Jurisprudence level 6 (Volume 1 Main)

ARTICLES

On the Shame of Not Being an Activist: Thoughts on Judicial Activism

by Upendra Baxi*

The fact that appellate justices make law, and not merely interpret it, is now fully acknowledged amongst the *cognoscenti*. But there are many, including the appellate justices, who even at this day and age contest this simple proposition. They do this in a manner reminiscent of the Three Sisters in Salman Rushdie's *Shame* who until the mysterious happened to them (or more accurately to *one* of them though, alas! no one will even know *which* one) firmly believed that 'fertilization might have been supposed to happen through the breast through "bizarre genitalia" such as holes in the chest into which their nipples might snugly fit' (Rushdie, 1983, p. 13). Those who wish to preserve their jurisprudential pubescence are entitled to such fantasies; but the shame of belated discovery would haunt them, like the Three Sisters, forever, with some sinister and some very tragic results.

If we, then, accept jurisprudential adulthood, the question is not any longer whether or not judges make law: rather the questions are: what *kind* of law, how *much* of it, in what *manner*, within which self-imposed *limits*, to what *willed results* and with what tolerable accumulation of unintended results, may the judges make law? These kinds of questions direct immediate attention to the ineluctable policy and political choices which judges have to make in their daily administration of justice and to the problem of accountability for their actions (see Baxi, 1982).

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It is only natural that judges wish to exercise power but do not wish to be particularly accountable to anyone. It is natural, too, for them to begin to indulge themselves in the honest fiction that they are merely carrying out the intention of legislators or discovering the immanent something called the Law. The tradition of the law and the craft of jurisprudence offer such judges plenty of dignified exits from the agony of self-conscious wielding of power. This stance suits, equally, also the lawyer and the scholar who also find it more convenient to deal with immediate issues of technique and substance, rather than look back to more fundamental questions of the role of the judge and the lawyer in a changing (often traumatically so) society. Hence, the conspiracy of the Great Blackstonian Lie; and hence, to borrow the felicitous phrase of Picasso, the incredibly persistent attempt to convince the people of the truth of the lie that judges do not make law.

These quest concerning power and accountability have been extensively dis ssed in literature (e.g. Bickel, 1962; Weschler, 1959; Miller & Howe 1960; Stone, 1964, 1966; Dworkin, 1977; Baxi, 1980; Ely, 1982). They will continue to be discussed for a long time to come, with or without any satisfactory final answer since there cannot be, in the very nature of things, a universal theory of the nature of judicial process (Baxi, 1980).

But with all its richness and promise, even the present framework of discussion continues to be confined to the problematic of the power of judges to make law and its justification. It ignores other powers which justices exercise which are not patently legislative and yet are almost as important. Let us call these powers '*faute de mieux* executive powers of appellate justices'. These deserve study by all those interested in the judicial process as a species of political process.

The 'executive' power of judges involves at least seven distinct sets of powers. Most of these powers may even result in a decision not to proceed to a decision! The executive powers thus extend to:

(i) powers of admission;
(ii) powers of scheduling cases for hearing;

(iii) powers to form benches or panels;
(iv) powers of granting 'stay' *pendente lite*;
(v) powers of 'suggestive jurisprudence';
(vi) powers of scheduling reasoned judgements and
(vii) powers of allowing/disallowing a review.

Except in category (vii) where occasionally at least a judgement needs to be written, there are, at least in India, no guidelines on how the rest of the discretionary executive powers should be used. In each of these categories the powers of appellate justices, and especially of the Supreme Court, are absolute, without a trace of accountability.

In regard to the first facet, take, for example, a prayer of a citizen before the Supreme Court of her country that the imposition of martial law or emergency or dissolution of a legislature or emergency should be allowed to be legally contested: the Court allowing such a challenge, regardless of the ultimate decision, would indeed be exercising its discretionary admission powers to allow space for political action. Take the less dramatic issues of *locus standi*: in deciding who shall have the right to activate the Court, the Court will undoubtedly make some law. Not so however, when it, in a non-speaking order, just dismisses the petition *in limine*. A group of citizens may be denied political voice just by refusal to hear them, even on the issue of why they should be heard.

The power of scheduling cases is also fraught with immense potential for good and bad use. Hearings on imminent violations of fundamental rights may be scheduled after their large-scale violations have taken place! Challenges to suspension of *habeas corpus* or the legality of military rule or the Emergency may be scheduled for hearing after the horrible realities of detention without trial and torture without redress have become *faits accomplis*. At less dramatic levels, courts could so organise their dockets as to hear late cases which should be heard early, given their social or political importance; and vice versa. This may happen through design or default, intention or inertia. The result, overall, is the same. Justices do not lag behind editors and proprietors of newspapers; these latter have the power to 'kill' stories. Justices have the power by simple or devious

docketing exercise, to kill controversy, contention and social relevance of cases before them.

