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JUDICIAL DISCOURSE : DIALECTICS OF THE FACE AND THE MASK

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I Legal justice : celebration of state power

IN THE discourse of the law, justice is merely an aspect of power. Justice, according to the law, is that justice which people holding power of the state may consider it necessary or justified to provide. The expectation is that when power defines justice it will enforce its definition. If this does not happen, legal justice itself may furnish standards to question the legitimacy of power. In the law, then, we may expect at the very best not the *power of justice* but *justice of power.*

Unless certain practices, institutions or features of society are considered as 'unjust' by those in power, there is no prospect that legal justice will deal with these. For example, although the Constitution of India declared as impermissibly exploitative and violative of the fundamental rights of Indians the practice of bonded labour, and commanded Parliament to make a law declaring this an offence, it was only in 1976 that it enacted a Bonded Labour Prohibition Act. Till then, at the national level, bonded labour was legally just, though constitutionally prohibited. Article 23, a fundamental right, stood cancelled for about a quarter century by legislative indifference, and is even now made nugatory by the stout refusal to implement the promise of the law.

Even when those in power agree that certain social practices are unjust, the nature of legal prohibition or regulation will depend on the *authenticity* of the perception of 'injustice' and the calculus of power in dealing with this apperceived injustice. Both these features are writ large in India on the so-called social "welfare legislations" for the *weakened* sections of society (described by the Constitution, forty-three years ago, as *weaker* sections).

The authenticity of the perception of injustice is blunted at the threshold by the fact of power. Neither have the bearers of state power nor the consciousness of the victim, barring situations of revolutionary seizure of power by the victims or their next best friends. A practice, an institution or a feature of the society must first become a *problem* for power; it is only then that it will be admitted on its agenda. But when a problem navigates to power, it is not the problem which directs power. Rather, it is power which defines the problem, ways to deal with

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it or to ignore it. Non-revolutionary power rarely knows the summoning force of injustice as a battle-cry. Indeed, often enough the problem instead of reforming power in the interests of its victims becomes an instrumentality for further legitimation or aggrandisement of power. This process displays itself all along in the so-called social legislation in India. Can we boast of any legislation, out of hundred thousands since Independence, which declares war and escalates hostilities against even a single situation of deep-rooted injustice in society?

Power cannot authentically perceive the meaning of injustice (again with the exception of the short-lived revolutionary power). It can be made to perceive problems which interrogate it, challenge it, or have the potential of delegitimating power. Legal justice then appears as a coping, management device. What are being coped with or managed are not necessarily the underlying injustices to the people but actual or latent insecurities assailing the structure of the management of distribution of power. Legal justice, in essence, is in the first place an attempt to solve the problems of the managers of the people; it is a common mistake to think that handling or solution of such problems is also necessarily achieving the solutions of the problems of the people so managed.

When situations of 'injustice' appear before power as a *problem* (that is when its gravitational force cannot just be ignored) political calculus decides what has to be done with those situations. In the last analysis, every 'injustice' serves the material interests of some groups in society; to attack it is to attack constellations or formations of these material interests. State power has to have recourse to political calculus; to work out the costs and gains to itself entailed in any planned attack on injustice. That is how you find legislations and even constitutions following a careful path of simultaneous attack and retreat. Not to attack the problem of injustice or rather injustice which has become a problem is costly for state power; to fully attack is also costly. The middle path that power takes is strewn with corpses of aspirations of complete justice and dense with disfigurement of the purportedly 'just' solutions.

If all this sounds too esoteric, please go through the mere texts of leading legislations on untouchability, bonded labour, *devadasis*, prostitution, land ceiling laws, anti-monopolies law, minimum wages, contract, migrant, and child labour laws. They celebrate the virtues of state power, unable any longer to ignore the problems, and unable also to tackle it with commitment to exile certain injustices.

