

ON BEING AN 'ACTIVIST' JUDGE NOT JUST AN 'ACTIVE' ONE!

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A. Introduction

It is a great privilege and honor for me to be invited to this historic conference.

But for the cordial and generous persistence on the part of Judge Sandra Oxner, I may not have had this privilege of presence and participation. My response to her invitation was chaotic and uncertain and she was generous to a fault. I thank her.

I come with a passport which is visa-hungry! If Vivienne Chin had not used her good offices with the South African High Commission in London, I would have had to abandon this visit. (For some strange reason, not only do Indian passports require a visa but it takes ten weeks, even from London!).

It is a great privilege to be in South Africa. South Africa is a site of new forms of constitutionalism, in the late twentieth century just as the Indian constitution was in the middle of it.

But the Indian constitution inaugurated a divide between civil and political rights which were justiciable and social and economic rights enshrined as directive principle of state policy, subject to regimes of progressive realisation, by act of executive and legislative policy.

It is sad but true that it is this differentiation which became writ large in the International Bill of Human Rights. The social, economic and cultural rights remain subject to "progressive realisation".

It is a happy augury that activist Indian adjudicators are now keen on making directive principles of state policy judicially enforceable.

In contrast, South African constitutionalism rests on indivisibility of civil and political and social, economic and cultural rights. This is a remarkable feat and summons South African Magistrates and Judges to be the architects of a new social order. A passive role of being judicial bureaucrats is not open to them.

Indian adjudicators took nearly fifty years to reach democratisation of access to justice and they accomplished this by social action litigation [still miscalled by Americanised Indians as "Public Interest Litigation"]; in contrast, standing stands radically liberalised (as already emphasised by Justice Langa) in Article 38 of the South African Constitution.

In many a sense, the South African constitution is not *just* a constitution but it is a *just* one. Adjudication, as a form of democratic power, stands tinged with incredible popular expectations. Magistrates and Judges are expected not just to use their power wisely and well; they are also expected to accelerate the pace of historic transformation in state and civil society.

Thus far, these expectations have been rightly fulfilled. Just around the time when the United States was feebly defending, before the United Nations Human Rights committee, on the ground of federalism, death penalty for juveniles the Constitutional Court unanimously outlawed capital punishment.

The creative role of the court is also writ large in the decision on certification of the new text of the Constitution. Most crucially, while interpreting Article 8(2) extending to juristic persons, as far as applicable, the Bill of Constitutional Rights, the Constitutional Court germinally left open the question of whether corporations will remain endowed with all the basic rights conferred on citizens. In this mindless era of free markets, economic liberalisation, and globalisation, the Constitutional Court has created a scope for activist contention around the emergent *paradigm of trade-related, market friendly human rights* of national and multinational capital.

This foundational jurisprudence renders, in comparison, *Marbury v Madison* a pale and anaemic achievement.

It is a great privilege for me to be here amidst the Commonwealth of Adjudication.

I do not bear the burdens of judging in a very complex world. And, perhaps, the world is a better place for that reason!

But I have, as a law teacher, disciplinary burdens of my own – of relating your good, and occasionally great, work to the visions of the future of the law and the law of the future.

My job entails teaching generations of students about the nature of adjudication and its social impact. And I do so by recalling Karl Llewellyn (the founder of American legal realism) who used to say:

Do not look at what the judges say but look at what they do with what they say.

Judges often do what they do not say and often, too, say what they do not actually do! Some judges are juristically active, not judicially; that is, they deploy reasoning – in the hope that it speaks to future – which does not apply to the result!

Being a judge of judges, believe me, is no less a complex task than your daily acts and feats of adjudication.

By now you have some measure of modesty! But for the first act of immodesty I unreservedly apologise. It is embarrassing to find that my entry in the speakers' list should have been so large. Do please read it as confessional statement of how I have mismanaged my time and life!

