *The Times of India* 8 (7 September 1980).

72. See, *e.g.*, Sobhanlal Datta Gupta, *Justice and the Political Order in India* (1979); Upendra Baxi, "Review of Sobhanlal Datta Gupta's *Justice and the Political Order in India*", 4 *Indian Book Chronicle* 367 (1979).

73. *Private Property and the Constitution* (1977).

74. *Joseph Lochner* v. *People of the State of New York*, 198 U.S. 937 (1905).

not enact Mr. Herbert Spencer's Social Statistics,"[75] had also said in his memorable lecture *The Path of the Law*[76] that

> [f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[77]

It is unfortunate that so talented a person as Seervai should have followed Justice Holmes' judicial opinion of 1904 but totally forgotten the extra-judicial utterances of the selfsame Justice Holmes in 1897. It is doubly unfortunate for India that a Seervai should have chosen only the role of "the man of the present".

75. *Id.* at 949.
76. *X. Harv. L. Rev.* 457 (1896-97).
77. *Id.* at 469.