In the third category, peculiar only to countries where the Court as a whole does not sit, the Chief Justice possesses enormous powers to constitute benches or panels of justices to decide matters. There are no guidelines for the exercise of this discretionary power; it has unfettered and hitherto unreviewable administrative discretion, open to malign and benign uses. In any case, the Court becomes fragmented, shifting panels of judges decide cases and in many cases the Court as an institution loses its corporateness and craftspersonship. From the point of view of the citizen, the Court as an institution becomes merely a panel of a few justices selected unaccountably by the Chief Justice from time to time.

The power of granting stay, *ex parte* and upon hearing till the disposal of the matter, is also a very potent power, which can be used to great mischief or great service, depending on the specific litigious and overall political context. To decline to give stay against demolition of twenty thousand hutments of pavement dwellers one day may mean bulldozing of their lives and livelihoods; and to grant a stay the next time round would be to allow them to continue to cheat their way to survival. To allow governments to transfer incorruptible officials in favour of more 'pliable' ones by refusing stay might cancel all the possible gains of upholding on 'merits' after some years their plea against transfer. In the meantime, effective enforcement of legislation (say, land reforms) beneficial to the masses may be suspended by the *de facto* placement of a corrupt official. The examples can be multiplied. The fact remains – a decision to exercise judicial power to favour or restrain redistribution is made when stays are allowed or disallowed. The decision, howsoever masked in terms of 'balance or convenience' and related 'tests', is ultimately grounded in some political choice, favouring either status quo or redistribution. Undoubtedly, this is an important power, especially in countries like India where population explosion seems not unrelated to docket explosion (Baxi, 1982; Dhavan, 1978). It is the Indian experience, at least, that justices cannot be hurried, based perhaps on the maxim 'Justices hurried are justices buried'!

Powers of 'suggestive' jurisprudence often result in compromise, settlement, abandonment of a case or evolution of jurisprudence *ex concessionis*. Justices have ways of communicating to counsel, in a variety of explicit and implicit ways, the anticipations they have of how the case might be decided by them, and good counsel decide often accordingly. This is not an insignificant power at all. The career of an important constitutional conception or an elaboration of a doctrine could be aborted by, for example, proceeding on the basis that the so-called ratio of a case is what counsel for the instant case agree it to be (as partly happened in the *Indira Nehru Gandhi* v. *Raj Narain* in regard to the 'ratio' of the basic structure in *Kesvananda Bharati*: see Baxi, 1978). The same result, more or less, might ensue when a case is withdrawn on the basis of compromise, led by justices. Once again it needs saying that suggestive jurisprudence is not in itself good or bad; but its possible uses and abuses do need attention.

It is not to be assumed, at least in India, that upon the completion of the hearing on merits a reasoned judgement will follow in reasonable time. In the Supreme Court of India, judgements take a long time to come; unaccountably, they are held up by some justices for months and years together. Sometimes, orders are given but reasons deferred, and these are delivered after long lapses of time. The time-context in which a judgement is rendered is often charged with political or social significance, and unreasonable delay, planned or inadvertent, affects the course of public opinion and social action on the issues involved.

Much the same can be said concerning the powers of courts to review their own decisions. For example, following the 'Open Letter to the Chief Justice of India' (see Baxi *et al.*, 1979), national women's organizations insisted that the Court review its verdict of acquittal in that rape case. The review was actually taken in hand after about two years and quietly dismissed. The power and procedure for review of its own judgements by the Supreme Court of India are subject to no specific discipline and accountability; almost all is left to the 'good sense' and power of the deciding justice.

This rapid review does suggest that the 'executive' powers of appellate justices are as important as their law-making powers and, importantly, there appears to be an even greater degree of unaccountability in their exercise of the executive powers. For example, by the fairness standards the Supreme Court of India has itself developed, concerning the exercise of administrative judicial powers (see Baxi, 1982), many of these powers are too wide and confer uncanalized discretion and their actual exercise violates many of the fairness requirements! *Quis custodiet ipsos custodes?*

Discussion on judicial activism has hitherto focused merely on the exercise of judicial lawmaking powers. But 'activism' also has an important role to play in the exercise of judicial executive/administrative powers discussed in the preceding paragraphs. In each of the seven categories identified by us (and there indeed might be some more still to be identified), judges have the choice of exercising their powers militantly in favour of constitutional values or of behaving merely in a bureaucratic manner, looking at issues presented before them strictly as routine managerial tasks. One would expect that an activist justice will be inclined to take the former view in exercise of executive powers as she is inclined to do in exercise of her judicial legislative powers. But this correlation has to be empirically established. There might also be dissonance in judicial behaviour in these two realms.

