PRAGMATIC LEGAL PHILOSOPHY AND JUDICIAL CHOICES

Prof. Dr. A. Lakshminath*
Dr. Mrs. K. Sita Manikyam**

Knowledge being a philosophical concept, for anything to constitute an adequate ground for legal validity, it must satisfy the standards set by knowledge. In the perennial debate between positivists and non-positivists legal validity has always been a subject of controversy. In exploring standards for legal validity we must remember that knowledge is the outcome of an activity of judging which is constrained by reflexive reasoning. Amongst the constraints are found not only general metaphysical limitations but also the fundamental principle that one with the capacity to judge is autonomous or in other words capable of determining the reason that forms the basis of action. As soon as autonomy has been introduced into the parameters of knowledge, the law is necessarily connected with every other practical domain. The issue of knowledge is orthogonal to questions about the inclusion or exclusion of morality for what really matters is whether the putative grounds of legal validity are appropriate to the generation of knowledge. Under such circumstances neither an absolute deference to either universal moral standards or practice-independent values nor a complete adherence to conventionality or institutional arrangements will do. The outcome should be towards more integral rather than current positivism versus non-positivism debate.

Prof. Amartya Sen in his book on *Idea of Justice* gives us a political philosophy that is dedicated to the reduction of injustice on earth rather than to the creation of ideally just castles. Prof. Sen showed that there was no such thing as perfect justice; that justice was relative to a given situation; and that rather than searching for 'ideal' justice the stress should be on removing the more manifest forms of injustice.

But what is justice? Is it right to go on harping on the injustices of the past such as colonialism in order to deliver justice? For example, does 'justice' demand that developing countries should be allowed to pollute the atmosphere to the same degree that the industrialized world did before they agree to move on climate change? Can 'retribution' be regarded as a form of justice? Are any means legitimate in pursuit of a perceived 'just' goal?

The idea of justice demands comparisons of actual lives that people can lead rather than a remote search for ideal institutions. That is what makes the idea of justice relevant as well as exciting in practical reasoning.

Prof. Sen further points out in his social choice theory, the grave problems with the 'transcendental approach' of John Rawls and argues that what we

* Chancellor, D. S. National Law University, Visakhapatnam; Vice-Chancellor, Chanakya National Law University, Patna.
** Assistant Professor, Faculty of Law, Andhra University, Visakhapatnam.

urgently need in our troubled world is not a theory of an ideally justice State, but a theory that can yield judgments as to comparative justice, judgments that tell us when and why we all are moving closer to or farther away from realizing justice in the present globalized world. There is obviously a radical contrast between an arrangement focused conception of justice and a realization focused understanding: the latter must concentrate on the actual behaviour of people rather than presuming compliance by all with ideal behaviour.

With judicial practice and legal theory in closer harmony, judicial reasoning aimed at advancing the ends of justice and contemporaneity in the law will become more prevalent. Formalism, or its lingering influence, will be replaced by a judicial methodology that is every bit as disciplined in the service of the law as that outmoded creed. Realism, pragmatism, practical reasoning and principles will become the order of the judicial day.

As long as judges remain under the influence of outdated and discredited theories of law, the judiciary will not escape the opprobrium of 'muddling along'. The common law process is congenitally incremental, and without the guidance that a sound conception of the judicial role can bring, the judiciary will inevitably lurch from case to case without any, or any adequate, direction or purpose. Incrementalism itself demands something more than the application of practical skills. It requires a unifying legal theory or approach.

Discarding discredited and untenable theories as a basis on which to base a sound conception of the judicial role necessitates the deliberate rejection of formalism, or the lingering traces of formalism. Only then will the judiciary have the capacity to adopt an approach or methodology which is pragmatic whereby the denunciation of formalism is possible. There is no greater solecism in the working of the law than blind unthinking adherence to that creed. As an off-course substitute for a considered conception of the judicial role, formalism is the real and enduring opponent of fairness and relevant in the law.

There have been true constitutional crises in the past, and our system has weathered them without resort to the drastic remedies proposed by current critics of the Court. There is no crisis now, and it would be a serious mistake to let partisan alarmists convince us that any such measures are necessary. Constitutional democracy demands more than the conviction of narrow minds.

Judging is neither just acting nor merely thinking, for otherwise thoughts would become either indeterminate or unintelligible. Instead it is an integrated instance of thinking and acting, or a practice, which asks for justifying reason with respect to any cognitive move performed within it.

Constitutional Law prescribes generally the plan and method under which the public business of the political organ, known as the State, is conducted. And it differs further from the other types of law, in that it is both

enacted and changed either in an extraordinary manner by an ordinary legislative body or by an extraordinary body, such as a Constitutional Convention, constituted especially for that purpose.

A legislature must speculate more perilously as to how future cases will arise and what contingencies they will involve. Because perfect generalization for the future is impossible, no generalization is complete. Aware of this impossibility, legislatures often do no more than purport to lay down the most general statements of law, intending that the Courts and other law applying agencies shall creatively adapt the general principle to specific cases. Thus, every time a statute uses a rule of reason, or a standard of fairness without specification, there is conscious and deliberate delegation of this responsibility to the Courts.

