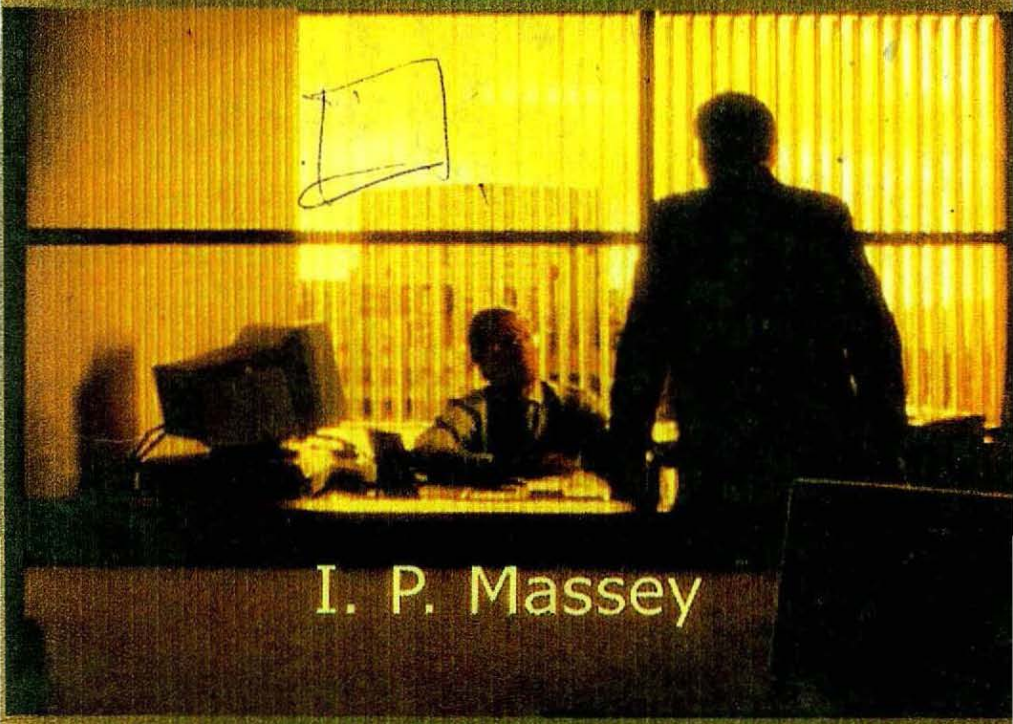
ADMINISTRATIVE LAW



I. P. Massey

Sixth Edition

EASTERN BOOK COMPANY

Administrative Law

Dr. I.P. Massey

LL.M.(Lko), LL.M.(Calif., Berkeley), Ph.D.
Former Professor and Chairman, Department of Law
and Dean, Faculty of Law
Himachal Pradesh University, Shimla
Member, State Legal Services Authority, (H.P.)
Ex-Member, State Human Rights Commission, (H.P.)
Ex-Fellow, Indian Institute of Advanced Study, Shimla

Foreword by
Hon'ble Mr. Justice P.N. Bhagwati
Formerly Chief Justice of India

With an Introduction by
Professor Upendra Baxi

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Ph. : (011) 23752321/22/23, Fax : (011) 23752320
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MANAV LAW HOUSE
8/10, M.G. Marg,
Opp. Bishop Johnson School,
Allahabad—211 001
Phone : (0532) 2560710
Fax : (0532) 2623584

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Administrative Law

CHIEF JUSTICE
OF
INDIA

FOREWORD TO SECOND EDITION

I am very glad that Dr. I.P. Massey has brought out a really useful book on Administrative Law. The concept of Administrative Law has assumed great importance in the last three decades and it has witnessed remarkable advances in recent times. It is a branch of law which is being increasingly developed to control abuse or misuse of Governmental power and keep the executives and its various instrumentalities and agencies within the limits of their power. The rule of law which runs like a golden thread through every provision of the Constitution and indisputably constitutes one of its basic features requires that every organ of the State must act within the confines of the powers conferred upon it by the Constitution and the law, and Administrative Law is that branch of the law which seeks to ensure observance of the rule of law.

We are at present living in a modern welfare State and its chief characteristics are : (*i*) a vast increase in the range and detail of government regulation of privately owned economic enterprise ; (*ii*) the direct furnishing of services by government to individual members of the community—the economic and social services as social security, low-cost housing, medical care, etc. ; (*iii*) increasing government ownership and operation of industries and businesses, which at an earlier time, were or would have been operated for profit by individuals or private corporations. In short, as pointed out by Friedmann in his well known book '*Law in a Changing Society*', the State performs five different functions and three out of these functions result from the activities of the State as Provider, as Enterpreneur and as Economic Controller.

In the welfare State, public power becomes an instrumentality for the achievement of purposes beyond the minimum objectives of internal order and national defence. It is not sufficient that the State be secure against internal disorder and external aggression; a state can be secure and well-ordered and yet lack the attribute of distributive justice. But as social justice becomes the conscious end of State policy as is the case in India under our Constitution, there is a vast and inevitable increase in the frequency with which ordinary citizens come into direct relationship with the wielders of

power. An ordinary citizen's significant encounter is not so much with the policeman or magistracy as with the officers representing regulatory authorities, dispensers of social services, managers of public sector undertakings, etc. It is this dramatically increased incidence of encounter that set the task of the rule of law in the welfare State. It should be the goal of rule of law to see that these multifarious and diverse encounters are fair, just and free from arbitrariness. This was precisely what was pointed out by me speaking on behalf of the Supreme Court in the *International Airport Authority case*[1] : "Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise."

It is also an important factor which cannot be ignored that a modern Welfare State entails the conferment of discretionary powers on the administration to effectuate wide socio-economic goals. In any area of socio-economic regulation, discretionary power over valuable interests is perhaps inevitable. The theory that the legislature must delineate the policies and that administrators must have no discretion except to apply the legislative policies has to yield to the stark reality that legislatures cannot possibly anticipate and provide for all situations. As Aristotle said : "The generality of law falters before the specifics of life." Moreover, quite often, the legislation is skeletal, leaving many gaps and conferring powers on the administration to act in a way it deems "necessary" or "reasonable" or if it "is satisfied" or "is of opinion" and so on. The legislature often bestows more or less unqualified or uncontrolled discretion on the executive. Discretion is a tool for individualization of justice. The administration has to apply statutory provisions, which may be seemingly vague or indefinite, according to the fact situations as they arise with a view to effectuating legislative policy. As Davis has said : "All governments in history have been governments of laws and of men. Rules alone, untempered by discretion cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law." It therefore becomes necessary to confine structure and check discretion in order to uphold the principle of rule of law in administration. The judiciary has over

1. (1979) 3 SCC 489.

the years evolved rules for controlling and structuring the exercise of discretionary power which, having regard to the complexities of modern economy, has necessarily to be vested in different instrumentalities and agencies of the State, so that the discretionary power does not degenerate into arbitrary power. There is often antithesis between power and justice and by administrative law. This antithesis is sought to be removed and power is sought to be controlled and channelised for bringing about a just result. Administrative law is, in fact, a potent weapon for bringing about harmony between power and justice.

There are several principles of Administrative Law which have been evolved by the courts for the purpose of controlling the exercise of power so that it does not lead to arbitrariness or despotic use of power. These principles are intended to provide safeguard to the citizens against abuse or misuse of power by the instrumentalities or agencies of the State. One of the most important of these principles is the rule of natural justice which consists of two major constituent principles, namely, the principle of audi alteram partem and the principle that no one shall be a judge in his own cause. The principle of audi alteram partem requires that no one shall be condemned unheard and it has received its finest flowering in recent times in the decisions of the Supreme Court in *Mohinder Singh Gill's case*[2] and Maneka Gandhi's case[3]. The Supreme Court has held that if in a given case prior hearing would frustrate the object and purpose of the exercise of the power, it can be dispensed with but in that event it must be substituted by post-decisional hearing. This is a striking advance made by the Supreme Court on the English law because there the law is that the requirement of prior hearing may be dispensed with if it would frustrate the object and purpose of the exercise of the power and in such a case, there need be no hearing at all, but in India, the Supreme Court has introduced the necessity of post-decisional hearing in such a case. Sometimes an attempt is made by lawyers appearing on behalf of the government to contend that even where prior hearing is not given, the exercise of the power does not become bad and it can be cured by post-decisional hearing. But this is a gross misunderstanding of the decisions of the Supreme Court in *Gill's case* and *Maneka Gandhi's case*, because it is clear law that if prior hearing is required to be given as part of the rule of natural justice, failure to give it would indubitably invalidate the exercise of the power and it cannot be saved by post-decisional hearing. It is only where the necessity for prior hearing cannot be read into the statute because to do so would be to defeat the object and purpose of the exercise of the power, that post-decisional hearing is required to be given

2. (1978) 1 SCC 405
3. (1978) 1 SCC 248

and if that is not done, the exercise of the power would be vitiated. The other principle that no one shall be a judge in his own cause has also been recognised and developed in Indian jurisprudence in several decisions of the Supreme Court. The Supreme Court has also held that every quasi-judicial tribunal must give reasons for the decisions it makes and necessity to give reasons is a part of the principles of natural justice. Dr. Massey has very perceptively dealt with these rules of natural justice as evolved in various decisions of the Supreme Court as well as courts outside India.

One other development which has revolutionised Administrative Law in India owes its genesis to the decisions of the Supreme Court in *Airport Authority's case*[1] and *Ajay Hasia etc.* v. *Khalid Mujib Sehravardi*[4]. These decisions have laid down that not only the State Government but also every instrumentality or agency of the State Government is subject to the constitutional limitations imposed by the Fundamental Rights and one of the limitations so imposed is that every action of the State or its instrumentality or agency must be reasonable and non-arbitrary. The Supreme Court has imposed the requirement of reasonableness and non-arbitrariness in every action, whether it be of the government or any of its instrumentalities or agencies and laid down that the yardstick of reasonableness must be found in the Directive Principles of State Policy. This principle has invested the courts with immense power to scrutinise the action of the executive and its instrumentalities and agencies for the purpose of determining whether such action is reasonable and non-arbitrary. If the court finds that the action is not based on any principle or norm but is arbitrary the court would be under the plainest duty to strike it down. This principle has also been adequately discussed by Dr. I.P. Massey in this book.

