

# Judicial Activism in India

## Chief Justice P.N. Bhagwati

*Last fall the Law School was honored by a visit from Indian Chief Justice Prafulla-chand Natwarlal Bhagwati. Justice Bhagwati came as the guest of Prof. Marc Galanter, himself an expert on Indian law and a consultant to the Indian government in the Bhopal disaster. Bhagwati is the 17th chief justice of the Indian Supreme court, and follows his father as a justice of that court.*

*India Today called Bhagwati, "A conscious disciple of Felix Frankfurter, Learned Hand and the whole galaxy of activist judges who helped fight color bar and segregation laws in the U.S. during the 30's." In this article, adapted from a speech he gave while here, Justice Bhagwati discusses his concept of judicial activism, with its implications for this country as well as India.*



I have the privilege to speak to you on the subject of judicial activism in India. This subject is very fascinating and its dimensions are so large that it is not possible to cover them within the short time that is available to me. But I shall try to place a few aspects of it before you to demonstrate how through activism we in India have developed our human rights jurisprudence and brought help and succor to the masses of people in the country. Let me first of all make clear what I mean by judicial activism and why judicial activism is necessary in a country like India.

One basic and fundamental question that confronts every democracy, run by a rule of law is, what is the role or function of a judge. Is it the function of a judge merely to declare law as it exists—or to make law? And this question is very important, for on it depends the scope of judicial activism. The anglo-saxon tradition persists in the assertion that a judge does not make law; he merely interprets. Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function. It

has long held the field in England and its most vigorous exposition is to be found in a speech made by Lord Chancellor Jowett at the Australian Law Convention where he said, "The function of a judge is merely to find the law as it is. The law-making function does not belong to him, it belongs to the legislature."

This judicial view, I'm afraid, hides the truth of the judicial process. This theory has been evolved in order to insulate judges against vulnerability to public criticism and to preserve their image of neutrality, which is regarded as necessary for enhancing their credibility. It also helps judges to escape accountability for what they decide. They can plead helplessness by saying that it is a law made by the legislature and they have no choice but to give effect to it. The tradition of the law and the craft of jurisprudence offers such judges plenty of dignified exits from the agony of self-conscious wielding of power. And hence the incredibly persistent attempt on the part of lawyers and judges to convince the people about the truth of the lie that judges do not make law. There can be no doubt that judges do take part in the law making process.

And even some judges have now openly avowed their creative role. Lord Reid, a great English judge said, "There was a time when it was thought almost indecent to suggest that judges make law; they only declare it. Those with a taste for fairytales seem to think that in some Aladdin's cave there is hidden a common law in all its splendor and that on a judge's appointment there descends on him knowledge of the magic words,

**It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge.**

'Open Sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairytales anymore."

Lord Reid considered that in a democratic society the legitimacy of judicial lawmaking had to be faced. He did not

agree with Lord Radcliff's solution of publicly denying one's creativity while privately exercising it—what he called the facade approach. He asserted in a famous address, "We must accept the fact that for better or worse judges do make law and tackle the question how do they approach the task and how should they approach it." Lord Denning also remonstrated that judges cannot afford to be timorous souls. They cannot remain impotent, incapable and sterile in the face of injustice. The same view, I believe has prevailed in your country where a frank and ruthless analysis of the judicial function and its lawmaking potential have been acknowledged and recognized. It is no doubt true that a judge has to interpret the law according to the words used by the legislature. But as pointed out by Justice Holmes, a word is not a

**The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.**

crystal, transparent and unchanged. It is a skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge. Plato posed the problem 2,000 years ago: Is it more advantageous to be subject to the best men or the best laws? He answers by saying that laws are by definition general rules and generality falters before complexities of life. Laws' generality and rigidity are at best a makeshift, far inferior to the discretion of the philosopher king whose pure wisdom will render real justice by giving each man his due. Aristotle was, however, in favor of the rule of the law. He said, "He who bids the law's rule bids God and reason rule, but he who bids man's rule adds the element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men."

Yet Aristotle and Plato knew that law cannot anticipate the endless permutations of circumstance and situation. There is bound to be a gap between the generalities of law and the specifics of life. This gap in our system of administration of justice is filled by the judge. In entrusting this task to the judge we have synthesized the wisdom of Plato and Aristotle. It is here that the judge takes

part in the process of lawmaking. Law-making is an inherent and inevitable part of the judicial process. The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society. By thus making and molding the law he takes part in the work of creation. The judge is not a mimic. Greatness of the bench lies in creativity. It is for this reason that when a law comes before a judge he has to invest it with meaning and content.

There are cases where a decision one way or the other will count for the future, will advance or retard sometimes much, sometimes little, the development of the law in a proper direction. It is in these types of cases where the judge is to leap into the heart of legal darkness, where the lamps of precedent and common law principles flicker and fade, that the judge gets an opportunity to mold the law and to give it its shape and direction. This is what we have been trying to do in India.

Once it is recognized that the judges do make law, though not in the same manner as the legislature, it will immediately become apparent why judges can and should adopt an activist approach. There is no need for judges to feel shy or apologetic about the law creating roles. The Supreme Court of India has been performing this role in the last 7 or 8 years by wielding judicial power in a manner unprecedented in its history of over 30 years.

