

ON THE PROBLEMATIC DISTINCTION BETWEEN "LEGISLATION" AND "ADJUDICATION": A FORGOTTEN ASPECT OF DOMINANCE*

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I

THE LAW—as an ideology and as an ensemble of institutions - has featured preeminently in the mainstream theorizing concerning the nature, and changing forms, of the state, both in the liberal and marxian traditions of analysis. Indeed, a characteristic feature distinguishing the state from any other social ordering has been expressed in terms of the legal monopoly of force by the state; the notion of "law" is thus central to thinking about the state. It has been a prime cultural and civilizational, function of the law to reiterate and reincarnate the boundaries between the permissible and proscribed uses of force. The critical role of legal norms in the complex organization of the internal powers of state is also recognized in theorizing, and in actual practice, of the capitalist and in actually existing socialist societies.

Indeed, a major question concerning the nature of state and law (which has fertilized most recent theorizing on capital and state) was acutely formulated by E.B. Pashukanis when he asked:

Why does the dominance of a class not continue that to be that which it is—that is to say, subordination in fact of one part of the population by another part? Why does it take on the form of official state domination? Or, which is the same thing, why is the mechanism of state constraint created as a private mechanism of the dominant class—taking the form of the impersonal mechanism of public authority isolated from society?¹

His own answer to this question that the legal form of *Rechtsstaat* is required by the nature of the bourgeois social relations, entailing a close analysis of the homology between the commodity form and the legal form,² has in turn generated many varied elaborations of linkages between the state as an "ideal collective" capitalist and the nature and forms of law in capitalist societies.³

But in most of this state theorizing (which at times becomes state and law theorizing) the "law" appears as an undifferentiated category, encompassing legislation, administration, adjudication and enforcement. The distinctive charac-

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1. E.B. Pashukanis, *Law and Marxism: A General Theory* 139 (1968).

2. Isaac D. Ballbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy of the Law'", 11 *Law & Society Rev.* 571 (1977).

3. For a recent analysis of writings on commodity circulation, law and state, see B. Jessop, *The Capitalist State* 84-101 (1982); J. Holloway & S. Picciotto *et al.* (eds.), *State and Capital: A Marxist Debate* (1978); U. Baxi, *Marx, Law and Justice- Indian Perspectives* (1990, in press).

teristics of these domains of law, so familiar to the lawpersons, tend to be totally ignored. The form and function of the state is perhaps understood but at the cost of encapsulating the forms of law. Thus, for example, Poulantzas attributes to the legal and ideological structures the "effect of isolation." Agents of production are distributed "in social classes as juridico-ideological subjects" who actually experience "specific fragmentation and atomization".⁴ Individuation through the system of juridical norms thus helps to conceal from the agents "in a particular way that the fact that their relations are class relations"⁵ and the state also appears to perform the function of representing the "unity of isolated relations."⁶ the reference to normative legal order causing this effect of isolation, of course, cannot only signify legislation; the effect of isolation must be seen as a joint product of legislation, administration, adjudication and enforcement. The interesting and intriguing way in which these different domains of the law collaborate or compete to continuously produce and reproduce this pertinent effect does not constitute a part of the problematic for Poulantzas.

Similarly, we constantly come across the notion of the centralized unity of state power in state theorizing. However, its existence and development may be sought to be explained, the assumption of such unity seems to be an ineluctable feature of marxian theoretical approaches to state power. And the locus of the centralized unity of state power often enough turns out to be the executive. The seeds of this tendency were, of course, sown in the much misleadingly misquoted aphorism in the *Communist Manifesto*: "The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie."⁷

From this standpoint, the doctrine of separation of powers, which features preeminently in the liberal discourse on the nature and forms of state as a critical variable, marking the differentiation of state power, appears "above all, a political problem of relation of forces, not a juridical problem concerning the legality and its spheres." As Louis Althusser has reminded us, Montesquieu himself meant by the notion of separation of powers "no more than the calculated division of *puvoir* between determinate *puissances*."⁸ And when one asks of the doctrine of separation of powers the question: "To whose advantage does this division work?", one begins to decipher the class domination legitimated by this doctrine,⁹ which otherwise powerfully projects the ideology of a multi-centred, pluralist state, mediating conflicting social interests.