One other question which has bedevilled Administrative Law is the question of State liability for the unconstitutional acts of its servants. What is the extent of liability of the State for the wrongful acts of the administration? There are decisions of the Supreme Court which seem to indicate that where there is gross violation of the right to life and the principle enshrined in Article 21 of the Constitution by any Government servant, the State may be held liable to pay compensation to the victim or his dependents. The Supreme Court in *Rudul Sah's case*[5] directed compensation in the sum of Rs. 30,000 to be paid to Rudal Sah for his detention in jail contrary to the mandate of Article 21. So also the Supreme Court in *Sebastian M. Hongray*[6] directed the State to pay a sum of Rs. one lakh each to the wives of two citizens

4. (1981) 1 SCC 722.
5. (1983) 4 SCC 141.
6. (1984) 3 SCC 82.

who were arrested by the armed forces but who did not return back. This is a developing branch of the law and it remains to be seen how far the Supreme Court will go in awarding compensation for violation of Article 21 of the Constitution.

Dr. I.P. Massey's book contains a lucid exposition of Administrative Law in all its aspects and dimensions and offers a highly perceptive and critical analysis. I have no doubt that this book will be of immense use not only to law students but also to lawyers and administrators and men in public life.

May I once again congratulate Dr. I.P. Massey on bringing out a really critical and refreshing book on Administrative Law.

3 Janpath
New Delhi
August 16, 1985.

—P.N. BHAGWATI

PREFACE TO THE SIXTH EDITION

The fifth edition of the book came out in 2001 and therefore, I was always under the impression that I shall have to revise the book only after five years as I have done in the past. However, to my surprise Eastern Book Company informed me in 2003 that all the copies have been sold out, hence I have to revise the book for the sixth edition. It was a pleasant surprise to me. My sincere thanks to my readers, whose continuous interest in the book has always inspired me to bring the book up-to-date to serve their needs better. This substantial increase in the constituency of readers impelled me to undertake this revision for a new edition.

My endeavour in this revision has been to fine tune the material and also to bring the law up-to-date. This will make the understanding of the subject still more clear and comprehensive and while doing so, I have tried to keep the volume as slim as possible.

As always I am highly indebted to Professor Upendra Baxi for finding time out of his very busy teaching and research schedule abroad to revise his Introduction to the book. As usual Prof. Baxi's Introduction, which offers a highly perceptive and critical analysis of administrative law, remains the most attractive part of my book and bears the imprints of his rare and profound scholarship.

I also express my gratitude to the publishers, Mr. Surendra Malik and Mr. Vijay Malik and their entire team at the Eastern Book Company for doing an excellent work in bringing out this revised volume.

I owe my gratitude to my grand children Sana, Saniya, Aditya and Ankita all of whom found their patience tried repeatedly as I was busy writing and had no time for them. I am also

grateful to my wife Meera who helped me in various ways and even read the manuscript and page proofs.

Shimla —I.P. MASSEY

INTRODUCTION

by

Upendra Baxi[1]

The Myth and Reality of the Indian Administrative Law

I. FAIRY TALES AND HORROR STORIES

Professor Massey's admirable textbook has stood the test of time. It has contributed to the understanding of continuity and change in the tradition of '*doing* of administrative law.' The production of the discourse named as 'administrative law' involves a whole range of actors pursuing their special, contingent and almost always conflicting interests. Far from being an embodiment of ideal considerations of justice, fairness, and due process, administrative law is a messy, untidy affair archiving the deeds of power. This Introduction is being written as India approaches the 20th Anniversary of the Bhopal catastrophe, which comprises besides the first catastrophe of December 2/3 1984, the second catastrophe that occured with the judicial settlement orders immunising the Union Carbide Corporation, and the third catastrophe that constitutes a never ending story of official neglect and political indifference towards the sorrowful plight of the Bhopal violated. The 'victims' undergo a ceaseless process of revictimage.

Each and every Bhopal violated knows a few cruel truths concerning the much-vaunted tradition of doing administrative law and justice in India. They have experienced, at each step of their unfolding tragic life in the aftermath of the catastrophe, the cruel hollowness of the commanding doctrines of the Indian administrative law, superbly crafted by some of India's (and the world's) gifted justices. Administrative law requires that public decisions ought to be taken in consultation with affected interests; at no stage in past two decades have the Bhopal violated enjoyed the blessings of this maxim. They were denied the right of being heard, even when parties to proceedings, when the Supreme Court arrived at a settlement, wholly adverse to their claims, interests, and dignity. The post-decisional hearing accorded to them after the settlement only aggravates the initial judicial default: it does not cast on the Union Carbide Corporation beyond the initial

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1. Professor of Law, University of Warwick; Vice Chancellor, University of Delhi (1990-94); University of South Gujarat, (1982-85); Professor of Law, Delhi University (1973-76).

settlement amount any legal responsibility for the amelioration of their plight; nor are the Union of India and the State of Madhya Pradesh required systematically to redress the continuing human rights violation of the Bhopal violated. The duty to give reasons for decisions is flouted not just by administrative agencies but also not fully cognized by the Supreme Court itself. The Bhopal case demonstrates extraordinary judicial paternalism that erases all the way the languages of human rights, justice, and core due process obligations.

Is the erosion of administrative norms in the Bhopal saga an exceptional deviance from their routine prowess to enforce fairness discipline on holders of public power? Or, does all this symbolise the inherent arbitrariness of judicial process and power? How may we even begin to tell the stories of the Indian administrative law? This question directs attention to underlying question concerning the *story of telling stories* (meta-narrative.) Meta-narrative determines the contexts, conditions, and circumstances within which all stories may be narrated. Our favoured ideas concerning administrative law determine *what* and *whose* stories we may tell within its frameworks. Further, we ought to note how authorship and authority stand dispersed. Those who impart authority to the doings of administrative law may never be those whose life projects stand massively affected by it. The producers of administrative law norms and standards are not among their eminent consumers. Those who tell stories about administrative law, the epistemic communities that produce knowledges about that something named as 'administrative law', do not necessarily bear in their individual lifetimes the brunt of its costs. Of course here the exceptions prove the rule! Thus, even some Justices of the Supreme Court in the Bhopal case complained that they were being 'victimised',[2] when all that happened was the appeal by Bhopal victims that their Lordships adhere to their own natural justice jurisprudence, proclaimed most notably in *Antulay*[3]! And in the (the first and the last instance in independent India) *Ramaswami*[4] affair, the impugned Justice claimed several violations of natural justice by his own Brethren[5].

There are many stories to tell about administrative law in India. Each has its heroes and villains, climax and anti-climax, elements of pathos and bathos. Each has its elements of myth and ritual, which configurate both

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2. Confronted with victim, activist and media criticism, often strident, of the Bhopal settlement orders, Justice E.S. Venkataramiah at one point stated, in the open court, that public expression of outrage was worse than facing an impeachment!
3. For analysis of the Antulay discourse, see U. Baxi, LIBERTY AND CORRUPTION: ANTULAY CASE AND BEYOND (1990, Lucknow, Eastern Book Co.).
4. *Sarojini Ramaswami* v. *Union of India*, (1992) 4 SCC 506.
5. *See* S. Sahay, GONE AT LAST? (a useful critical anthology on Ramaswami episode; 1994, Delhi, Har-Anand).

violence and *justice*. And because there are so many narratives possible, it is difficult to say which one should be regarded as more important, or privileged, construction of administrative law. Not unexpectedly, the story tellers are located either in the grid of power or in the expanded arc of victimage. The notion of victimage remains of course entirely appropriable. Thus, people in business and industry, education and research, political functionaries and civil servants who themselves wield public power characteristically describe unfavourable judicial outcomes in terms of their victimage at the whims, fancies and vagaries of judicial power and process. And bureaucrats, who feel so articulately irritated by judicial insistence on natural justice when they wield ultimate power, begin to sing a different tune when they perceive themselves to be the victims of political power, as the jurisprudence of Article 311 so poignantly demonstrates.[6] The point of all this is to suggest that administrative law, as often, serves as frustrates the needs and interests of those already well-placed within the grids of power and influence.

A strong ambivalence emerges: power-holders, especially elected officials and civil servants, usually resent judicial power and present expansive judicial review as a principal factor for their inability to deliver 'good governance'. At the same time, these very people rarely hesitate to invoke judicial review to protect their own rights and interests. What at one moment is represented as an arbitrary extension and exercise of judicial power becomes at another a legitimate function, nay even a duty, of adjudicatory power! This is a kindergarten see-saw perspective of role and function of administrative law in India. Behind all the soul-destroying distinctions between 'administrative' and 'quasi-judicial' powers and the meandering discourse on the so-called rules and maxims of natural justice, administrative law emerges as an adolescent and ambivalent narrative of the agony of power. But take a different narrative path and Indian administrative law becomes a long lament, an epic of sorrow for vast masses of Indian humanity.

Think, for a moment, about hundreds of thousands of Bombay (now Mumbai) pavement-dwellers. In *Olga Tellis*[7], a case still in search of a judgment[8], the Supreme Court of India, while affirming Article 21 life and

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6. *See* Justice Rama Jois, CIVIL SERVICES UNDER THE STATE (U. Baxi, ed.; 1989, Bombay, N.M. Tripathi).

7. *Olga Tellis* v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545.

8. I have consistently maintained that if by a 'judgment' we mean a discourse where reasons or grounds of decision have at least *some* bearing on the final result or order, *Olga Tellis* cannot be dignified with that description. The result there so contradicts the operative order as to make it *insensible*, both legally and logically. Not all documents signed by Justices and published in law reports necessarily become binding judgments. Undoubtedly, situations in which one would have to take such a stance as I do with respect to *Olga Tellis* would be rare. But when they occur, it is our duty to explain that as a matter of fact *no*

liberty rights as inclusive of the right to housing and shelter decided, in effect, that no rights of theirs would be violated if the Municipal Commissioner of Bombay was, even without a hearing, to throw them with their belongings to the sea! And in the *Bhopal case*, their Lordships quoted Macbeth to Bhopal victims who urged that a settlement, which denies even a modicum of hearing to them, is legally flawed by the very jurisprudence developed by the Supreme Court. Their Lordships said: " 'To do a great right' after all, it is permissible sometimes 'to do a little wrong'."[9] In complete plain words, when the claims of justice of a mighty multinational (a 'great right') are pitted against those of hundreds of thousands of children, women and men, radically MIC-infected (a 'little' wrong), the 'great right' has to prevail! [10] On this perspective, administrative law in India emerges as an archive of production of human rightlessness for the Indian 'masses' and a saga of solicitude for the Indian middle 'classes'[11].

II. THE LEGAL\JURIDICAL NARRATIVES

Legal textbooks and commentaries tell doctrinal stories; stories concerning how different ideas, principles, standards, and even values of administrative law emerge.