II

'Activism' is one word, but does not have one meaning for all those who use the term. An activist judge, to my mind, is a judge who is aware that she wields enormous executive and legislative power in her role as a judge and that this power and discretion have to be used militantly for the promotion of constitutional values. Such a judge realises that the legal system is, to some extent or other, relatively autonomous both from the economy and the polity and that this autonomy is a function of the very nature of the coalitions of the ruling class which have acquired the powers of national governance.

An activist judge knows that the constitutional value proclamations are an aspect of the ideology-maintenance apparatus of the state and are designed

to enhance or reinforce the legitimacy of the ruling classes. By the same token, such a judge also knows that the ruling class is divided in its pursuit of constitutional values, since an authentic pursuit of these values will bring about a change in the very class character of the state. Elaboration of constitutional values by justices assists the process of legitimation of the ruling classes; at the same time, it tends to expose them to new demands, new uncertainties, new sources of discontent and fresh challenges to their legitimacy. The dual character of judicial elaboration is always pre-eminent to the mind of activist justices and that itself is the source of strength and legitimacy of judicial activism. An activist judge is thus one who has developed a heightened political consciousness concerning the structure of her society and the nature of transformation processes. The scope of her activism depends on how the ruling groups perform through the ensemble of state institutions. In what follows, we look at this aspect a bit closely.

If the legislature is in effect discharging its job of legislating, the scope for judicial legislation is constricted, and vice versa. let us take some concrete examples from the domain of relations between labour and capital in India. Parliament did not legislate on the legality of the scope of the contract labour system; the Supreme Court in 1960 laid down conditions under which contract labour is legally and constitutionally permissible. It is this decision which led Parliament to enact the Contract Labour (Regulation and Abolition) Act, 1962.[1] Similarly, when owners ask for voluntary winding-up of a company, the workers have no standing under the Companies Act even to contest the petition. Suggestions have not been lacking for the reform of this excessively pro-capital legislation. At last in 1982, some activist justices of the Supreme Court held that labour is not just a marketable, vendible commodity, but rather an equal partner with capital and changed the law to require that workers be heard.[2] Similarly, the Supreme Court radically redefined the concept of 'industry' under the Industrial Disputes Act, finding that Parliament had been inactive for over

1 Standard Vacuum Refining Co. of India Ltd. v. Their Workmen (1960) II Labour Laws J. 233, S.C.

2 National Textile Workers Union v. Ramkrishnan (1983) 2 S.C.C. (Supreme Court Cases) 248.

two decades and it had not altered the definition which was unclear and misleading in the first place.[3]

In other words, an activist judge will consider herself perfectly justified in resorting to lawmaking power when the legislature just doesn't bother to legislate. Whatever may be said in the First World concerning this king of lawmaking by judges (see Dworkin, 1977; Ely, 1982), it is clear that in almost all countries of the Third World such judicial initiatives are both necessary and desirable. At least in the Indian experience, it does not appear that legislators have resented much the judicial takeover of their burdens, since it liberates them to attend to other tasks of *realpolitik.*

There are other kinds of situations in which a legislature of a multi-ethnic society acts, but is often acts in such a way as to preserve anti-constitutional traditions and practices of a minority group. For example, while amending the provisions of the Indian Criminal Procedure Code relating to maintenance, Muslim spouses were excluded, not because the system of *mahr* was considered to ensure adequate maintenance to Muslim women but because the ruling coalition apprehended alienation of Muslim male-dominated constituencies. Justice Krishna Iyer valiantly reinterpreted the relevant provisions to apply to Muslim women, thus daringly reversing the exclusion specifically desired by the legislature.

An activist judge would also legislate to protect and preserve the human rights of ethnic minorities guaranteed by the Constitution. The Indian Supreme Court, for example, has devised (primarily through the medium of P.N. Bhagwati) a unique form of epistolary jurisdiction through which public citizens or groups can activate the Court on account of violation of fundamental rights of ethnic and other minorities in Indian society. Any citizen may now activate the Court by means of a letter which is treated as a writ petition: the traditional law relating to *locus standi* has thus undergone cataclysmic innovation. What is more, the Court has devised an unusual procedure for investigating facts relating to torture, terror, extra-judicial executions, deprivations and denials of rights, and gross abuses of power. It now appoints citizens' commissions of enquiry

3 *See* Bangalore Water Supply Sewerage Board v. Rajappa (1978) I Lab. L.J. 349.

whose reports are held to establish facts sufficient for the purposes of judicial action (see Baxi, 1983 for a detailed account and analysis). In this process of developing social action litigation, the Court has fundamentally transformed, among other provisions, Article 21 guaranteeing life and personal liberty into a source of inexhaustible new rights and procedures for the victims of governmental lawlessness.