The very notion of separation of powers is said to presuppose a unity of state power, of which it represents delegation or division among various domains.

4. N. Poulantzas, *Political Power and Social Classes* 130 (Verso ed., 1975).

5. *Id.* at 130, 132.

6. *Id.* at 132-33.

7. K. Marx and F. Engels, "The Common Manifesto of the Communist Party" in 1 *Selected Works of Karl Marx and Frederick Engels* 110-11 (1969). Note the emphasis not merely on the "executive" but also on the "common affairs of the whole bourgeoisie".

8. L. Althusser, *Montesquieu, Rousseau, Marx: Politics and History* 91 (Verso Ed., 1982)

9. *Id.* at 91-92.

Poulantzas, for example, maintains that the separation of powers is more appropriately viewed as division of functions; such separation or division constitutes merely "the index of the internal relations of *subordination* by delegation of power, of the various state 'powers' to this dominant 'power' which constitutes the principle of unity of state power."¹⁰ Typically, the "nodal point where the unitary institutionalized state power is concentrated within the complex state organization"¹¹ is often enough identified with the executive, and in rare instances with the legislature. There is not a single theoretical analysis which identifies this nodal point in adjudication. The quest for understanding the state has invariably focussed on the composition and decomposition of the executive power, which liberal jurists comprehend to be the power to initiate and implement policies affecting the community and which most state theorists characterize simply as the totality of state powers. It is, therefore, not surprising at all that adjudication does not feature at all in the landscape of state theorizing.

Perhaps one may seek partially to explain this in the light of the fact in most societies of Western Europe, adjudication has a subordinate role compared with legislation and administration. Indeed, Montesquieu went so far as to describe judicial power as being "in some measure, next to nothing" and judges as merely a "sight and a sound", providing some sort of animation to the codes.¹² Of course, adjudication is not to be demoted to such a nondescript status in theory or practice of state; judicial creativity - in the sense of adjusting the text of the law to the context of capitalist development - has been a striking feature of both the civil law and common law traditions.¹³ But the civil law systems are not conspicuously endowed with judicial review powers, that is powers in constitutional courts to invalidate legislations. No doubt, West Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) and Italy's *Cort Costituzionale* furnish in recent experience significant exceptions. But, overall, there is not much scope for judicial activism—that is, such exercise of judicial power as may generate a recodification of power relations among the dominant institutions of governance¹⁴—in the organization of adjudication as an internal aspect of power structure of the state.

The attribution of a secondary status to adjudication is, however, not only confined to the civil law tradition. In the common law orbit too, the jurisprudential ideologies have inclined predominantly to the view that adjudication merely consists in the application of the law enunciated by the legislature and that judges declare the law but do not make it. In England where codification did not reach, and which evolved almost all its basic principles and doctrines due to judicial creativity, (the common law was nothing but the law made by the judges unaided by the legislatures to meet the needs of expanding capitalism)¹⁵ the Great Blackstonian Lie

10. Poulantzas, *supra* note 4 at 303.

11. Quoted in L. Althusser, *supra* note 8 at 90.

12. See G. Erosi, *Comparative Civil (Private) Law : Law Types, Law Groups, The Roads of Legal Development* (1979).

13. For this conception of judicial activism, see U. Baxi, *Courage, Craft and Contentions: The Indian Supreme Court in mid-Eighties* 2-20 (1985).