Their stories are neither time-bound nor space-bound. They speak about mighty evolution of grand, majestic principles of natural justice. Even when critical of this or that development or regression, they are neither overly concerned with the effects of law on human life projects nor perturbed by the magnitude of victimage, the debris of humanity left on the margins by the triumphant march of great and grand principles, maxims, conceptions and goals. In this abstraction, we lose all sense of the concrete contexts of power and resistance at play in the development of administrative law. We also surrender periodisation; put another way, the principles, maxims, standards, and doctrines of administrative law are slated to occur on a flat trajectory of the time of public law, ignoring all together vast political developments that

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'judgment' appears despite a *purported* act of issuing it and our right to insist that the Court deliver a *judgment*.

9 *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613, 705.

10 Note that "little wrong" consisted in (*a*) denying a pre-decisional hearing to victims in the Court approved settlement orders; (*b*) in offering, after a great struggle by victims, a post-decisional fairness hearing, only to hold that the rules of natural justice are not absolute; (*c*) in upholding the settlement amount of $470 million but striking down criminal immunities without any explanation of how a bargain represented in the settlement can be severed; (*d*) in not retrospectively legitimating, by explicit invocation, the principle of absolute multinational/economic enterprise liability which would avoid future Bhopals. *See inter alia* "Introduction" to VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE (1990 Bombay, N.M. Tripathi; U. Baxi and A. Dhanda *eds.*)

11 I realize that in deploying the contrast thus, I remain open to the charge that I am using obsolete vocabulary in these halcyon days of globalisation. But for any Indian *human* being the contrast between 'classes' and 'masses' must surely be a *lucid one*.

always inform the context of adjudication. Yet, a rough and ready understanding of political contexts remains important: for example, the Nehru decades reveal administrative law development where Justices trusted, by and large, the executive whereas new patterns of mistrust develop in the many post-Nehru periods that follow. I do not develop this thematic any further here because of constraints of space save to say that a history of Indian administrative law and jurisprudence has yet to be written.

But even so, these stories do offer us rich raw materials to tell stories of the ways in which the Indian middle-classes enjoy and manipulate the blessings of developments in administrative law in different moments of Indian constitutional development. They have exploited, fascinatingly, every nook and cranny of indeterminate development in jurisprudence, naturally, to their own advantage. Perhaps, 'middle classes' is too amorphous a term.[12] Salient illustrations include:

> Systemic recourse by university students who regularly invoke administrative law jurisprudence to stay action against them on manifest grounds of discipline or unfair means (i.e. cheating at exams) or admissions to professional courses[13]
>
> Some spectacular recourse even by University teachers![14]

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12. *See*, Upendra Baxi, "*The Avtars of Judicial Activism: Explorations in the Geography of (in) justice*" in Fifty years of the Supreme Court in India, 159-209 (2000); S.K. Verma and Kusum Eds, New Delhi, Indian Law Institute.

13. Of the latter category, an example was furnished by an elaborate *inquisition of* the Law School Admission Test conducted by Dehli University and actual admissions made in a particular year. In one proceeding, I was directed to file, as the Vice Chancellor of Delhi University, an affidavit. The Delhi High Court orders and judgments indicate that universities are *suspect* institutions and that any person — student or aspiring student need not meet even the *slightest* burden of proof at the stage of admission. What is more, such persons and their lawyers seem India-wide to enjoy impunity from even judicial strictures or reprimands, let alone credible sanctions for perjury.

14. The most spectacular writ in this regard was by a Delhi law teacher before the Delhi High Court insisting that the UGC Merit Promotion Scheme which considered "equivalent publications" as an alternative to Ph.D. in Law *in effect* estopped the University from saying that he was not *constructively* holding a Ph.D. degree of Delhi University: *see*, *Shyam Sunder Vats* v. *Delhi University*, a writ petition continued without disposal by the Delhi High Court for a number of years and finally withdrawn. The petitioner, no doubt, had obtained a letter from the Registrar saying that for purposes of merit promotion his publications were, under the relevant guidelines, equivalent to Ph.D. degree. What Their Lordships would have finally decided is *unknowable*. But for that entire period as candidate duly selected as a Professor held his post subject to final orders. And the status of the highest degree a University could confer remained indeterminate !

    The petitioner, an able law teacher, was subsequently merit-promoted by the University to the chair. Obviously the Delhi University's decision was based on its due process of academic appointments. The possibility which the High Court raised by its entertaining the petition was that Courts could issue *mandamus* to Universities for conferment of constructive doctorates, and that too in *law* !

Judicial cloning of hybrid of stay-order Indian humanity, manifest in situations where students, academics, highly designated government officials, even stay-order Vice Chancellors (as Shri Hardwari Lal's court-extended tenures at Mahrishi Dayanand University at Rohtak) assume or occupy statuses created by chaotic judicial interim orders and even verdicts;

Successful deflection of all sensible regulatory efforts advantaging industries as shown in *Rohtas*[15] and *Escorts*[16] cases

Empowerment of *eco-enemies* (forest contractors, miners, dam builders, polluters of Holy Ganges and manifestly corrupt politicians), which stymie the reach of rectificatory action by appealing to various tragic-comic invocations of natural justice maxims and principles;

Deployment by political actors and parties of the grounds of natural justice that contest the Election Commission's decisions on repolling[17] and related matters.

It is pointless to multiply these instances. But all these little stories put together testify to a boundless manipulability of an *otherwise* hopefully benign potential of Indian administrative jurisprudence. But, overall, the lawpersons' narratives of administrative law speak to us *abstractly* and acontextually concerning the *formations* of arbitrary power, and ways and means to checkmate these by acknowledged, judicial *feats*. In each society, this story runs, a person is either a beneficiary or a victim of societal or governmental power. In each society, there exists conflict between power and justice. Wherever there is power, there exist likelihood of its abuse. One way is to do nothing about this and let the celebrated Kautilyan *matsanyaya* (big fish eating little fish) prevail. The other way is to try and combat this. Administrative law is said to identify the excesses of power and endeavours to combat them. These excesses may take many forms. Power may be exercised, for example, for purposes other than those for which it has been conferred by the constitution or the law. Or, it may be exercised for legitimate purposes but exercised arbitrarily. Arbitrariness consists in the attitude and action, which say, in effect, 'I have this and that power. I exercise it in this or that manner because I so wish. The only good reason which I exercise my power this or that way is that I wish to exercise it in this

15. *Workers* v. *Rohtas Industries Ltd.*, 1994 Supp (2) SCC 359.

16. *LIC* v. *Escorts Ltd.*, (1986) 1 SCC 264.

17. *Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 SCC 405. Of course, this citation has a sligtly musty air because since then the Election Commission has evoked cooperation of the Supreme Court to reinforce its autonomy as well contested its jurisdiction in defence of its own autonomy. Even as this Introduction goes to press, the Commission has successfully persuaded the Court to the view that even it lacks power to stay Rajya Sabha polls once announced by the Commmssion.

or that manner.' The will of the power-wielder becomes the sole justification for the exercise of power. This is the essence of arbitrariness.

Arbitrariness takes myriad forms. As a wielder of public power, I may so act as to favour some and disfavour others. I may so act as to give an impression that I am acting within my power and jurisdiction but in reality I may be acting outside it. I may act within my power and jurisdiction but I may be predisposed towards certain persons or policies. I may even decide to be a judge in my own cause. I may decide by myself what your rights are without giving you any chance to be heard or I may make your opportunity to be heard a meaningless ritual, as a prelude to depriving you of your legal rights. I may decide but decline to let you know the reasons or grounds of my decision, or provide 'reasons' without being reasonable.[18] I may use my power to help you only if I am gratified in cash or kind or I may choose to use my power only after a good deal of delay and inconvenience to people. Indeed, I may just refuse to exercise the power I have, regardless of my legal obligation to act and social impact of my inaction.

In modern societies, wide powers vest with legislators, judges and administrators. Each group can, if it so wishes, act quite arbitrarily in any or all of the ways thus far specified. Or, as also happens, one group may quite arbitrarily assume control over the functioning of the other; often enough it may not be the group, but just one single person. In this latter case, we speak of dictatorship or tyranny. When one group with a strong leader concentrates all powers in itself, we speak of 'authoritarianism.' When power is dispersed in dominant institutions of governance and when those affected by power can, in theory, hold their rulers accountable (in one way or the other), we speak of a liberal democracy or a 'rule-of-law society.' This type of society basically seeks to ensure that *grants of power to the rulers are at the same time charters of accountability for the ruled*.[19]

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18. John Rawls has consistently guided us to think this difference. Reason signifies relating means to an end. But not every decision or choice that is rational remains reasonable. Rational actors chose to maximise their power, influence, or authority but doing so may not always be reasonable. The Bhopal settlement orders were rational in this sense but they were not reasonable. The decision in *ADM* v. *Shivakant*, (1976) 2 SCC 521 denying habeas corpus even on grounds of mistaken identity was 'rational' in terms of the furthering the ends of Emergency Rule but was not reasonable. It would be interesting to study the jurisprudence of the duty to give reason from this perspective. *See also* the interesting discussion the contributions in David Dyszenhaus (Ed.) *The Unity of Public Law* (2004, Oxford, Hat Publishing).

19. The distinction between forms of polity made in the text is rather simplistic. Concepts like 'authoritarianism' and 'liberal democracy' have acquired rich and diverse historic meanings. We must accept the fact that even forms of democracy vary; there exist 'non-liberal democracies' with rather distinctive mechanisms of political accountability. *See* C B. MacPherson: THE REAL WORLD OF DEMOCRACY (1972); S. E. Finer. COMPARATIVE GOVERNMENT (1970).

The trouble and tension arise from the fact that those who have the power to rule do not generally or always like to account for their actions. They believe, and would like all people to believe, that the very fact that they are the rulers (legislators, judges, bureaucrats) should be in itself a sufficient assurance that they will exercise their powers justly. One reason for this belief is the fact that each group in a 'rule-of-law society' has conceded some claims of general accountability. Legislators go to polls periodically; people, they say, can always withhold the 'mandate' from them if they ruled badly or exercised power arbitrarily. Errant judges could always be, in theory, impeached. Bureaucrats (including law enforcement personnel) are broadly within the control and direction of elected politicians. Trade union groups, opposition parties, and a 'free press' would always provide mechanisms of general accountability. And the courts with wide powers to review legislative and governmental action are always in place. What more, indeed, can one have by way of accountability in the exercise of public or governmental power?