The state power perceives, almost by definition, a situation as a problem of injustice *if, and only if it can be safely attacked.* Therefore, each of its major legislations, identifying and 'attacking' a problem of injustice, is on the one hand a testament to power; on the other hand, it is also a confession of vulnerability. This vulnerability, dramaturgically viewed, is only an apologia; state power assumes its historic limits in *advance* of its historic assertion. Paradoxically, this power emerges as a statement of inability to do things to or for the impoverished; as a recodification of constraints on political action through the law rather than as an active assertion of the will to power.

In Indian experience these constraints on power, strangely enough, become resources for state power! The paternalistic political culture, with the conception

of *mai-baap sarkar*, encourages personalisation of power. The elected leaders are contemporary equivalents of the *rajahs* of yesteryears; allegiance to them is a way of solving problems. But when they cannot solve them, the impoverished are encouraged to think that it is not because the leaders do not want to. Not too long ago, one almost always heard the non-militant impoverished speaking about the lamented Indira Nehru Gandhi, "She desperately wants to improve our lot; but poor thing, how much she can do by herself!" In other words, the person eminently perceived as powerful, not just in India but in the world at large, appeared or was *made* to appear, in a strange inversion, helpless at the zenith of her power! Personalisation of power, as against its transpersonalisation[1] — associating power with historic processes of transformation — is an aspect of political calculus aimed at ensuring that the masses do not create a "legitimation deficit"[2] for state power.

The calculus of power influences the design of legal justice. Legislation is typically used as a statement of aspiration, as an acknowledgment of injustice which must be fought, as a moral posture against non-negotiability with evil. At the same time, the edge of all this is blunted because the legislative programme, the plan of implementation, does not match the promulgation of justice. This hiatus is an act of will, an exercise in mature political imagination, a ceaseless innovation in methods of simultaneous attacks and retreats. Indeed, the good the legislation achieves is the good it is designed not to actively attain; but the good is achieved only inadvertently and occasionally. The words of statute are not inaugural words but words of valediction. "The problem has been tackled, long live the problem" is the message of most progressive legislations in India. Thus, the state power accomplishes its historic mandate of representing the "general" interest. In this sense, legal justice is the active celebration of the state power. It is an answer to St. Augustine's immortal question: "What is state without justice but a band of robbers?" In this sense, legal justice is, always and everywhere, a mask over the face of dominance.

But, for all that, the mask covers the hideous face of raw and bloody power. Dialectically, the mask often has to begin to be the face; power acquires the visage of benign justice, despite its intentions and programmes. Herein, despite all that we may say about power's war of attrition against justice, lies the historic importance of the mask.[3]

II Will to power in judicial discourse

The judicial discourse is an aspect of this dialectic between the face and the mask. Judges and courts, obviously, are organs of state power. But not of the same order as the executive and legislature, which in India mean, more or less, the same.

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1. See, for an elaboration of these notions, Julius Stone, *Social Dimensions of Law and Justice* 606-16 (1966).

2. On the notion of legitimation crisis and deficit, see, J. Habermas, *Legitimation Crisis* (1973).

3. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975) poignantly reminds us concerning the rhetoric of the rules of law: "If the rhetoric was a mask, it was a mask that Gandhi and Nehru were to borrow, at the head of a million masked supporters." (*Id.* at 266).

In order to appreciate this point, one has to understand the *form* into which state power recasts itself when it organises itself as judicial power.

The judicial power has to be so organised, in liberal bourgeois orders, as to give it an *appearance of autonomy*. The executive does not arrogate to itself the task of dispensing legal justice; that task is assigned to a relatively autonomous judiciary. Here we encounter an entrenched, civilisationally so, maxim of legal justice (no older than Montesquieu) namely that there shall be separation of powers or at least division of functions among the executive, legislature and the judiciary. Not to allow such separation or division has since been recognised as the very definition of tyranny.