I have promised the chair not to exceed twenty minutes; this period beings, of course, now!

B. AN ACTIVE JUDGE

May I begin by raising a simple question? How may we distinguish between an *active judge* and an *activist one*?

By definition, judges must be active and appear to be so. They must exercise the power of the state and law to the conflicts, contentions and parties before them. By definition, no judge may refuse to decide and yet be a judge!

All this is obvious. But as Justice Oliver Wendell Holmes Jr. [Often difficult to distinguish from my hypothetical judge Mr Justice Sherlock Holmes!] what we all need from time to time is the *education in the obvious!*

It is obvious that an *active* judge is not an *activist* one.

To put it too summarily but still accurately, an active judge is a servant of political power; an activist judge is a servant of peoples' rights and entitlements. The latter holds the power of adjudication in trust for the people; the former stands in fiduciary relationship only to a political regime.

An active judge is bound by five commandments, as follows:

1. *Thou shall forever defer to the executive.*
2. *Thou shall never make law or policy.*
3. *Thou shall never seek to govern*
4. *Thou shall endeavour, as far as possible, to serve the structures of patriarchy*
5. *Thou shall never question but always endorse the political regimes' definitions of 'security' and 'development.'*

Judges, on this conception, ought to be active in perceiving themselves as part of the political regime, as apparatuses of governance. They must never:

- breach the *culture of deference to the elected executive*
- even seek to be [to borrow Ronald Dworkin's distinction] *deputy legislators* but remain content with the role of being *deputies to legislators*
- always leave to the executive the hegemony of deciding what is public interest or policy
- seek to administer legal institutions [such as prisons, juvenile homes, detention centres, women's remand homes] even when these are run, incorrigibly, in violation of constitutional and international human rights standards
- question the legitimacy / legality of security legislation and overreach, through preventive detention jurisprudence, the state determination of procedure and duration of preventive detention
- question developmental decisions at the bar of bill of rights [such as mega-dams, civilian uses of nuclear energy, or location of ultra-hazardous industries in high population density areas] question the *three 'Ds' of globalisation [economic liberalisation or structural adjustment programmes]: namely, Deregulation, Denationalisation and Disinvestment.*

All this constitutes *good sense* for the holders of public power. It also constitutes *misfortune* for those governed.

Justice Langa has addressed the theme of bridging the gap between law and justice. It remains for me to add a footnote.

Justice may not preserved without preserving at the same time a *sense of injustice*. But that sense is only active when people are able or enabled to make a distinction between *injustice* on the one hand and *misfortune* on the other. [I commend very warmly a meditation on this by Professor Judith Sklar *The Faces of Injustice*, 1990, Yale Univ. Press.]

An active judge constantly blunts the distinction between the two. She educates people into believing, though acts of adjudication in good times as well as bad, that *power is providence*, that the

law is a form of *fate*. Nothing can be more complicit with the political regime than this; nothing also blunts the haunting edge of distinction between injustice and misfortune. An active judge renders adjudication into an institution of *disarticulation*, and *disempowerment* of those subject to law. For, while one may seek to struggle against injustice, misfortune is that which one must learn to bear.

C. AN ACTIVIST JUDGE

An activist judge comes into being when she *chooses* to conscientiously disregard the Five Commandments. The qualifier is important. The aspect of conscientiousness is concerned with the source of legitimation of judicial power. An activist judge does not look always to legitimation from the holders of executive power or of economic power; she rather looks to social legitimation from the deprived, the disadvantaged and the dispossessed groups of society. And that choice is critical. Once made, such judges remain activist during the moment of rule of law as well that of the *reign of terror*. And it is the articulation of the grounds of this conscientious choice which enables one to distinguish mere *judicial adventurism* from authentic *judicial activism*.