Compared with the non-rule-of-law societies, the rule-of-law societies do proclaim, *in theory*, much greater scope of accountability. Those who are ruled are thus not entirely at the mercy of those who rule. But there is a difference between regimes of general and specific accountability. That is why even in a 'rule-of-law society' there remains scope for grave and continuing excesses of power, whether spectacular or routine. Thus arises the need to evolve specific and concrete mechanisms of accountability in addition to the diffuse and general ones like elections, impeachment, public opinion, etc. It is this *search* for new and effective mechanisms to make holders of public power adhere to the law and justify the exercise of power in terms of law, policy and constitutional values, which distinguishes a rule-of-law society from others. The basic expectation in a rule-of-law society is, this narrative would have us believe, by sheer force of repetition, that holders of public power and authority must be able to publicly justify their action as legally valid and socially wise and just.

Naturally, this effort does not wholly or even substantially succeed. *But what matters is, we are constantly told, that the effort is made at all and the underlying conviction that such an endeavour is worthwhile and necessary.* And one would like to think that one general result of such an effort in the long run would be to help diminish arbitrariness in the exercise of public power. This progressive diminution of arbitrariness in the exercise of public power is ultimately what the rule-of-law notion is all about.[20] Indeed, in one sense, that is what we mean, and ought to mean, by a 'civilised society.'

Administrative law is nothing but the exercise of judicial power to correct arbitrariness in the wielding of governmental power. In this sense,

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20. *Cf.* P. Selznick: LAW, SOCIETY AND INDUSTRIAL JUSTICE (1969).

courts function as custodians and guardians of the rule-of-law values. The Indian courts have, indeed developed a rich and complex, though at many points indeterminate, body of principles, maxims, standards and doctrines in their attempts to regulate the exercise of public power.

A student of law or a practitioner who does not understand or know the evolution of administrative law cannot hope either to understand the judicial process or the substantive law of India. Nor can she understand the dynamics of human rights in India. Indeed, I would go so far as to say that such a lawperson (be she a student, teacher, practitioner, official or a judge) represents, in the short and long run, a potential *threat* to the basic values of a rule-of-law society. This is so because what is called administrative law is not really a subject of law like, say, torts or property or criminal law. It has *no* fixed terrain. Principles of administrative law emerge, and are to be found, wherever allegations of arbitrary exercise of power are raised. And these can be, and have been, raised in almost all areas of substantive law. One can reasonably specialise, in studies or in practice, in civil or criminal or tax law or in private or public law (though these divisions are themselves conceptually questionable). But any specialisation that ignores administrative law must remain suspect as incomplete. By the same token, one cannot specialise in administrative law *as such*. To understand the stuff of which administrative law is made one has to understand relevant domains of substantive law to which courts apply the more general principles of legality and fairness. In this way, a thorough study of administrative law is, in effect, a study of the Indian legal system as a whole. *More importantly, it is a study of the pathology of power in a developing society.*

III. OPERATIONALISING THE RULE OF LAW

The book in your hands (as other leading treatises on the subject)[21] documents vividly the malignancy of power and portrays ways in which judges and courts have acted in diverse roles to combat and correct it. Judges and courts have acted as diagnosticians, physicians and therapists of the body politic. Where compelled, they have used the surgeon's knife and voided administrative action or even excised that part of law, which offended fairness and fundamental rights. But more often than not, judicial hypnotherapy consists in heavy sedation accompanied by heavily suggestive jurisprudence. Courts regularly insist, against the grain of experience, that high officials such as Commissioners of Police, District Magistrates and

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21. C.K. Thakker: ADMINISTRATIVE LAW (1992); M.P. Jain & S.N. Jain: PRINCIPLES OF ADMINISTRATIVE LAW (1979, 3rd Edn.); C.K. Takwani: LECTURES ON ADMINISTRATIVE LAW (3rd Edn., R/p 2003); S.P. Sathe: ADMINISTRATIVE LAW (1998, 6th Edn.). *See also* the two early but insightful works: A.T. Markose: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA (1956) and M.A. Fazal: JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA AND PAKISTAN (1959).

Ministers are least likely to abuse their powers, in the very cases in which such abuse is patent or least arguable.[22] All this concedes heightened quotas of discretionary power to the executive and related institutions wielding public power alongside with the gentle (though often futile) reiteration of norms of fairness which should be observed in the exercise of such power. The sovereign question then arises: May we ask Justices and Courts, after all wielders of state power, to *any more*?

All the same, certain 'dos' and 'don'ts' are already in place. Indian courts have held that powers thus conferred should only be used for the purposes for which they are conferred and for no other purposes.[23] If powers are used outside the ambit of statutory purposes we have a situation not just of *ultra vires* but also one of arbitrariness. Simple negation of arbitrariness is not, however, enough to preserve the rule-of-law values. The Indian judiciary has accordingly rightly proceeded to identify positive content of obligations arising from the rule-of-law values. These positive obligations include enunciation of the rules of natural justice, which have to be followed not just in quasi-judicial action but also in what may even be called purely administrative action although only brave souls may tell where the difference may thus lie![24] The scope and contents of requirements of natural justice have varied from time to time but the broad judicial insistence remains. In addition, access by the aggrieved individual to the grounds or reasons of decision has remained an important preoccupation of the Indian courts, since impediments in this area have the tendency of obstructing judicial review of administrative action. This means the courts have, from time to time, insisted that the exercise of executive power be accompanied by reasons although the exact legal status of the duty to give reasons is embryonic, and not wholly immune from judicially administered amniocentesis.[25]

Students of Indian administrative law ought to recall its central reality: this law is wholly judge-made (there being no counterparts of legislative codification of administrative law as in some 'advanced' democracies.) The *social meaning* of the expression 'judge-made' law in India is simply this: the *real* victims of arbitrary power (millions living below or slightly beyond the arbitrarily determined 'poverty line' — indeed, this arbitrariness has

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22. E.g. *Kishan Chand Arora* v. *Commissioner of Police*, AIR 1961 SC 705; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248; *Laxmi Khandsari* v. *State of U.P.*, (1981) 2 SCC 600. *Also see* U. Baxi: THE INDIAN SUPREME COURT AND POLITICS, pp. 166-67 (1980).

23. *State of Bombay* v. *K. P. Krishnan*, AIR 1960 SC 1223.

24. *Tara Chand* v. *Delhi Municipality*, (1977) 1 SCC 472; *Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405. *See also* M. P. Jain: ADMINISTRATIVE LAW in 13 ANN SUR IND L 451, 465-69 (1977); M. P. Singh: "*Duty to Give Reasons for Quasi-Judicial and Administrative Decisions*", 21 JILI 45 (1978). See also, Mary Liston, 'Alert, Alive, and Sesintive': *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law,' *in* Dyzenhaus, *op.cit.* at 113-141.

25. *See* pp. 207-215, *infra*.

never been a matter of judicial review!) are extremely unlikely to be beneficiaries of the truly great normative jurisprudence of the Indian administrative law. They simply (and this is among the defining parameters of their *impoverishment*) have *no* possibility of access to legal literacy, profession and courts. When they do, in rare and precious moments of social action adjudication, get such an access, the results often are devastating as is shown, paradigmatically, by *Olga Tellis*[26].

Of course, the rule-of-law notions have been construed to provide, as noted earlier, great moments of solace to the Indian middle classes against the amorality of the political-executive combine. In particular, the economic elite gained expansion of privileged spaces, even in the halcyon days of state-regulated capitalism and state-financed capitalism. Thus, for example,

(*i*) If the state provides certain assurances to industry, whether by way of tax incentives or allied forms of allurement, it may not resile from these, as the richly developed *public* law doctrine of promissory estoppel has demonstrated[27];

(*ii*) A new version, a sister conception, has emerged in the Nineties, which is named as a doctrine of *legitimate expectations* of economic enterprises; these expectations may not be frustrated without support or validation by the judiciary on administrative law grounds[28];

(*iii*) Governments may not 'blacklist' economic entities without giving them some kind of opportunity of being heard[29];

(*iv*) In the field of government contracts with the private sector of the economy, the dominating power of sovereign decision-making must be reigned in by duties of fairness, transparency and accountability[30];

(*v*) The defence of sovereign immunity of the state has been (in all sorts of salutary ways, especially in the arena of state economic enterprises) whittled away by judicial action,[31] even as the overall *impunity of* multinational capital (as the Bhopal case/discourse

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26. *See* notes 7 and 8, *supra*.

27. See pp. 423-33 *infra*, and in particular judicial meanderings in *Jit Ram Shiv Kumar* v. *State of Haryana*, (1981) 1 SCC 11.

28. *Union of India* v. *Hindustan Development Corporation*, (1993) 3 SCC 499; *Madras City Wine Merchants' Assn.* v. *State of T.N.*, (1994) 5 SCC 509. I am not as sanguine about the doctrine of legitimate expectations as the author: *see* pp. 300-308 *infra*.

29. *V. Punnen Thomas* v. *State of Kerala*, AIR 1969 Ker 81; *Erusian Equipment & Chemicals Ltd.* v. *State of W. B.*, (1975) 1 SCC 70; *R. D Shetty* v. *International Airport Authority*, (1979) 3 SCC 489.

30. *See infra* pp. 379-391. The 'deficient' development of the doctrine is perhaps inevitable given the admixture or commingling of the realm of 'private' (civil) law with 'public' (administrative) law.

31. *See* pp. 391-411, *infra*.

suggests) is unfortunately now entrenched. In other words, rules, principles and maxims which bind the states as an economic actor do not obligate the capital in let alone the same way but indeed in *any* way[32].

The more specific regime of fairness duties continues to flow from the fecund rule-of-law notions. Even as conferment of vast discretionary powers on administration proliferates, judicial acquiescence with it has been accompanied by rich caveats of strict scrutiny on the actual *exercise* of such powers. Thus, for example,

(*i*) *Mala fide* exercise of discretionary power is not to be countenanced, although courts have developed nearly impossible onus of proof[33];

(*ii*) Less stringently, power may not be exercised as *Krishnan* in the fifties memorably enunciated) for purposes other than for which it has been conferred[34];

(*iii*) Nor may discretionary power be exercised on "irrelevant considerations",[35] a fluctuating corpus of considerations;

(*iv*) Abdication of discretion is said to occur in a whole variety of ways and when proved will be invalidated by courts[36].

IV. DELEGATED LEGISLATION

With the germinal enunciation in Delhi Laws Act[37], the Indian Supreme Court extensively legitimated delegation of legislative power, which it defined elegantly and memorably (as configuring power to enunciate a legislative policy that binds, and the power to prescribe sanctions for violation). The long narrative of patterns of delegation soon demonstrated the fact, the consuming, even carcinogenic, sway of delegated powers. Confronted with this, judicial role has been reduced to two operations: *one*, ideological justification, *second*, tactical (interpretive) strategies.