But to allow the judiciary the autonomy to decide disputes between state and citizens and among members of the civil society *inter se* is, from the standpoint of power, a risky enterprise. Therefore, the matrix of judicial power is always structured by the executive power. In other words, it is the executive which appoints judges and determines their jurisdiction. The Indian executive of the present times will never appoint a 'Naxal' as a judge; nor will Fidel Castro appoint an erstwhile landlord to the Cuban judiciary. The assumption is that power, coupled with limited intelligence, will not, as it were, dig its own grave through judicial appointments. Or, to try to put it more elegantly, one would not appoint persons as justices who are prone to dramatise the executive as an epicenter of all tyrannies. The assumption proceeds further: once you have justices, carefully screened for 'good behaviour', and adequate 'class' background, legal justice will not deviate from the service of the centralised unity of state power[4] ordained by the power bloc.

This is how things are devised and, from the vantage point of power, ought to be. But the lesson of human history asserts itself here as everywhere, that is, the lesson of latent and unintended consequences. Soon judges discover that they cannot fulfil completely or adequately the expectations of the executive (and these are often inchoate) even if they want to. And many judges do not see the precise moral obligation to do the bidding of the executive which appointed them. Of course, they remain aware that they must not go too far too quickly. But by slow patient work, by the dint of cultured effort, they create a jurisprudence which the executive did not want, desire or intend, but with which it has to live.

Judges and courts create jurisprudence because of the way they are structured. At least in the common law orbit, they are under an obligation to produce discourse. In other words, theirs is not the will to power; but the will to reason. Unlike the legislature and executive, they cannot always choose their terrain of decision. And unlike other organs of the state, or indeed, of the civil society, they cannot merely express their will (that is, say that X rather than Y is what they have decided) they have to articulate their reasons for what they decide. If the legislature wills not to make a law or wills to make one, the configuration of power is the only reason there is for its action. For four decades the mandate of the

4. On the notion of the centralised Centre of State Power, see, N. Poulatzas, *Political Power and Social Classes* 130 (1975); and U. Baxi, "On the Problematic Distinction between 'Legislation' and 'Adjudication': A Forgotten Aspect of Dominance", 12 *Delhi L. Rev.*, vol.12, pp.3-15 (1990).

Constitution to evolve a uniform civil code was ignored; now it suddenly appeared on the legislative anvil. No amount of rationality, other than that of power, would justify the enactment of the Muslim Women (Protection of Rights) Act 1986.[5] At the root of legislative and executive power is an act of will; not an act of reason.[6]

In judicial discourse, at least in the tradition of legal justice in the Anglo-American orbit, the will to power has to be constantly, in each act of decision, justified by an act of reasoned discourse. Judges have to give cogent reasons for their decisions, which have to be publicly articulated and reported (unlike a minister's orders on files). Not merely is this articulation and publication of reasons thus structured; it has also to form part of a corpus of judicial reason itself. In other words, past decisions are a guide, and they sometimes bind, the future scope for decision. The obligation for public discourse is thus writ large on judicial power which, all said and done, is not like the executive and legislative power residing in the domain of sheer will. It also straddles the domain of reason; judicial power is the *jurisdiction of reason*, in ways that neither legislative nor executive power is, in its very nature.

This then, is the second salient aspect of legal justice. The third is simply that judges and courts find the raw material for their discourse in the dynamic realities of power relations, whether among citizens and state or among citizens themselves. The full human, social context pulsates before the adjudicator in a way it does not before the legislator. In deciding an instant conflict, judges and courts do no more than merely decide it. At the same time, the cumulation of discourse performs enunciative functions[7] for the articulation of power itself. Put another way, especially the appellate judges and courts in deciding the instant issue develop a "gravitational force" of precedent[8] which will constrain, modulate, condition and even determine the outcome of cases and controversies non-existent at the time of the instant decision. It is in this sense that the role of the legislator, law-maker is, willy-nilly, built into the role of the judges and courts.

All this, and more that can be said, suggests that judicial discourse concerning power is fraught with unsuspected potentialities, which the executive can neither wholly anticipate nor fully control.

These peculiar features of structuration of judicial power as state power assist the growth of the dialectic between the face and the mask of power. In judicial power the state power has always the potentiality of turning back upon itself, of generating internal dialogue, and antagonistic and non-antagonistic contradictions with its other realms.