14. David M. Trubek, "Max Weber on Law and the Rise of Capitalism", *Wisconsin L.Rev.* 720 (1972).

still persists that judges do not make law; what is more, judges and everybody else are asked to believe this unquestioningly. In a sense, this assertion assists the ideology of parliamentary sovereignty, which in real terms means the supremacy of the executive. In the United States where a written Constitution provides for judicial review of executive and legislative action and where the American Supreme Court has at times been significantly activist (in the sense given above), persistent questioning concerning the legitimacy and democraticity of judicial review has become the standard feature of political and jurisprudential discourse.¹⁵ In other words, judges are constantly asked to observe judicial restraint and maintain institutional comity with other organs of the state and are reminded of their true role of expositors of the Constitution and the law.

In other words, there seems to be a persistent tendency, whether in the liberal or marxian variants of political thought, to regard "adjudication" as distinct from "legislation" and subordinate to it. In the current theorizing on the state, the real bases for comprehending this tendency are not readily available. In what follows the difficulties in cogent articulation of this tendency in jurisprudential discourse is explored. Typically in that discourse, the question of the role and limit of judicial power is articulated, more or less, through the questions: Do judges "make" law? And if they actually do, *ought* they do so?

II

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 as 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.¹⁶

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 focussed 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 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

15. See e.g. literature cited in J. Stone, *Social Dimensions of Law and Justice* 656-96 (1966); Ely, *Democracy and Distrust* (1980).

16. H. Kelsen, *General Theory of Law and State* (1961).

also a prescriptive theory of evaluation of judicial role.

One general answer is that in making choices judges ought to follow 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. But even so, as Ronald Dworkin has felicitously put it, when "... 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."¹⁷

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...."¹⁸

Or, further still, one may envisage the judicial role essentially as a bureaucratic role. In this view, governmental institutions appear 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."¹⁹ Prescriptively put, the sole expectation here is that when carrying out legislative instructions requires filling of gaps, judges ought to go about

17. R. Dworkin, *Taking Rights Seriously* (1977).

18. J. Stone, *Legal Systems and Lawyers' Reasonings* 113 (1964).

19. R. Dhavan, *Judicial Decision-making* (1979, mimeo., University of Delhi Law Faculty Lectures).

their tasks as intelligent bureaucrats seeking to emulate what their superior would have done were she (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 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. 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."²⁰ 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), 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 bureaucrats 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;"²¹
- (v) judges ought also to recognize that in hard or determinate cases, problems of discretion arise whenever the applicable precepts provide not one but several choices;
- (vi) judges ought, even in hard cases, to have 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

20. J. Stone, *supra* note 15 at 687 (emphasis added).

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

and even wisely; in other words, they must follow the canon of self-restraint.

III

So far, so good. But how does one 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 presupposes 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 Ronald 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,²² 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 discourse.

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. A typical instance is of polycentricity provided by the situation calling for decision to commence a nuclear power plant.

Of course, Fuller is not saying that courts are necessarily incompetent to adjudicate 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

22. For reasons elaborated in U. Baxi, *supra* note 13.

ought not to happen.²³

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. 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").²⁴

Ronald Dworkin has over the past fifteen 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. 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."²⁵ 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 are always to be found in the 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."²⁶

Decisions based on principle protect individual or group rights; decisions based on policy advance community goals. If a judge is conscientious, she would

always be able to ground her decision even in a hard case on some principle protecting group or individual rights. She ought only to justify her 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."

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.

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."²⁷ 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 authoritative standards which he is bound to apply."²⁸ He elaborates this point thus:

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

27. R. Dworkin, "Is Law a System of Rules?" in R. Summers (ed.), *Essays in Legal Philosophy* 35 (1968).

28. R. Sartorius, "Social Philosophy and Judicial Legislation", 8 *Am. Philosophical Qly.* 151 (1971).

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

24. J. Stone, *supra* note 15 at 655.

25. R. Dworkin, *supra* note 17 at 82-85.

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

own personal scheme of values...It 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.²⁹

However, well intentioned, this kind of prescription for judicial role is indeed vacuous. What does the 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? How should judges articulate such coherence?

IV

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 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."³⁰

Unless a coherent theory satisfactorily preempting creative role for judges is available, it seems 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 unenvisioned 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.³¹

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."³²

V

More recently, Dworkin has argued, that we bid farewell to the "ancient question whether judges find or invent law."³³ Rather, "jurisprudence and

29. *Id.* at 156-59.