In the very short time I now have I can only illustrate how activist judges articulate their conscientious choice. They do so in a dialogical mode by:

- questioning with St. Augustine: *What is state without justice if not a band of robbers?*
- Allowing contestation, in the name of human rights and human justice, over the executive's claim of governmental monopoly over the conceptions of the public interest or the public good
- seeking to engender *judicial power and process*
- refusing narrower constructions of basic rights in actual interpretive choices
- remaining at all times aware to the overwhelming power of the state and modulating the norms of the culture of deference in terms of the history of *official deviance* and *governmental lawlessness*
- remaining anxious concerning the claims to ever-expanding regimes of human rights by formations of global capital and technology [in particular the multinational corporations] as the South African constitutional court has so valiantly done in the Certification Case in keeping open to future determination the issue of the enjoyment of all rights in the Bill of Rights by *juridical persons* under Article 8 (2.)
- seeking to limit runaway exercise of the power to amend the constitution [as the inaugural discourse by the Indian Supreme Court in *Kesavananda Bharati* accomplished through the doctrine of the basic structure, followed by similar developments in Pakistan, Bangla Desh, Nepal]

D. A BRIEF EXCURSUS INTO SAL

All this, and perhaps more has been achieved by the exertions of some Indian activist justices. Their legacy has been the institutionalisation of what I insist in naming as *social action litigation* [SAL] in contrast to the American-style *public interest litigation* [for reasons elaborated elsewhere.]

That much of SAL accomplishment may have entailed effective collaboration between long-haired, pipe-smoking, sartorially inelegant Professors of law [how modest can one *really be*?] is another story.

But SAL has accomplished six things:

- an active solicitude for human rights in the administration of criminal justice
- inscription of social and economic rights [from the part IV of the Constitution : Directive Principles of State Policy] on Part 111 [judicially enforceable fundamental rights]
- inauguration of jurisprudence converting basic *human* needs into basic *human* rights

- engendering constitutionalism [slowly but surely Indian adjudication is taking seriously the maxim "Women's' rights are Human Rights". In *Visakaha v. Rajasthan* the Supreme Court independence, formulated a *national legislation on sexual harassment at workplace* and ruled that it shall be the binding law on state and society until Parliament enacts a law.]
- moulding a jurisprudence of sustainable development by reading a whole regime of environmentally related rights in Part 111 rights to life and liberty [under which the courts are actively seized with SAL challenges to mega-dams, large power projects and ultrahazardous manufacture.]
- attaining maximal transparency in governance by sculpting a most fundamental of all fundamental rights: *the collective right of the people to immunity from corruption in high places* [the Supreme Court of India has notably achieved this by the device of *continuing mandamus*, subjecting the Central Bureau of Investigation, normally accountable only to the Union Government to constant duties of reportage and explanation of the direction and pace of investigation and prosecution and even preventing the transfer, at times, of competent officials in charge of investigation of the political stars in the Indian firmament!]

E. CONCLUSION

It is only the received wisdom which makes *problematic* the notion of activist *justicing* [for judging is almost always a collective act and even when it is a solo performance it occurs within the ethos of institutionality.]

That received wisdom emanates from the notion that there is a *universal / cross-cultural theory of judicial process, power and role*. Those who build such 'theory' only invoke the American British or European experience. From Benjamin Cardozo to Ronald Dworkin what is presented as a *prescriptive theory* of judicial role is summatable in one sentence: *The West still knows the best!*

I am putting the matter so sharply as I have reached the end of my allotted time! And the chair beckons me to my seat, ever so graciously! But I hope that somehow the point is made that we need to pluralise theories about judicial role.

The Western prescriptive theory is one among the many approaches to judicial activism and its legitimacy. But in much more difficult, neo-colonial and postcolonial milieux judges at their work have shown the futility of raising questions concerning the legitimacy of judicial review and its anti-majoritarian character. Perhaps, it is time that we listened more closely to their voices rather than rehearse the same tiresome phrases about the nature of judicial role that valorise *mimesis* and marginalize the *creativity of the Other*.