The first operation consisted in reiteration of the maxim: the probability that a power may be abused is not a ground for the denial of conferment of the power. To repudiate this maxim was to make governance (administration) in modern state inconceivable. Judicial power and process has to legitimate and facilitate governance and also in the process *nudge* it in directions of *good* governance. And trust, belief in good faith of

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32. Despite the notable enunciation of absolute liability of hazardous or inherently injurious manufacture or industry in *Shriram Fertilizers case* (*M.C. Mehta* v. *Union of India*), (1987) 1 SCC 395.

33. The iron law of onus is embodied in *S. Partap Singh* v. *State of Punjab*, AIR 1964 SC 72.

34. *See* pp. 60-66, *infra*.

35. *Ibid.*

36. *See* pp. 57-59, 80-81, 89-96.

37. AIR 1951 SC 332.

administrators, is an important marker of a healthy democratic society and polity. Distrust of politics, as well as distrust of governments, augur ill for democracy. Professor Massey provides an embarrassment of riches of ideological discourse on this register.

The second operation is tactical. When does *delegation* become *abdication*? Or, in technical lawyerly terms, when is delegation 'excessive'? This led, as Justice K. K. Mathew complained, to a wholly 'unedifying' judicial search to discover in the 'nooks and crannies of legislation'[38] underlying legislative policy or purpose (which can't be delegated) which would somehow structure guidelines/directives for the actual use of delegated powers. The search was unedifying in several senses. For one thing, extremely brief statutes (e.g. The Essential Commodities Act or the Import and Export Control Act—dozen or so sections) have spawned regulatory empires, reminiscent of the creeping jurisdiction of the East India Company! For another thing, judges had to become (in the phrase regime of Ronald Dworkin[39]) chain novelists, creating plots and characters in the drama of delegation; and the fiction was simply not good enough. To discover a regime of policy in skeletal legislation was at all times an extraordinary judicial feat, not worthy of adjudicatory time and talent.

The fantasies of excessive delegation of legislative power are the operative realities of the modern administrative state. Soon enough, despite all disclaimers, judges and jurists gave up the dream of voiding laws, which actually surrendered almost all essential legislative policy-making tasks to the unelected administrators. But they focussed with great vigour on the arbitrariness of actual exercise of executive power.

Critical students of Indian administrative law (or of comparative administrative law) may however wonder whether these ideological and tactical operations mark a retreat from democracy as well as justice. If legislation is the obligation of legislatures (with attributions of representation, accountability, legitimacy) how does it become unworkable to demand, even in a modern state, that legislators make it their prime, if not sole, duty to attend to the business of legislation? That they know what they intend to do, and prove this by their hard work on drafting and enacting legislation? One has just to consult the archives of the Lok Sabha Debates to see what minuscule amounts of time are dedicated to the actual form and contents of laws willy-nilly enacted. I suspect that an easy minded acceptance of delegated legislation has virtually left Indian legislators off the hook! Much of their time and talent are dedicated to *politicking* (in some very bad senses of that term) than *legislating*. There is simply no way of avoiding the question:

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38. *Gwalior Rayon Silk Mfg. & Wvg. Co. Ltd.* v. *CST*, (1974) 4 SCC 98.
39. Upendra Baxi: '*A Known but an Indifferent Judge: Situating Ronald Dworkin in Contemporary Indian Jurisprudence*,' 1 I.CON, *International Journal of Constitutional Law* 557-89 (2003.)

would Indian democracy have been more substantial a human achievement than it is now if the Indian judiciary had held delegated legislation to the strictest scrutiny of legislative application of mind to the infinite detail, and labour, of legislation? Reference to the Commonwealth, West European or American experience does not simply help, given the longer and different traditions and histories of their legislation (and democracies).

The justice-costs of judicial abdication monitoring excessive delegation of legislative powers are indeed high, and perhaps unconscionable, too. To show that actual exercise of delegated power is arbitrary or unreasonable entails a curious phenomenon: legislators who ought to be accountable for legislation stand absolved whereas administrators (who are accountable only to their political superiors) are asked to be the prime agents of rule-of-law society. This apart, this mode of judicial review favours only the privileged few who have access to adjudication and staying power as well as stakes to meander through the Byzantine Indian judicial processes. To be sure, the device of social action litigation has redressed the situation somewhat but it remains open to doubt whether this amelioration will ever be commensurate to redress the Himalayan excesses of delegated public power as these bear on the lives and fates of billions of Indians.

V. ADMINISTRATIVE LAW IN A GLOBALISING ERA

Stories concerning administrative law development may no longer afford to ignore the seismic shift caused by the specificity of contemporary Indian globalisation, comprising the three 'D_s': *denationalisation, deregulation and disinvestment*. Each form signifies new challenges to the received understanding of the theory and practice of the Indian administrative law. The three 'D_s' now sculpt what may best be described as *economic administrative law*, raising in turn issues concerning ideologies and impacts. It will take this Introduction too far a field to pursue the transformations in the culture of human rights ushered in by the distinctive Indian globalization theory and practice. I here silhouette a few aspects.

Denationalisation practices signify the processes of dismantling state ownership of public/statutory corporations and government companies. Disinvestment practices signify allied practices of selling off public sector undertakings, or major state shares in these, to private ownership. Deregulation indicates incremental, yet substantive, abdication of human rights oriented governmental oversight, invigilation, and superintendence over corporate governance and business conduct. Obviously, this commonsense understanding of the three key terms may be endlessly refined But at the end of the day, the paradigm shift is indeed unmistakable Deciphering the 'new' forms of the Indian administrative law and jurisprudence under the circumstance of Indian globalisation thus remains a daunting task.

Let us take as an example the administrative law requirement that generally insists as imperative the requirement of consultation with the adversely affected interests. Does this notion any more *include* the requirement that the employees and workers have any 'say' concerning decisions about denationalization and disinvestment? Does it necessitate any significant prior consultation with these interests? Or, does this signal an unwholesome and rapid demise of this doctrine, such that altogether disarticulates these constituencies?

Take further the requirement of reasoned decision. Who may, after all, decide momentous matters concerning the 'reason' and the 'unreason' of disinvestment decisions? Should the governmental decisions, and decision-making processes remain subject to *any* sort of judicial review? Should the Supreme Court, under the received doctrine of administrative law and jurisprudence, entertain social action litigation petitions impugning executive decisions concerning 'disinvestment,' even of profit-making statutory corporations/undertakings? Should they entertain social action petitions challenging as arbitrary the methods of valuation at which public sector undertakings may be sold (the distinction usually involves contrast between book value of assets and their real market value) and invigilate procedures for international bids for such sale? Or, ought they to leave alone the processes and outcomes of 'macroeconomic' choices that elected officials may make from time to time, regardless of their manifest human rights violative short term and long run impact? How may in the process the Supreme Court invigilate excesses and abuses of public power? Should it deploy the very same corpus of judicial attitudes and principles that characterised its militant strict scrutiny approaches to the diminution of the Article 31 right to property to arrest and deflect a headlong and heedless rush towards deregulation? Should *judicial performance hold deregulation as rigorously accountable as regulation once was*? Is it the case that only this virtue of overall judicial consistency may serve Indian democracy truly well against the blind spots of the Indian globalising political elite, which has comprehensively forgotten the ideals that animated struggles for Indian Independence, and some of the finest hours of Indian democracy at work?

Undoubtedly, as the *Balco*[40], and related case law, crucifies the received administrative law and jurisprudence on the cross of Indian globalisation.

VI. FAIRNESS AND EFFICIENCY

The standard story about administrative adjudication in India, and abroad too, is that it is a continuing quest for balancing *fairness* and *efficiency* in administration. This balancing must be achieved not in a grand narrative but through little stories; that is, in the context of each case. In

40. *BALCO Employees' Union (Regd.)* v. *Union of India*, (2002) 2 SCC 333.

some stories, *efficiency* wins out, in others fairness. But there is absolutely no way to tell what happens *overall*. There is no way to put together all these little stories into the big one, unlike an epic which has some threads of unity in its multitude of heroes, villains, plots, struggles and destinies. Indeed, administrative law stories, on this aspect, put together, may not achieve even that three-hour titillating 'unity' of Bombay or Chennai box office movies!

How administrative adjudication optimises fairness and efficiency is a macro-level question, which the aggregation of micro-level judicial feats do not fully enable us to answer. That administrative adjudication increases fairness or efficiency or even both is an order of beliefs coming close to being a tenet of faith. The dominant story telling insists that one ought not to disturb faith; rather one ought to sustain it by retelling stories about administrative law. This is the function of judges and jurists, working in unconscious formation of a contemporary priesthood in India. Occasionally, even as history of the growth of faith has abundantly revealed, a little interrogation reinforces faith. Let us ask in this spirit, at random, whether we can say fairness or efficiency or both are well and truly served at a societal level when courts rule, for example, that

(*i*) Homeless persons dwelling on pavements in Bombay have a right to shelter but no right to hearing before mass evictions (*Olga Tellis*[26]).

(*ii*) The potential victims of Tehri (of reservoir induced seismicity, landslides, siltation and possible devastation in case of dam-burst) are not sufficiently affected interests to be entitled to a hearing even as the Tehri dam proceeds[41].

(*iii*) A similar lack of standing, or its indeterminacy, affects populations at risk by nuclear power plants location whether Kakrapar (Gujarat), Narora (U.P.) or Kaiga (Karnataka).

(*iv*) The colonial process of land acquisition provides enough of *audi alteram partem* for victims of big irrigation projects; they have no right to prior hearing (Narmada project, for example) save, perhaps, on 'rehabilitation'.

"Enough unto the day, is the evil thereof — one would have to say in order to arrest this germ of evil gnawing at the heart of Indian administrative law. Clearly, marching with *economic* administrative law is a *developmental* administrative jurisprudence, which practices Dicey's maxim that we should not weigh butcher's meat in diamond scales! The slight difficulty is that the butcher's meat here comprises the destiny of millions of citizens of the Indian Republic!