30. D. Lloyd, *Introduction to Jurisprudence* 848-49 (4th ed., 1979).

31. H.L.A. Hart, *The Concept of Law* (1961).

32. *Id.* at 200.

33. R. Dworkin, *The Law's Empire* 225 (1986).

adjudication" stand united by the principle of law as integrity which insists that adjudication "is different from legislation, not in some single, univocal way, but as the complicated consequence of the dominance of that principle."³⁴ Law as integrity is a complex and rich conception, deserving a fully-fledged analysis: we here ambush it momentarily in our search for a coherent discourse on adjudication. *The Law's Empire* seems to offer us a fresh start in this direction by illuminating the "complicated consequence of the dominance" of integrity in adjudication which marks it off from legislation.

In this conception, judges are no longer deputies to legislators. Rather, the courts emerge as "the capitals of law's empire" and "judges are its princes."³⁵ Integrity which elevates adjudication thus consists of two political principles:

[A] legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible.³⁶

The principle of integrity is "attractive" for several reasons well stated by Dworkin.³⁷ He also concedes that neither the legislative nor the adjudicative principle of integrity is sovereign, for example, pursuit of justice may require sacrifices of integrity.³⁸ But, in real life, a "working political theory must be more relaxed"³⁹ as far the legislative principle of integrity is concerned; here, pursuit of "general strategies that promote the overall good as defined roughly and statistically..."⁴⁰ will have to do. Strategic decisions of this sort are matters of *policy*, not of *principle*; they

[M]ust be tested by asking whether they advance the overall goal, not whether they give each citizen what he is entitled to as individual.⁴¹

In contrast, the adjudicative principle of integrity emphasises matters of principle, the *principle* being that rights will be taken seriously, recognizing

[D]istinct individual rights as trumps over these decisions of policy, right that the government is required to respect case by case, decision by decision.⁴²

In a sense, we find rehearsed the same distinction as a mark of distinguishing legislation from adjudication which attract the same difficulties articulated in the preceding section of this paper.⁴³ What makes *The Law's Empire* distinctive is Dworkin's analysis of how the adjudicative principle of integrity ought to work in

34. *Id.* at 410.

35. *Id.* at 407.

36. *Id.* at 177.

37. *Id.* at 188-90.

38. *Id.* at 217-18.

39. *Id.* at 222.

40. *Ibid.*

41. *Id.* at 223.

42. *Ibid.*

43. The notion that rights do have a "trumping" feature has been rigorously ^{applied} ascribed by Allan Buchanan, "What's Special About Rights?" 2 *Social Philosophy & Policy* 61 (1984).

matters of principle. In this prescriptive framework, judges constitute an interpretive community; they "interpret contemporary legal practice as an unfolding political narrative."⁴⁴ Each judge must think of herself as "an author in the chain of common law." Each judge must think of the past judge's decision as "a part of the long story." She must now interpret and "then continue" according to her "best judgement of how to make the developing story as good as it can be."⁴⁵ A chain novel is a novel-in-progress, demanding both continuity and innovation in narration; and when several authors contribute a chapter each. Complex interpretive acts and standards of consistency (fit), totality and taste come into play. Like chain-novelists (for aesthetic reasons), judges too (for reasons of political and moral theory) have to embark an increasingly complex interpretation from "competitive rather than contradictory principles, that is, from principles that can live together in an overall moral or political theory though they sometimes pull in different directions."⁴⁶ The collective work of judges, respecting integrity, aspires to the construction of "a community of principle"⁴⁷ such that:

The imperatives of integrity always challenge today's law with the possibilities of tomorrow's, that every decision in a hard case is a vote for one of law's dreams.⁴⁸