The most historic, and therefore complex, illustration of this potential at work is in the domain of the power of amendment of the Indian Constitution. A multi-party consensus has existed since the adoption of the Indian Constitution that

5. See, Janak Raj Jai (ed.), *Shah Bano* (1986).

6. N. Luhman, quoted in Habermas, *supra* note 2 at 98.

7. M. Foucault, *The Archaeology of Knowledge* 88-105 (1972). See, on the problematic 'precedent' R. Dhavan, *The Supreme Court of India* 39 (1977); U. Baxi, "The Travails of Stare Decisis in India" in A.R. Blackshield (ed.), *Legal Change: Essays in Honour of Professor Julius Stone* 34 (1984).

8. This is the striking phrase of Ronald Dworkin, *Taking Right Seriously* 111 (1977).

Parliament is 'sovereign'; that it can change and even replace the existing Constitution. It is this assertion of sovereign power of the elected rulers of India which received a historic repudiation through the doctrine of basic structure of the Constitution enunciated by justices of the Supreme Court, after much agonising, in *Kesavananda Bharati*.[9] It was argued on behalf of the government and Parliament that they have the power even to repeal the Indian Constitution and replace it by a new one, substituting theocratic for secular state, monarchy for republic, unitary for a federal state. The court managed to say, that this could not be done. "The plenitude of power to amend the Constitution cannot go this far; you cannot change the essential features of the basic structure of the Constitution."

This unique assertion of judicial power is now a constitutional *fait accompli* for the elected rulers of India.[10] Whatever be our views on the quality of the reasoned justification in the *Kesavananda* discourse, it is now the Constitution of India itself. The state may not take away by constitutional amendment the 'democratic' features of the Indian Constitution; and these include the power of justices and courts, in the final analysis, to say what the Constitution means from time to time.

This historic judicial intervention is no judicial meandering for the consumption and manipulation by skilled law-persons. It has a structural message for the people of India in their struggle to make power respond more amply to the tasks of justice. For the *atisudras*, the social and economic proletariat, the reaffirmation of the unchangeable basic structure not merely marks the limits of the power of the state but also the maintenance of civil and political *space* within which they can continue to articulate their struggle against the dominating groups.[11]

In this historic battle, unprecedented in world judicial annals, both the executive and the court appealed to the text and context of the Constitution of India; but given the way in which state power manifests itself in the judiciary, the Constitution becomes ultimately what the judges say it is from time to time. When till 1973, the Supreme Court broadly acquiesced in the assertion of parliamentary sovereignty, the executive retained its grudging regard for the relative autonomy of the judiciary. Now, the calculated risk was perceived to have gone awry. Thus we witness in the period since 1973, beginning with the supersession and resignation of three senior Supreme Court Justices (parties to the *Kesavananda* discourse limiting amending power) and appointment of Ajit Nath Ray as the Chief Justice of India, a series of executive-orchestrated articulations of the role of judges and courts (the "committed judiciary" debate). We see now crude devices such as transfer of High Court justices — mass transfers during the emergency[12] and more systematic transfers since the *Judges* case[13] since 1981; continuing underpersonning of appellate and trial courts;[14] incomprehensible antics, as those

9. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 S.C.C.225; see also, Baxi, *infra* notes 11, 12.

10. *Waman Rao* v. *Union of India*, A.I.R. 1981 S.C. 271.

11. U. Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* 86-97 (1986).

12. See, U. Baxi, *The Indian Supreme Court and Politics* 198-209 (1980).

13. For an analysis of the *Judges* case, see, Baxi, *supra* note 11 at 36-53.

14. See, U. Baxi, *The Crisis of the Indian Legal System* 58-83 (1982).

very recently involved in direct violation of the executive's own declared policy, of delay in elevation of senior judges to the position of the Chief Justice of High Court.