Indian administrative jurisprudence has in fifty plus years of its development not subjected to any theoretical scrutiny concerning the

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41 *Tehri Bandh Virodhi Sangarsh Samiti* v. *State of U.P.*, 1992 Supp (1) SCC 44.

relationship with *efficiency* and *fairness*[42]. Note that efficiency here has a double dimension. Judicial efficiency (only taking on these tasks which are judicially manageable) is an aspect of overall efficiency of democratic governance. And *developmental* efficiency (attaining long-term developmental goals with the fewest short-term costs) entails the view that courts ought not review developmental decisions because they are not the best areas for adjudging such public choice questions. The Indian Supreme Court has adopted both these notions. But it has done so with considerable ambivalence. Thus, it has encouraged social action litigation concerning macro-developmental decisions, as with spectacularly over the Narmada Dam. It has stayed public projects by interim orders pending full hearing but as, as we note later, it has finally authorised, with minimal oversight, their ultimate actualisation. Judicial activism in allowing access to courts has been matched by judicial restraintivism concerning the final disposition. In so doing, it has birthed a *narcotic function of judicial review in developmental administrative law* in which the pain of the project-affected peoples is momentarily assuaged. There is, of course, no development without its pathologies. And in a caste-ridden society dignity of labour stops short of even apex adjudicators becoming the *scavengers of mass pain*. Administrative adjudication does not scavenge all the dirt and filth of exercises of state power. Rather, it is an architectonic enterprise, which at the end of the day enacts a near Rawlsian veil of ignorance concerning *necessary* and *justified* victimage.

In less caustic judgmental terms, what courts and judges are saying to the victims of the excesses, outrages, and inherent lawlessness of governmental power is this:

Wherever we can, in balancing *fairness* with *efficiency* we promote the former. But it is, you'll appreciate, difficult often enough for us to say *which* is *which*! This so because it seems to us that when we condone lapses in fairness, 'efficiency' results! And no one has ever has ever told us cogently why efficiency is not integral to fairness.

Look, we're not to blame. India has *no* jurists (otherwise long ago, we'd have among our Brethren, at least *one* of them as provided by the Constitution). Where's an Indian theorist of *justice*? (Like John Rawls[43], R. Nozick[44] or even Michael Sandel[45]?)

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42. This is an area fully explored in law and economics discourse; see, for example, the literature cited in Upendra Baxi, '*Global Development and Mass Impoverishment*' in *Oxford Handbook of Legal Studies* (455-484) (2003) Peter Cane and Mark Tushnet Eds. Oxford, Oxford University Press.
43. J. Rawls, A THEORY OF JUSTICE (1971; Oxford).
44. R. Nozick, ANARCHY, STATE AND UTOPIA (1974; Free Press).
45. M.J. Sandel, LIBERALISM AND THE LIMITS OF JUSTICE (1982; Cambridge).

We have to husband (sorry! spouse) our energies. Administrative adjudication is one aspect, *not* the whole, of our work. Normally past the prime (we're almost all sixty-plus), we are overburdened. We don't know whether younger people, with life tenure, can do better.

But the same activists whose discourse we understand better even as we reach superannuation have no notable interest in articulating public interest in the extension of age of superannuation in our exalted offices. Please, in this zodiac, do not be so ungenerous, so uncharitable to us. We do our best. We know it is not good enough. But must you make the best the enemy of that which is not good enough?

To this kind of imaginary, but not therefore unreal, response I have no answer. The vigorous administrative law scholarship, it is true, is not much concerned with the structures of juridical production. It is not overly concerned with law reform, even by way of codification. It is insufficiently oriented to the crises of administration of administrative justice, let alone of adjudication in its entirety. All this and more is true. There is no justification for smug or narcissistic legal scholarship. But, with all its deficiencies, this less than five decade old innovation in Indian culture has served judicial development rather well, with meagre or no acknowledgement.

The central question is: how do we re-imagine, refashion, retool administrative law doctrines and methods (technologies) in ways which will truly begin to protect and promote the rights and interest of the impoverished masses of India? Perhaps, one way of doing this is to more fully accentuate the conflict between 'efficiency' and 'fairness', not so much at the level, of metalanguages of theories of justice but rather within the daily discourse concerning 'developmental' administrative law. In its context, 'efficiency' presents itself as a more compelling consideration. Considerations of efficiency involve at least three components:

(*a*) 'Efficiency' as cost-benefit calculus;

(*b*) 'Efficiency' as determined by access to complex knowledges deployed to administer public interest;

(*c*) 'Efficiency' in terms of how much judges and courts actually accomplish by expanding the frontiers of judicial power and process.

Very often (*c*) stands predetermined by approaches to (*a*) and (*b*) above. At times (*c*) looms large as a decisive factor. If we take as our prime examples the location of nuclear power plants and large irrigation projects, we find in judicial discourse all these three complexes of 'efficiency' considerations predominating. Do individuals or groups whose interests are likely to be affected by such projects have a right to be consulted or heard before they are undertaken? Do they have a right to access information, which will make hearing more than ritual, an empty formality? The state has usually argued (as Tehri, Narmada dams and Kaiga nuclear plant projects

have illustrated in my own strategic social action litigation experience) all the three foregoing considerations of 'efficiency'.

It has been argued that any extension of hearing principle will enhance 'costs' of the project, disrupting the cost-benefit equilibrium required in planning macro-developmental projects. It has been argued also that the expert analyses of technical, productive, ecological and financial soundness of public projects have already cognized every conceivable public interest consideration. In other words, technocratic policy-making serves better, even as it substitutes consultation with affected interests. And, finally, it has been argued that courts are not equipped to assess the costs (medium or long term) of major public projects because they do not have the sophisticated multi-disciplinary knowledges (in, for example, nuclear physics, reservoir-induced seismicity, earthquake engineering, causal factors of landslides, dam-bursts and siltation).

These arguments of efficiency are reinforced by the escalation in project costs that any administrative law invigilation, even by stay orders, must necessarily cause. It is easy enough to demonstrate that litigation time would enhance the already high costs large public projects necessarily entail. These sorts of arguments (though not necessarily always put in this way) have always swayed Indian courts, including the Supreme Court. The most conspicuous example is furnished by the Tehri Dam proceedings. The Supreme Court neither admitted nor dismissed a well-worked out petition; at the end of about three years, during which no interim order was issued, the Court (*per* Kuldip Singh, J.) simply urged the Tehri Dam Virodhi Sangarash Samiti (social action group of local communities) to hold discussions with the federal government! It did not even prove willing to address the question as to how local communities may effectively discuss issues with the government without full and complete access to information, which has been, from time to time, proclaimed rhetorically as a human, and a fundamental, right! In Narmada proceedings while interim stay orders have been issued, the judiciary has transformed the discourse into one of right to *rehabilitation*, obscuring the central issues of environmental impact and natural justice rights of communities concerned. The judicial performance on location of nuclear plants has been one continuing gesture of unreasoned dismissal of public anxieties.

The act or the posture of judicial deferment to executive prerogative (the superior wisdom) is not in itself always to be condemned. But it must invoke the sternest critique when it is *unreasoned* or manifestly *unreasonable*. In contemporary Indian adjudicatory performance, it has been both, and more conspicuously the former. Thus, courts have taken little or no notice of the fact that the claim to efficiency [(*b*) above] wholly overlooks the fact that expert knowledges are almost wholly placed at the service of *special*, rather than *public*, interest. Courts have regularly refused to take judicial notice of

the fact that there exists in India a dam-contractor lobby which coopts local and national bureaucracies to their own interests. They have refused to acknowledge the salient fact, despite the Macchu Dam disaster in Gujarat, that the combined opposition by dam-contractors and engineers of the Public Works Departments (PWD) has successfully thwarted all efforts, since 1962, towards a national law on dam safety. And so powerful these interests have been as to defeat even a temporarily benign World Bank conditionality that its project assistance would be subject to enactment of such a policy! In other words, courts have turned a deaf ear to interrogations which would have demonstrated that the so-called specialised knowledges have been 'specialised' only in the sense that they stand placed at the beck and call of industry. This judicial astigmia (as noted) extends to a consistent denial of access to information — access to so-called environmental impact statements 'prepared' by the government.

The argument that judicial intervention by extension of administrative law principles will escalate costs of mega-public projects forbids social action groups from unveiling strong *prima facie* evidence of large-scale corruption (therefore, *mala fides*) in public projects. On the evidence of the Public Accounts Committee of Parliament of India, for anyone to see, it is now well established that all major irrigation projects in India regularly overrun by three to four times at least — and that is a very conservative estimate—*both* their time and cost-budgets! There exists unimpeachable evidence of exorbitant corruption. In denying justiciability to social activists, Indian courts have provided, alas! a shield of impunity to large-scale corruptibility of the Indian state[46].

When costs of judicial review on public projects are pleaded, what stands concealed, with the approval of courts, are the invisible elephantine gestation costs. No court looking at the escalation argument has ever looked at the fact, for example, that *all* the *imperative* needs of development, now urged, were not so *pressing* for about two decades of the inter-state dispute on Narmada before a Tribunal presided over by a retired Supreme Court Justice! Social activists are denied *relevance* if they seek to argue that even in the absence of judicial intervention, the Indira Sagar Project in Rajasthan has overrun twice its span of project-completion! In this zodiac, would a few years of judicial invigilation contribute much to enhance the *significant* cost-escalation?

The point of raising this question, in this manner, is to deconstruct, decompose, the 'efficiency' argument. Why should *this* argument *militate* against social action litigation and at the same time *condone* the enormity *of* self-caused delays in projects 'manifestly' aimed to promote 'development'? The argument of judicial efficiency proves more than it should. If justices

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46 *See*, Upendra Baxi, *op. cit.*

and courts are by definition incompetent (less equipped) to deal with special bodies of knowledges (earthquake engineering, nuclear physics) how do they become competent to administer, for example, patent law appeals (whether chemical, engineering, metallurgical, plant or now — under the WTO Treaty — patenting of new life forms, engineered by recombinant DNA technology)? At less exotic levels are the knowledges required to administer political justice (protection of human rights against the powers of the states) less sophisticated than those entailed in technocratic/scientific knowledges?

Take for example, the recent, and first ever, refusal by the Supreme Court to accept reference by the President of the advisory opinion on Ayodhya temple.[47] And how about the decision, which holds that the power of the President to dismiss state governments on the ground of violation of 'secularism' is judicially reviewable?[48] In what respect, pray, is the opinion of Dr. Justice Jeevan Reddy holding that mixing of religion and politics stands constitutionally proscribed[49] is less complex than any adjudicatory feat on location of nuclear power plants or large-scale irrigation projects?

At the end of the day, the so-called difference between judiciary's power to pronounce on profound political issues and deep scientific/technocratic ones is a difference without distinction. Both sets of issues pose architectonic challenges of conceptualising/articulating the play of public power on the images and futures of human rights. The enunciation of the latter is typically the province and function of judicial power; within the well-recognised and legitimate division of power and separation of functions. Accommodation by the apex judiciary with the executive on grounds of efficiency deprives adjudication on administrative law of much of its vitality. Indeed, it is a species of self-inflicted wound on judicial power amounting (in phallocentric idiom) to a *self-induced castration complex*. This complex is inimical to a growth of culture of power even where fairness is valued as an *integral* part of efficiency.