Dworkin's endeavour to furnish, at the level of deep structure, affinities between legal and literary theory is exceedingly controversial.⁴⁹ But for the present purposes, we have to ask whether this mode of interpretation sufficiently distinguishes 'adjudication' from 'legislation'. Legislation can also be construed as narration in time of a society's search for a "community of principle." Constitutions and statutes recognize principles just as adjudication; in fact, the former furnish both a preinterpretive and postinterpretive context for adjudication.⁵⁰ And there is no inherent reason why legislators should not be considered with Dworkin (with all the infirmities of such an analogy)⁵¹ as collective authors of a chain novel. Further, as Dworkin himself concedes, that even when "all the discrete rules and other standards enacted by our legislatures" cannot be brought "under any single coherent scheme of principle" commitment to integrity demands that:

We must report this fact as a *defect*, not as the *desirable* result of a fair division of political power between different bodies of opinion....⁵²

Integrity still exerts its normative, ideal force on legislation, even though Dworkin has (as seen earlier) counselled a "more relaxed" political theory for judging political practices. Indeed, *The Law's Empire* ends with a clarion call that

44. R. Dworkin, *supra* note 33 at 225.

45. *Id.* at 238-39.

46. *Id.* at 241 (emphasis added).

47. *Id.* at 243.

48. *Id.* at 410.

49. S. Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism", R. Dworkin, "My Reply to Stanley Fish Please Don't Talk about Objectivity Any More" and W. Benn, "Is There a Politics of Interpretation?" in W.J.T. Mitchell (ed.), *The Politics of Interpretation* at 271, 287 and 335 respectively (1982).

50. R. Dworkin, *supra* note 33 at 65-68.

51. See *supra* note 49.

52. R. Dworkin, *supra* note 33 at 217 (emphasis added).

the law's constructive attitude aim "to lay principle over practice to show the best route to a better future, keeping the right faith with the past."⁵³ The 'law' here signifies both legislative and adjudicative law. All in all, the magnificent achievement of *The Law's Empire* falls short of the articulation of a coherent distinction between 'legislation' and 'adjudication.'

VI

The internal incoherence of bourgeois legal thought concerning the role of the judge and of adjudication in general is partly a result of the heritage of state theorizing which treats law undifferentially in relation to the state and puts all legal domains and powers under the shadow of the executive. In part, the confusion represents essentially the denial of even a relative autonomy of courts as a domain of the law, which is itself often thought of as having a relative autonomy of its own. The law has been identified as autonomous in terms of methodology, occupational culture, institutionally; it has features which render it at times even substantively autonomous.⁵⁴ The implicit denial of such autonomy to adjudication⁵⁵ must perform the ideological task of preventing adjudication from emerging as an arena for expression of class struggle, of articulation and accentuation of social contradictions through the legal order. That adjudication be a very powerful arena for such articulation has been dramatically, manifested in the recent experience of the Indian Supreme Court which through the social action litigation (miscalled public interest litigation) has begun its transformation from the Supreme Court of India to a Supreme Court for Indians.⁵⁶ In matters such as racial desegregation and legislative reapportionment and affirmative action, the American Supreme Court has also become an arena manifesting the relations of class struggle.⁵⁷ These examples point to an urgent need for a reexploration of the ideological functions of the doctrine of separation of powers and the inchoate distinction between "legislation" and "adjudication".

53. *Id.* at 413.

54. R.M. Unger, *Law in Modern Society* 53 (1976); D. Trubek, "Complexity and Contradiction in Legal Order: Balbus and the Challenge of Critical Social Thought About the Law", 11 *Law & Society Rev.* 529 (1971).

55. Even when considered as public officials, judges do not seem to strike as important public officials for the purposes of state theorizing. For the recent fascinating study of the relative autonomy of capitalist state, see E. Nordlinger, *The Relative Autonomy of the State* (1979).

56. U. Baxi, "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India", 8 & 9 *Del. L. Rev.* 91 (1979 & 1980) and its revised version, with the same title, in U. Baxi (ed.), *Law and Poverty: Critical Essays* 387 (1988).

57. D. Thelen, *Courts and Social Policy* (1970).