**There is no need for judges to feel shy or apologetic about the law creating roles.**

The courts in India have been active in other ways as well. We also started the legal aid movement. We said that this program by itself would not be enough to assist our people, so we developed certain strategies: the first was encouraged legal awareness. Then we organized legal aid camps. We would take lawyers to the rural areas, invite the people to come with their problems, and the lawyers would advise them, try to solve their difficulties. We would also take the government officials with us because some problems related to administration. We added to that another dimension, what we have been calling Lok Adalat, which are voluntary mediation agencies. These lawyers, retired judges, and social activists would take cases pending in the lowest courts and attempt to secure a settlement. Even those cases which have not come to court also would be mediated. In

**The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action being invalidated by judicial intervention.**

the last two years we have settled more than 10,000 cases and this movement is growing fast. Practically every fortnight a team goes to a place where a lowest court is situated, to bring about settlement of disputes.

We have also fostered the development of social-action groups. We started organizing them, providing them assistance in the shape of funds, the shape of lawyers and under the auspices of my committee they started holding campus for training social activists as paralegals so that they may provide first-aid in law in the rural areas.

Lastly we developed the strategy of public interest litigation. This litigation is of a slightly different character than yours and that is why some jurists in India prefer to call it social action litigation. We felt that even if we had all these legal aid offices it would not be possible for the poor people to afford the courts for justice. Therefore we sought the ways and means by which we can provide access to justice to the poor and underprivileged segment of society. One major impediment in the way of access to justice for the poor was the doctrine of standing. It requires that only a person to whom a legal wrong is done can seek judicial redress. So in one seminal decision we took the view that where a legal wrong is done to a person or class of persons who, by reason of poverty, disability, socially or economically disadvantaged position, cannot approach a court of law for justice, any member of the public or any social action group can initiate an action in the high court or the supreme court for vindicating the rights of the underprivileged. That is how we broadened access to justice. The result was a large number of cases coming to the court. We also said in appropriate cases they can move the court by just addressing a letter to the court. Thus developed what was now come to be known as epistolary jurisdiction, jurisdiction which is invoked by writing epistles to a court. Of course the parameters of this jurisdiction have been laid down: it can be only on behalf of a person in custody or on behalf of a class of persons who cannot approach the court on the

In the last few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India.

account of their poverty or underprivileged position.

Once the portals of the court were thrown open to the poor and underprivileged, large numbers of cases started coming. Social action groups, professors of law, journalists, social scientists, all started moving the court and investigative journalism played a very vital role. Investigative journalism now exposes what I call governmental repression, administrative deviance and exploitation by vested interests. So on the basis of reports of investigative journalism people started approaching the courts and we started entertaining letters and petitions for redressing the wrongs that had been done to the underprivileged segments of society. We had cases relating to bonded laborers, landless peasants fighting for minimum wages, women in distress, juveniles in jails, and a host of other disadvantaged people. These are class problems—the problem of poor are basically different from the problems that so far have been resolved by the courts. They are qualitatively different and the lawyering skills required was also of a different kind.

Another difficulty was how to produce evidence for these persons. Under the adversary system of justice both sides

produce their evidence and the judge sits like an umpire and decides. Under our anglo-saxon system, he does not take part in the process of data and fact collection, but doing so just would not work. So we made a departure from the adversary system and we have started appointing commissioners for the purpose of investigating and making reports to the court.

Copies of their reports are given to both sides and they are asked to make their submissions, file their affidavits and the court will decide. Next we faced the problem of what remedies to be given. The ordinary remedy of Writs of Certiorari and Prohibition would not help. So we developed a wide ranging repertoire of remedies which would help to solve the problems of these people. Finally, we needed to develop monitoring mechanisms for the purpose of seeing that our orders are implemented. Very often a social action group which has initiated an action will try to see that orders are implemented. Sometimes they set up monitoring mechanisms. Sometimes we instruct an officer of the government to go and find out what had happened and report to the court. If the orders are not carried out the court will take contempt proceedings. This is how, gradually, we have been trying to develop social action litigation in India, and large numbers of people are getting the benefit. Sometimes one action may result in granting of benefits to a thousand people, sometimes fifteen hundred and so on.

You thus see that the Supreme Court of India has expanded the frontiers of fundamental rights and of natural justice. In the process it has rewritten some parts

of the constitution. The right to life and personal liberty and the procedure established by law has been converted de facto and de jure into a procedural due process clause contrary to the intent of the makers of the constitution. This expanding right has encompassed, within itself, the right to bail, the right to a speedy trial, immunity against cruel and unusual punishment, the right to dignified treatment in custodial institutions, the right to legal aid in criminal proceedings and above all the right to live with basic human dignity. The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action being invalidated by judicial intervention. The Supreme Court has developed the doctrine of promissory estoppel, departing from any English and American decisions. We have held that it can be the basis of a cause of action and it can be used against the government and its instrumentalities as much as against a private individual. The Supreme Court has evolved a strategy of public interest litigation and made it possible for the problems of the disadvantaged to be brought before the courts. A host of other principles of constitutional and public law have been developed and many more are in the process of formulation and development. In the law few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India. It has augmented its moral authority and acquired a new credibility with the people through judicial activism and judicial creativity.