With all this, the structuration of judicial power as state power remains basically unaffected. Neither can the role of the appellate judges as law-sayers be repudiated; nor, still, their duty to create and nourish authoritative judicial discourse can be delegitimated; nor, further, can the legal profession be nationalised or even inhibited from taking cases to courts against powers which the executive exercises in what it perceives to be the supreme national interest. The executive power can affect the behaviour of individual justices with incentives and disincentives or create a climate when adversarial mode of adjudication affecting the executive at key-points can be muted. But the peculiar structuring of judicial power cannot be altered; the mask is still needed to hide the face. At the same time, the mask is to be restrained from substituting the face or indeed becoming the face. It is in this agony of power that promise of justice lies.

III Social action litigation: war of the mask with the face

Not consciously, and as a result of a whole variety of political circumstances and conjunctures, judges since the eighties have developed a discourse concerning their role in Indian society. Throughout the seventies, the executive made its wish public that the judges and courts should be committed to the Constitution and the promise of progress and justice within it. Now, led by the Supreme Court of India, judges and courts have shown their "commitment"; the executive did not have this kind of "commitment" in view at the same time, it cannot repudiate it publicly.

The new role that judges and courts have assumed since the 1980's through social action litigation (SAL), still miscalled by Americanised Indians as 'public interest litigation', is truly extraordinary. The procedure is that of epistolary jurisdiction, where letters written by ordinary citizens to courts get converted into writ petitions. And these letters do not allege violation of fundamental rights of their authors; the authors allege such violation of the rights of the impoverished groups of Indian society — be they people in custody, victims of police violence, forced, bonded, migrant, contract labour, child workers, rickshaw pullers, hawkers, self-employed people, pensioners, pavement dwellers, slum dwellers, fishermen or Sri Lankan Tamils used as bonded labourers. The law of standing, that is persons who can bring complaints of rights-violation, has been thus revolutionised; and access to constitutional justice has been fully democratised.[15]

The second major procedural innovation brought in by SAL is the collection of social data and legal evidence concerning the plight of these impoverished groups. Courts now appoint socio-legal commissions of public citizens, social scientists and others to examine the conditions alleged to be violative of people's rights; and the reports of the commission, constituted at state expense, provide the

15. See, U. Baxi, "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India" in R. Dhavan *et. al.* (ed.), *Judges and the Judicial Power* 289 (1985); also see the extended version of this paper in U. Baxi (ed.), *Law and Poverty: Critical Essays* 387-415 (1988).

material for doing justice. Increasingly, universities and research institutes are directed by the court to function as commissions. To cite a couple of inaugural examples, Chief Justice Poti directed the Vice-Chancellor of the South Gujarat University to assist the court as a commission to report on the working and living conditions of migrant workers in Surat textiles (powerloom) production.[16] Chief Justice Bhagwati directed the College of Social Work (University of Bombay) to report on the conditions of women prisoners in Bombay.[17] This practice constitutes a remarkable cooptation of state-supported academic institutions in activist administration of justice and has the potential for redirection of these institutions to a participatory role in the realisation of constitutional values. This redirection holds potential for innovation in teaching, learning and research — an aspect, expectedly, altogether ignored in the New Education Policy.

The third major aspect of the SAL is in the area of relief. Compensation and rehabilitation for victims deprived of their fundamental rights now constitute a constitutional right; the Supreme Court undertook a detailed monitoring of the rehabilitation of the blinded of Bhagalpur and since then has fashioned many a measure of compensation and rehabilitation;[18] it has ordered the administration of theosuplhate injections to the Bhopal victims and upheld the constitutional validity of the Bhopal Act by reading into it the obligation to provide monthly interim relief (thus to an extent overcoming the shame of settlement by the Union of India with Union Carbide);[18a] it has provided elaborate directives for treatment of prisoners and undertrials in jails; it has given specific directives for humane and just conditions of work for migrant workers[19] and forced labourers.[20]

The fourth salient aspect of the SAL is the development of constitutional jurisprudence itself. The right to compensation for violation of fundamental rights is now fully emergent.[21] Indians have now a right to speedy trial though nowhere explicitly formulated by the Constitution.[22] The custodial inmates have a right to dignity and immunity from cruel, unusual or degrading treatment, thanks to the incomparable initiative for prison justice taken by Justices Krishna Iyer and Bhagwati.[23] Above all, the jurisprudence of SAL insists on a simple postulate of civilised jurisprudence : administration shall act in accordance with the law and

16. Surat: South Gujarat University, *A Report on Working and Living Conditions of Textile Workers: A Survey* (1985).

17. *Sheela Barse* v. *Union of India*, (1986) 3 S.C.C. 596 at 632. The court unable to cope with state intransigence on the one hand and insistent, outraged place for more effective exercise of judicial power, nationalised this SAL petition by allowing the petitioner to withdraw. The overall results are not strikingly different.