VII. SOME COMMON CONSIDERATIONS

Even so, we now return to the more familiar, and less unconventional, hometruth, which students of administrative law and process must bear in mind. *First*, courts are not the *only*, even when important agencies for combating and controlling excesses of public power. Whether they are decisive in terms of their impact on administrative behaviour and structures remains an open question though, in all honesty one must acknowledge massive contrary evidence. In any case, we need worthwhile empirical studies of the impact of judicial intervention, control and review on the

47. *Ismail Faruqui* v. *Union of India*, (1994) 6 SCC 360.
48. *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1.
49. *Id.* at p. 236 (para 310).

behaviour of those who hold and wield public power. This is a gap in our knowledge, which ought really to be remedied sooner rather than later.

Second, courts (in the common law orbit) are considered essentially as passive agencies. Affected individuals must challenge in the first place what they see to be arbitrary exercise of public power. To the extent that they do not do so, courts become *irrelevant* as mechanisms of accountability and also *helpless*. Some activist justices, especially on the Supreme Court, occasionally try to get around judicial helplessness by writing judgments in such a way as would lay down general propositions or lines of thought and enquiry not strictly germane to cases at hand but of considerable relevance to the future development of the law. I have described this phenomenon elsewhere as 'juristic activism'"[50] Justice Mathew's opinion in *Sukhdev Singh*[51] and Justice Bhagwati's opinions in *Maneka*[52] and *Shetty*[53] as well as Justice Krishna Iyer's opinion in *Nawabkhan*[54] exemplify this technique.

Third, judges and courts may only provide effective results in cases and controversies coming before them. They may counsel, cajole and even threaten and warn holders of public power to heed to demands of fairness in future; but they have no means whatever to *ensure* that this will happen. Indeed, times without number, cases come up, right up to the Supreme Court, which demonstrate that holders of public power are either unaware or deliberately flouting fairness requirements enunciated by courts. *Increasingly the burden of maintaining a modicum of fairness in administration of public institutions is being passed on to courts.*[55] It is doubtful that courts have been the decisive instrumentalities of generating an ethic of power anywhere in the world. However, one would like to think that judicial influence must lie at least in communicating and diffusing the rule-of-law awareness among all its constituencies and in making somewhat irksome the exercise of arbitrary power by its wielders. That, all things considered, is no small gain for citizens in the short and long run.[56]

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50. U.Baxi (ed.): MATHEW ON DEMOCRACY, EQUALITY AND FREEDOM, xxxvill *et. seg. (1978).*
51. *Sukhdev Singh* v. *Bhagatram,* (1975) 1 SCC 421, 447, *et. seq.*
52. *See supra* Note 20.
53. *R. D. Shetty* v. *International Airport Authority,* (1979) 3 SCC 489.
54. *Nawabkhan Abbaskhan* v. *State of Gujarat,* (1974) 2 SCC 121.
55. You have just to look at leading decisions to appreciate this situation. The respondents are not just the state and union governments, but also departmental undertakings, statutory corporations, registered societies, universities, colleges and school boards, municipalities and tribunals among others. See U. Baxi: *"Mass Copying: Should Courts act as Controllers of Examination"*, (1978-79) 6-7 Delhi L Rev, 144; U. Baxi: *"The Supreme Court Under Trial: The Supreme Court and Undertrials"*, (1980) 1 SCC (Jour) 35; S.N. Jain: *"Law, Justice and Affirmative Action"*., 21 JILI 262 (1979).
56. One wishes that in India the gain was real, at least in the short run. Abuse of discretion and excess of power continue at a scale which really seems to reduce judicial impact to even less than marginal significance. I invite your attention once again to books and journals

Fourth, one often wonders (as you might, going through this excellent treatise and related works) whether recourse to courts does not merely involve a trade-off between executive arbitrariness and judicial arbitrariness. In quite a few vital areas of administrative justice, one has the irresistible feeling that judicial choice making is binding not because it is reasoned but because there is no further recourse available to the victims of arbitrary power. Yet, there is no escape from recognising forms of judicial arbitrariness that revisits so regularly those who visit courts! It has often happened that in the selfsame case some judges consider the decision as administrative and deny relief while others consider it quasi-judicial and would grant relief whereas some others would call it administrative and yet proceed to apply some rules of natural justice to the case! [57] What some justices in same fact-situations consider to be a case of excessive delegation, others consider it to be a situation of valid delegation.[58] Opportunity to be heard, as already noted, may be differentially granted in similar fact-situations. The categories evolved to control discretionary powers regularly produce strikingly different results in similar fact-situations.

It is pointless to multiply relevant illustrations. Much of the volatility of decisional law arises from the fact that administrative law is, by and large, judge-made law: a series of *ad hoc* judicial responses. But aside from these general factors, we also ought that judicial arbitrariness often arises because of the uneven craftspersonship among justices that produces not just unreasoned judicial decisions but *poorly* reasoned decisions. The tendency to decide important questions of law and life by judicial fiat seems to be on the increase in India, given the fact and perceptions of the ever-increasing arrears and workload.[59] Moreover, the juristic competence of justices varies enormously (as of other professionals); this also contributes to the

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referred to in the text of Section VII and urge you to examine the cases discussed in this book from the standpoint of *recidivist administrative deviance*.

57. E.g. in *Board of High School & Intermediate Education* v. *Ghanshyam Das Gupta*, AIR 1962 SC 1110 involving cancellation of results of three examinees for having resorted to unfair means, a tremendous difference of opinion arose. The learned Single Judge of the Allahabad High Court held that there was no duty to act quasi-judicially. Brijmohan Lall, J., held that the committee on unfair means was acting administratively; yet in this situation *audi alteram partem* rules did apply. Dayal, J., accepted that the function was administrative; but he refused to extend these rules to the instant case. Agarwala, J., accepted that the function was administrative but held, finally, that the *audi alteram partem* rules applied. The Supreme Court held the function to be quasi-judicial. But in *Bihar School Examination Board* v. *S.C. Sinha*, (1970) 1 SCC 648 involving mass copying, considerations of 'efficiency' outweighed those of justice.

58. *See Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.* v. *Asstt. C.S.T.*, (1974) 4 SCC 98. *See* the discussion of the sharp dialogue in the Court on limits of delegation, Baxi, *supra* note 51, LI-LIII.

59. *See* U. Baxi, *The Crisis of The Indian Legal System*, 58-83 (1982) and the materials there cited.

appearance and reality of arbitrariness. The varying levels of forensic competence further aggravate the situation; there is no assurance that all members of the Bar put in amount of 'homework' equal to the fees they charge. It is well known that many counsel fail to cite relevant decisions; appellate courts, overburdened with work and without any research assistance, are thus further disabled from maintaining and transmitting institutional memory of past decisions. Judges then tend to overlook relevant decisions, and at the Supreme Court even the pretence of adherence to precedents is being gradually given up. Fluctuating Bench-structures also add to problems of craftspersonship.[60] There are other variables.[61] However the point is simple: appellate choice making in administrative law arena is particularly vulnerable to the *image* of arbitrariness despite the notorious fact that the very objective of administrative law is to control arbitrary exercise of public power.

Both the *appearance* and *reality* of arbitrariness in this arena is dangerous for future development because the targets of judicial decisions (administrators of institutions and bureaucrats) may genuinely begin to feel that judicial process unduly obstructs their role and function, if not their *status*. Instead of generating fairness discipline among them, judicial waywardness may generate adventurism among some of the administrators. They tend to take *'fly-now-pay-later'* type *decisions*; in other words, the ambiguity and fluidity in administrative justice norms itself becomes a *resource* for the erratic, and arbitrary, exercise of their power. On the other hand, victims of arbitrary power may feel discouraged or diffident in bringing their complaints to courts. Not expecting an expeditious relief but also deprived of an assurance of *any* relief, they begin to use the writ jurisdiction processes not so much to vindicate their rights or redress their grievances but to obstruct, as much as possible the adverse exercise of public power. This in turn may lead to a degree of political consensus that courts impede social progress.[62]

Taken in its entire context, the appearance and reality of judicial arbitrariness presents a grave threat to the development and impact of administrative law jurisprudence towards the growth of an ethic of public power. Students of administrative law and justice have accordingly directed attention to feasible alternative models of administrative justice. One such

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60. *See* the analysis in Baxi, *supra* Note 49, at pp. i-xv, and the literature there cited.

61. U. Baxi: *supra* Note 60.

62. Admittedly, this scenario of impact on public and political mind of the appearance and reality of arbitrariness in judicial process is based in part on some perception of recent history and in part on conjectures. The real situation is bound to be much more complex, and in some respects even different than the summary presentation seeks to highlight. And we have still to quantify and qualitatively assess the appearance and reality of judicial arbitrariness.

model is that of tribunalisation: that is a large-scale network of administrative tribunals functioning under a general law regulating all tribunals and allowing only one appeal to the Supreme Court or the High Court.[63] Another, and no less demanding is the creation of public law division (since questions of administrative and constitutional law are often intertwined) in the High Courts and the Supreme Court, dealing exclusively with exercises and excesses of public power and assured of high juristic competence. There might be other feasible models. But this Introduction need not be burdened with an elaborate analysis of possible alternatives. No search for genuine alternatives can succeed or indeed even start in the absence of a critique of the institutions and processes of administrative law and justice. And, in turn, such a critique requires a sensitive social understanding of the processes of control over wielders of public power through judicial power. Professor Massey's present work, provocative with live insights,[64] is a step forward towards this kind of understanding. Undeterred by the conventional Indian models of a law textbook, Massey has gone much beyond a narration of the law as it is. Rather, he quite consistently and overtly articulates concern about the future directions of development. Indeed, what is striking about this book is the insistence that "courts must exercise its power for the protection of the 'little man', the historic victim of carcinogenic concentration of public power in dominant institutions of governance.

VIII. SOCIAL ACTION LITIGATION

Happily, a sensitive social understanding of the pathology of public power now leads to a meteoric rise, though highly controversial, of the social action litigation (unhappily miscalled by an American label 'public interest litigation'.) I have traced the growth of social action litigation in some detail

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63. *See* S.N. Jain ADMINISTRATIVE TRIBUNALS IN INDIA (1977). But as the author demonstrates tribunals are rapidly developing their own distinctive problems of exponential workload and massive arrears.