The responsibility for effective execution of legislative mandates expressed through statutes rests clearly upon the executive. If the executive defaults on its legal and constitutional obligations however, courts and judges cannot for too long take a view that violations of rights involved in such defaults are no concern of theirs. If the duly authorised constitutional officers do not appoint judges in time, creating a situation of massive arrears, whatever be the inherited law and wisdom about mandamus, an activist justice may feel justified in issuing directions to them to do their jobs expeditiously. If there are large numbers of undertrial prisoners, not brought to trial for a long time, such a judge might feel more than justified in ordering expeditious trials or their release. If conditions in jails are inhuman and debasing, such a judge may order creation of minimum facilities. If officers under the Contract Labour Act are not doing their duties, or if the relevant Committees under the Bonded Labour or Equal Remuneration Acts are not established, such a judge might order compliance with the statute. India has many laws, including constitutional amendments, which the executive has been authorised to bring into force but which it simply refuses to do. Even the activist justices refused to direct the executive to bring these into force; but their hesitation is a matter of surprise, looking at their otherwise unblemished activist record.

When an activist judge finds that directions given to the executive are not fulfilled, she has three choices:

(i) to struggle ahead with the effective exercise of contempt powers;
(ii) to stage a mini-takeover of the concerned department or the institution or
(iii) to accept defeat with grace.

In the Indian experience, alternatives (i) and (iii) have not been as yet resorted to, although governmental intransigence is now manifest over certain matters. Instead, the Supreme Court has been able to stage mini-takeovers, especially of custodial institutions such as jails or remand homes. In the Agra Women's Protective Home case, for example, the Supreme Court has ordered compliance with creation of additional sanitary facilities, supervised medical treatment of inmates, and regularly (over the past two years) supervised discharges from the Home.[4] In the Bihar undertrial cases (see Baxi, 1980), the Supreme Court has monitored thousands of entries in jail records to ensure that no undertrial languishes in courts and, as a result of its labours, arrived at such an understanding of the problem as to direct an annual census of all prisoners toe submitted to the Court. In the Bihar blindings case the Court ha supervised medical treatment and rehabilitation programmes, even as the principal hearings on merits are under way. All these furnish outstanding examples of uses of interlocutory jurisdiction; the Court thereby acquires 'creeping jurisdiction' over State institutions hostile to the citizen's basic rights.

Obviously, an activist judge or an activist court soon confronts problems of 'coping'. Daily administrative vigilance or overall policy oversight is simply not possible for any Apex Court in the world. Some activist justices have had, therefore, to fashion substitutes to do these jobs for the Court on a delegation basis. In addition to co-opting the High Courts and District Courts for these functions, the Court through its activist justices has also begun making use of state legal aid boards and other social action groups. The issues of institutional competence are imposing in the extreme when stated at a scholarly level (Horowitz, 1979).

The Indian experience so far shows that the question is not so much one of lack of competence in the Supreme Court but rather of its wider and sustained diffusion throughout the entire judicial system. Indeed, the Indian experience shows that judicial activism can be contagious. The initial reservations, conflicts and tensions, inevitable when some activist justices designed a continental shift in the Court's concerns and profile, have now given place to understanding and even enthusiasm for social

4 *See* Dr. Upendra Baxi v. State of U.P. (1983) 2 S.C.C. 308.

tion litigation. What was formerly insurrectionary jurisprudence has now become a part of the institutional culture of the Court. Of course, not all justices like the characteristic features marking the birth and growth of judicial activism, especially through social action litigation. Many continue to worry about the future roles of the Court were unrestrained activism to guide most of its actions. For the moment however, the Court has developed far-reaching communication constituencies and has innovated in both juristic and judicial activism.[5] Through all this, it has acquired enormous political legitimation.

An activist judge will also be inclined to use *suo moto* powers when she deems it necessary. The use of *suo moto* powers is not widely prevalent even in India, the home of epistolary jurisdiction, but Justice M.P. Thakkar, now Supreme Court Justice, resorted to this power frequently to achieve justice. He has on one occasion acted on newspaper reports of injustice or atrocities, by taking jurisdiction, with telling effects. Usually, *suo moto* interventions are directed to check a continuing abuse of power by the executive. The most justified case for the exercise of *suo moto* powers exists whenever there is an allegation of atrocity or torture in police custody or jail, because both these institutional processes fall within the direct oversight of the judiciary. Such allegations are prima facie allegations concerning violation of basic human rights; and people are committed to fails only through Court directions. Even when they are not in prison through Court directions, the Court's jurisdiction should extend to them. For example, an activist judge, were she located in Sri Lanka during the recent prison massacres, would not have to summon up too much courage to start *suo moto* enquiries. Such a judge would find jurisdiction over the prison staff and prisoners incarcerated on conviction who were allegedly responsible for this brutal violence.

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5 For the distinction between *juristic* and *judicial* activism see U. Baxi (ed.), Introduction to K.K. Mathew on Democracy, Equality and Freedom, Lucknow, Eastern Book Co., 1978.