18. *Khatri* v. *State of Bihar*, A.I.R. 1981 S.C. 928; see also, for an overall review of judicial achievement in this area, U. Baxi, "A Perspective From India" in Theovan Boven *et.al.* (ed.), *The Rights to Restitution Compensation and Rehabilitation* 75-85 (1992).

18a. See, U. Baxi and A. Dhanda, *Valiant Victims and Lethal Litigation* 550-635 (1990); see the Introduction, *id.* at i-lxix.

19. *Peoples's Union for Civil Liberties* v. *Union of India* (known as *Asiad* case), A.I.R. 1982 S.C. 1473.

20. *Bandhua Mukti Morcha* v. *Union of India*, A.I.R. 1984 S.C. 802.

21. *Supra* note 14.

22. *Id.* at 208-27.

23. *Hussainara Khatoon* v. *State of Bihar*, (1980)1 S.C.C. 98 at 108, 115.

the Constitution. This is a monumental achievement of SAL jurisprudence as this insistence has been vividly and memorably, in concrete contexts of the growing lawlessness of the state.

Fifth, without being exhaustive, the SAL processes have at times resulted in a mini-takeover of the administrative regime of certain institutions of administration, which have displayed a congenital inability to work in accordance with the law and the Constitution. The most conspicuous illustration of this, perhaps, is the Agra Protective Home for Women, virtually run by the judiciary for well over ten years.[24] The Supreme Court is doing its best to enable, by constant invigilation, the State of Bihar to ensure proper prison administration, to the point of maintenance of the record of undertrial and convict populations in the various jails of Bihar.[25] In environmental cases, the Supreme Court has ordered the closure or monitored the pollution potential of private industries.[26] The State High Courts have not lagged behind in these and related areas.[27]

The SAL movement is only about a decade years old and owes much for its setting and mood to Justice Krishna Iyer's tempestuous presence in the Supreme Court, and sustained leadership of Justices Bhagwati, D.A. Desai, O. Chinnappa Reddy. The early discords among justices,[28] a natural accompaniment to daring redefinitions of the judicial role, swift and sudden in their emergence in the judicial and public consciousness, have now subsided; and even justices who believed that reticence was a source of judicial power (and quite rightly so, given the missionary zeal of the judicial initiators of the SAL) have done quiet, but fairly consistent, work to sustain the SAL.

It is important to stress that the constituency of the SAL is wider than of the routine constitutional adjudication. Social and legal activists and journalists form the core constituencies of the SAL. The SAL has marked a reciprocal relation between judges and courts, on the one hand, and journalists on the other. The latter found in the SAL a fantastic legitimation of the fledgling post-emergency investigative journalism; the former found in the press an ally which accomplished the legitimation of new incursions of judicial power. And, perhaps for the first time, social activists learned the uses of law as an aspect of overall struggle on behalf of the dominated and the vulnerable just as judges and courts began to take the Indian suffering seriously. If the print media assisted the emergence of new forms of judicial power, it at the same time, generated a rather rigorous climate of accountability for it as well; judges and courts not merely acquired news value; they also acquired views-value. Perhaps, at no other time since Independence judges and courts have been subject matters of serious editorials and centrepiece articles as they have been since emergence of the SAL.

Holders of executive power in India have just about recovered their wits, after the first massive onslaught of the SAL. The SAL processes have put them in

24. *Upendra Baxi* v. *State of U.P.*, (1986)4 S.C.C. 106.