64. For example, Massey suggests that for purposes of Article 12 invocation there is no justification for courts to take the view that "private individuals and bodies are not amenable". He suggests that the "correct approach" to Article 12 is that "every authority or person who pose a threat to fundamental rights should be amenable to the jurisdiction of the court". The relevant test, he maintains, should not be the ' 'type of agency" but rather the "threat to fundamental rights", (p. 252, *infra*). Similarly, he observes that "in a country like India where people have no right to know, judicial process grinds slow and other grievance procedures are feeble and inefficient, perhaps the discretion to disobey may provide an effective check on the operation of the government machinery in a reckless manner", (p. 487, *infra*). Massey is also the first Indian administrative law specialist to explicitly say that the notion of the rule of law has an 'ideological' content as well (*see* pp. 24-27, *infra*).

elsewhere;[65] and Professor Massey has, innovatively, devoted a whole chapter to it in this revised edition.[66] Attacks on, or 'critiques' of, social action litigation (SAL) abound since its inception. SAL is under attack by a cross-section of retired and sitting justices, politicians, journalists, lawyers, administrators and even social activists. Some people are thought even to be leading "cheer squads" for or against SAL.[67]

The salient criticisms against SAL, in essence, relate to the notion of the judicial role. Courts and judges ought not, it is said, 'usurp' the power of other organs of government (legislature, executive), lest it might lead to government by judiciary. Courts and judges ought to leave other institutions to mind their legitimate business; they must respect autonomy of other institutions of governance.

In the abstract, this is an appealing argument. The term 'usurpation' suggests crystal-clarity concerning institutional roles. But this kind of clarity is hard to achieve or sustain. I have elsewhere argued that:

(*i*) There is no *universal* theory about what judges ought or ought not to do (judicial role);

(*ii*) Most purported theories of the judicial role, on deeper analysis, turn out to be relevant to, and drawn from, the experience of the First World societies; and that those may not be uncritically extended to our experience;

(*iii*) The inherited categories of distinction between 'legislation' and 'adjudication,' are, to say the very least, questionable and ought to be questioned.[68]

Be that as it may, even our readily imported, duty-free notions about the judicial role must take account of, and be held by, the oath of office taken by the justices which includes the proposition that they will "perform their duties ... without fear or favour, affection or ill-will and that they will uphold the Constitution and the laws."[69]

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65. U. Baxi, "*Taking Suffering Seriously: Social Action Litigation before the Supreme Court of India*" (1979-80), 8-9 DLR 91; extended and revised in LAW & POVERTY: CRITICAL ESSAYS (1989, Bombay, N.M. Tripathi, U. Baxi *ed.*).

66. *See* pp. 359-378, *infra*.

67. Coomi Kapoor, "*Supreme Court: Conflicts Within*" INDIA TODAY, pp. 126 at 128 (November 15, 1984).

68. U. Baxi, "*On How Not to Judge the Judges: Notes Towards Evaluation of Judicial Role*" 25 J.L.I. 212; U. Baxi, "*The Travails of Stare Decisis in India*" in A.R. Blackshield (ed.) LEGAL CHANGE: ESSAYS IN HONOUR OF PROFESSOR JULIUS STONE, 34-51 (1982).

69. True, the Constitution requires an oath from members of Parliament and State Legislatures. Union and State Ministers, Governors, etc. But all of these save the Comptroller and Auditor General of India, and the Justices, do not take the oath to uphold the Constitution. They, rather declare their faith and allegiance to the 'Constitution of India as by law established'; some of them, especially the legislators, are obligated to uphold "the sovereignty and integrity of India'. It is significant that the duties arising under the various

Those who talk glibly about judicial role, on the basis of imported wisdom (and mostly duty-free wisdom) thus overlook the text of the judicial oath prescribed by the Constitution. Can any critic of SAL demonstrate that any single SAL matter involved situation of subverting, downgrading or merely departing from the oath of judicial office? Non-judicial critics of SAL, who swear at SAL and, judicial activism, have never taken any oath prescribed by the Constitution. So long as the text of the Constitution remains what it is today, no judge can go so far as to say that her conception of judicial role disallows her from 'entertaining' matters which disclose prima facie violations of fundamental rights and constitutional provisions through governmental lawlessness, administrative deviance, tyranny and torture.

The 'usurpation' argument is misconceived as a critique of SAL. Should not the judges and court respond to SAL petitioners: when police do not enforce the law to prevent buying and selling of women in market ŏvert; when superintendents of prisons do not and will not prevent torture and brutalisation of prisoners; when trial courts fail to bring thousands of undertrials to trials for cruelly long periods of time; when governments fail to carry out release and rehabilitation of bonded labourers mandated by the Constitution and the laws; when the officials responsible for the administration of minimum wages, contract labour, migrant labour, and labour safety legislations (when in many more situations, involving clear violation of the law and the Constitution). When they respond to these, are they 'usurping,' in any sense of that word, the powers of other institutions of governance?

Another principal criticism is based on the proposition that judges ought not to undertake tasks, which they cannot effectively accomplish. This is the old idea that jurisdiction must be related with effectiveness. This idea is invoked by all and sundry, but when sitting justices and renowned social activists reiterate it, we need to attend to it rather carefully.

'Effectiveness' in a way means 'compliance'. If Supreme Court's reliefs and directions are not administered, or are defied with impunity, the only remedy available to the SAL petitioners is invocation of contempt jurisdic-

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forms of oath under the Third Schedule are expressed differently. The task of upholding the Constitution is for judges (and for the Comptroller and Auditor General of India) by virtue of their oath. Judges are not required to bear faith and allegiance to the Constitution; they must uphold it with or without faith and allegiance (whether one can uphold anything without allegiance is a different, and a difficult, question). The point here simply is: if judges do some things by way of SAL how can they be said to usurp any other institutional powers? Can upholding the Constitution without any fear or favour be 'usurpation' in any sense of that term? Judges and courts remind the nation and its governors that there is something called the Constitution of India; a reminder of this nature is not 'usurpation' of power but a necessary challenge to abuse of power, to the myriad forms of governmental lawlessness.

tion. Such invocation, of course, is diversionary of the principal issue and to be effective it requires a rewriting of the rather liberal contempt jurisdiction.[70] One may even speculate situations of confrontation where the Chief Secretary of a State, or the Commissioner of Police, or a Minister defies with impunity directions and orders made in exercise of contempt powers. Should courts, and especially the Supreme Court, neglect the possibility of open defiance of its orders and their overall helplessness in case of open confrontation? The executive, possessed both of the power of the purse and the sword, is in an advantageous position with an arsenal of techniques (including powers to appoint and transfer justices of High Court and powers to supersede the judges in designating the Chief Justice of India) to subvert and thwart the judicial will. Many SAL petitions show (e.g. the Agra Protective Home Case, the Kesari Dal petition, the Bhagalpur blindings and Bihar undertrial matters) the executive at its subversive best.

The Supreme Court has not been unaware of the perils of an uneven combat (though some High Courts have yet to show the same level of statespersonship in SAL matters). Radicals, who criticise the Court for not moving fast, or not going far enough, have overlooked the historic constraints on the judiciary. Critics who find courts treading warily in new arenas of power have yet to fully appreciate that the discourse of SAL is a different kind of discourse than that of adversary jurisdiction. SAL seeks to exhort the lawless; it strives to make them unlearn the arrogance of their power; it seeks to educate them in responsible exercise of public power. The SAL justices may compel but only as a last resort.

SAL has initiated a dialogue subversive of our tame certainties and pet dogmas concerning the judicial role. SAL, and judicial review generally, is an ongoing aspect of the struggle to realign the balance of power between the governors and the governed. It is an effort to make the rule-of-law notions, which have pre-eminently served the rulers to increasingly serve as well the ruled of India.

Finally (without being exhaustive) there are those who maintain that the Supreme Court is not effective in terms of providing real relief to those harmed by abuse of power. This kind of criticism, coming as it does from gifted and dedicated activists (like Vasudha Dhagamwar) deserves serious acknowledgement. Her point, essentially, lies in a series of earnest and existential questions: What happens after the Supreme Court has decided on SAL petition? Who is going to assure that bonded labourers freed by a judicial order, are actually rehabilitated? What happens, in real life, to the released undertrials — who gives them a recompense for missed opportunities (education, socialisation, employment)? When extrajudicial murders (through fake 'encounters' or 'anti-dacoity' operations) occur, how do court's direc-

70. *See* U. Baxi, *supra* Note 66.

tives/orders protect people? She maintains, rightly, that without follow-up action SAL orders merely have a symbolic effect; some amelioration in the plight of victims occurs but the structure of suffering, and systems of suffering, continue to assert themselves.

What follows from this anguished analysis? Surely, no one intends to say that the court and the judicial process will solve all the nation's ills. Nor, surely, should courts permit such an impression to arise. Furthermore, courts should be, and usually are, cautious and should not allow SAL petitions to be filed by people who seek to pursue their self-interest through the device of SAL. That having been said, what critics mean has *nothing* to do with SAL jurisdiction. Their agony, genuine as it is, has to do with callousness of groups and institutions, which fail to utilise effectively the normative enunciations of Supreme Court (and High Courts) as *resources* to steadfastly pursue their constitutional duties as citizens, individually and collectively. The SAL endeavour will be effective, in its vast socio-political significance, only when the well-endowed *few* begin to fight for the disadvantaged, dispossessed, and deprived millions of Indians. The SAL endeavour is the call to thinking humanity to *suffer* by the suffering humanity, which has now begun to *think*. As Karl Marx said:

> "The existence of a suffering humanity which thinks and of thinking humanity which is oppressed will necessarily be unpalatable for the passive animal and the world of Philistines.... The longer circumstances give thinking humanity time to reflect and suffering humanity time to rally, the more finished when born will be the product that the world carries in its womb."

ABOUT THE AUTHOR

Professor I.P. Massey, formerly was the Professor and Chairman, Department of Law and Dean Faculty of Law, Himachal Pradesh University, Shimla. From 1996 to 1999 he was the Fellow at the Indian Institute of Advanced Study, Shimla. He was appointed Member of the Himachal Pradesh State Human Rights Commission in 1996 for a period of five years. Presently, he has been appointed member of Himachal Pradesh State Legal Services Authority. Professor Massey received LL.M. degree from Lucknow University and also from School of Law (Roalt Hall) University of California, Berkeley, U.S.A. with specialisation in Constitutional and Administrative Law. He obtained Ph.D. in Law from the Kurukshetra University. He is widely travelled and delivered lectures at Indiana University, Fortwayne campus, USA and MART Institute of Technology and TMT/MICIA Co-operative Programme in Malaysia. He has written extensively on Constitutional and Administrative Law. He participated in various national and International seminars and conferences. His research articles have been published in reputed journals and books.

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