25. See, *supra* note 23.

26. *M.C. Mehta* v. *Union of India*, (1986)2 S.C.C. 176 at 325.

27. *E.g.*, M. Mridul, *Public Interest Litigation in Rajasthan* (1989).

28. See, U. Baxi, *supra* note 15; S.K. Agrawala, *Public Interest Litigation in India: A Critique* 16-24 (I.L.I. 1985).

unpredictable difficulties which the traditional political processes leave no scope, tactics or tools to combat. The SAL is not merely *expose* litigation; it literally takes the mask off the face of power which does not want to be held within the law, power that is colonially repressive and at times openly brutal. It is too late in the day for the executive to ask judges and courts to stop or reverse SAL; for over a decade it propagated 'committed judiciary' and although it did not quite mean this kind of 'commitment', the executive is in no position to delegitimate SAL activism. The next best strategies are obviously preferred; lawyers, on behalf of the state, simply use all the tricks that lawyers use for any clients who hire them. There is needless denial, even of conspicuous facts; there are postures of non-cooperation in matters of judicial commissions, but these are necessarily short-lived; endless delays and proliferation of superfluous documents designed to wear down both the courts and the activists constitute about the only successful aspect of this assemblage of tactics.[29]

But when, at the end of the day, judicial orders arrive, the executive is left with a series of rather painful choices. To implement them is to engage in tasks of renovation of power which the executive loathes in the first place: *e.g.*, appointment of vigilance committees under the bonded labour law, prosecution of officers allegedly guilty of blindings, torture and tyrannies, expansion of the minimum wage of factories inspectorate, avoidance of sex-based discrimination in public works, including famine relief, running of remand homes for women and juvenile institutions in accordance with its own declared laws and policies, and reformation of jails. The SAL outcomes are not perceived as opportunities to reshape power but rather as obstacles in the exercise of *real* power.

What we get, then, is a slow-motion, grudging compliance; the SAL petitioner comes to the court again and again to get her directions enforced. The court moves its discourse from the enunciation of legal norms to a frank dialogue on the programme of implementation. Occasionally, there arises in this discourse the jurisprudence of rancour and strictures.[30] In the face of outright defiance, invocation of the contempt jurisdiction is the only strategy; when it is adopted, the Supreme Court at least proceeds to move at a snail's pace, not wishing to take on the executive, not for the latter's inability, but for the cussed unwillingness to

29. See, for an analysis of the strategies of resilience, U. Baxi, "Sunset or Dawn: Towards Deconstructing the Activist Judicial Discourse" (Sri Ram Iyer Memorial Lecture, 1986; mimeo).

30. A stricture is the signature of disapproval and dissent. It is also a summons to constitutionally becoming behaviour. A stricture is not a sentence and yet it enjoys the fecundity of a sanction. It stigmatises without conviction. Its moral rhetoric of dismay, distress and disgust creates an aura of illegitimacy of power. Its moral force pierces even the rhinocers-layers of the political skin, in a kind of micro-surgery on body politic.

The jurisprudence of strictures sustains a persuasive discourse; especially when the *dramatis personae* are highly visible political personages. It creates a Hamlet-type dilemma; to resign or not to resign is the question. The activist judicial pen symbolises the slings and arrows of outrageous fortune. Unlike Hamlet, the Indian political personage has no capacity or use for grandiloquent soliloquies. Not for them is the heroic, enduring prose of moral poignancy. Rather, the dull din of head-hunting chorus clashes with the sycophantic clamour for the leader to cling on to power. The tower of Babel at some point or the other marks the celebration of the rites of passage of the mighty and the powerful into instantaneous political wilderness and exile. The discourse of strictures is the discourse of untimely political obituaries.

comply with the law and the Constitution.[31] Constitutional adjudication in SAL becomes, then, a dialogue between judiciary and executive on the nature of public power and its public purposes. The executive has yet to accept the role of the pupil, although the courts have all too eagerly donned the didactic robes of pedagogues for democracy and constitutionalism.

Clearly, the SAL processes have begun to create murmurs of discontent not only among its target groups (people in administration) but also among activists who initiated it. Indeed, it suits power to generate and sustain this dynamic of disenchantment; since the holders of state power cannot afford to directly critique this usurpative role (from their standpoint of material stakes in legitimacy of power) of courts and judges, nothing more worthwhile can happen than internal critique by the initiators and participants in the SAL process. That critique would be authentic *looking*, since it does not emanate from the centre of power under judicial review but is based on historical experimentation in democratising justice by social and legal activists.

We say authentic-*looking* and not *authentic* critique because most activists, moving away from their initial nihilistic or merely opportunistic uses of the law,[32] have recoursed through the SAL to a more sustained enterprise with the law. At the same time, they have tended to regard the judiciary more or less as *kamadhenu*, (the celestial cow) which can be *dohhanned* (milked) as and when desired. The social activists have not adopted the appellate judiciary as a people's institution and tried to take sustained interest in matters like judicial appointments or role. The result is that while they take every salient problem to courts appellate, they fail to regard the problematic of the independence of the judiciary or its adequate infrastructure as problems serious enough to warrant their attention.

In these circumstances, all that the managers of the state have to do is to allow the SAL, as it were, to run its initial course and to deploy the growing internal critique of the SAL to eventually delegitimate it. As a string to the bow, by their own calculated and studied recalcitrance, they induce a loss of confidence among judges and courts, activists and beneficiaries. They hope to show through this process that judges and courts are equipped to deliver only limited legal justice and it is, in the last analysis, the legislature and the executive to which people must turn.

Strictures demobilise political camaraderie and marshal latent antagonisms. They isolate the doomed politician, disrupting clusters of expedient loyalties which catapulated him into power. The discourse of stricture sets limits to arrogance of power. It symbolises the epic struggle between constitutional rectitude and uncouth, untutored exercise of political power. In the discourse of strictures, the SAL operates through persuasive overkill.

To be sure, the discourse of strictures creates a sense of injustice among the dethroned and a sense of insecurity among the enthroned. Critics of SAL who overlook this potential, unwittingly, assist the arrogance of power. The SAL discourse of strictures has assumed unimaginable potency; it poses a fertile threat to all those who would exercise power as if they were above the law and the Constitution.

31. The directions in *Bandhua Mukti Morcha, supra* note 20, have simply not been complied with; the first major contempt petition in SAL lay pending with the Supreme Court for several years.

32. See, U. Baxi, "Law, Struggle and Change: An Agendum for Activists" in *Social Activists and People's Movements* 110-25.

An old management trick or device, this! Exhaust the staying power of the activists; then occupy for a short while the space that has been occupied only in order to vacate it for the benefit of state power. Judicial intervention on behalf of justice and constitution is now a problem on the agenda of political power. The managers of the people know that it *also* can be managed, quietly and with the infinite resource of political time.

This is how we see the battlelines over SAL. And the next decade or so will lead to a result; either armistice with the executive power or escalated hostilites between judiciary and dispossessed millions of Indian citizens unto whom the Constitution promises justice.

IV Conclusion

In a sense, SAL and judicial activism engendered by it is a struggle for the recovery of the Indian Constitution. A Constitution which sought to structure power is now constituted and reconstituted by power. The judicial discourse in SAL seeks to return to the simple idea that wherever there is power there is accountability, on the assumption that wherever there is accountability power would know its limit and proper uses. That assumption may or may not hold true, especially because accountability as justifying uses of executive power — action or inaction — does not always mean that power will hold itself bound by the law and the Constitution. Accountability in the sense of public justification is one being; *action* towards the final ends of reformation of power is another. For example, paying compensation to those illegally confined for unconscionable decades or rehabilitating the blinded of Bhagalpur is an aspect of accountability; ensuring by political action that such things do not happen at all is another.

But as things are, judicial intervention for justice has, at last, taken the momentous step of ushering in accountability in the limited sense. This is not a small gain. There is no prospect of the second step being taken successfully if one does not wish to add our little voices to create a chorus for a just society, with the refrain: "Let the mask become the face."