Judges sometimes reach outside the Constitution to discover fundamental or universal principles to guide their decisions. This natural law approach, however, remains a continuing source of dispute. To shed further light on constitutional meaning, judges turn to historical analysis. If the Constitution is to guide future generations, there must be some flexibility in applying its language. After reviewing the various approaches to constitutional interpretation, Justice Cardozo described the judges' task as an eclectic exercise that blends in varying proportions the methods of philosophy, history, tradition, logic and sociology. Rules are replaced by working hypothesis. Judicial power must be understood in terms of methods used by courts to preserve their institutional integrity, prestige and power, the organizational evolution and politics of the courts; and the dynamics of decision-making within the judiciary.

With no prospect of a change in responsive governments in the immediate future, the pressure on Courts to resolve the nation's social and political problems and maladministration in the country is bound to increase. If the Indian judicial system is to be saved from collapse, the need is not only for more judges and Courts but also a need to conserve judicial power where it can be utilized most effectively on a principled and predictable way and in areas where it is most needed.

Under no Constitution can the power of Courts go far to save the people from their own failure. There are too many dangers to the judiciary itself from an omnipresent and rescuing judicial power. In its own interest the Indian judiciary may sooner or later have to propound a policy of judicial non-intervention in defined areas. Such a policy is not a sign of weakness or abdication by the judiciary but only recognition of the fact that the Constitution did not make the judiciary a substitute for the failure of the other branches of government and that judicial power has its limitations.

The Indian Supreme Court in recent years as an activist Court had to make up for the failings of Indian Parliament and Government to bring about appropriate changes in the law. The Jury is very much still out on whether the activism of the Indian Supreme Court has gone too far. There is a case to be

made for the view that by seeking to build great structures on the 1950 Indian Constitution. The Supreme Court has actually shaken that Constitution's foundations, to the extent that the Court's judgments no longer carry the weight and respect that they once did. But others would argue that, compared with the relative lack of ambition displayed by the High Court of Australia and the Supreme Court of Ireland, the Indian Supreme Court has much to be lauded for. There is, at present, a rampant conservatism on show in both of those other courts, where civil society may well look with envy at their Indian counterparts.

In response to the civil society's claim the recent Delhi High Court, on 2nd September 2009, rebuffed the Apex Court, holding that the declarations of assets, were not immune from RTI, and added for good measure that declaring personal assets resonated with the best practices and standards of ethical behaviour of judges. In the matter relating to Gay Rights too the Delhi High Court has shown more pragmatic orientation.

If judges' practical skills are to be harnessed to a sound conception of the judicial role based on legal theory, follows that legal theory should be readily accessible to judges. Regrettably, that is not always the case. Many legal theorists seem to write to and for each other. In the result, jurisprudential theory has become burdened with a surfeit of theories and sub-theories, some of which misrepresent and distort the subject theory, which in turn provokes further critical comment.

Unpalatable though it may be, it has to be said that there have been too many rather than too few contributions to legal theory, to the point where the subject has generated its own somewhat self-conscious and introspective industry. Within this industry, legal terms are defined and redefined and inspire theories that may be perceived to have both their footing and their reach in the given definition; legal concepts are classified and reclassified until the classification or reclassification seems to become the end of the discourse in itself; and hypotheses are advanced and readvanced until they break down under the weight of their own linguistic genesis. Jurisprudence has come to possess the variety of a giant supermarket. Small wonder that the practitioner is bemused as to what to take from the shelf.

Legal Philosophy: Epistemological Considerations

The reality of the judicial process would be recognized, principally, the inherent uncertainty and vagueness of the law. This uncertainty vests judges with vast discretion and confronts them with limitless choices in the course of reaching a decision. Judicial autonomy is not only inevitable, but also essential to ensure that substantial justice is done in the individual cases and the law be applied and developed to meet current requirements through 'pragmatic approach'.

There are various theories of the nature of law. It is important to note that non-universality of law is the central principle of social organization. The

epistemologies that underline these theories are irreconcilable and ideological incipience is often manifest in these theories.

Epistemology is that branch of philosophy which studies knowledge and explores such matters as the nature of knowledge, its scope, its presuppositions, its laws and the general reality of claims to knowledge. It is concerned with the question whether the beliefs are based on good grounds. It is concerned with the justification in claiming knowledge of a whole class of truths. The theories of law consist of three types of theories of knowledge.

The Metaphysical-Rational Epistemology claims that all knowledge is contained in nature and it is discoverable by reason. We can see these in the classical theories of natural law.

The Idealist Epistemology maintains that the mind and the spiritual values are fundamental in the world as a whole. Philosophical idealism consists of Immaterialism, Transcendental Idealism(Kant), Absolute Idealism (Hegel) and Neo-Hegelianism.

We are concerned with Kant's Transcendental Idealism so far as law is concerned. Accordingly our perceptions have to be organized within the pure a prior institutions of space and time in terms of rational principles. We cannot have knowledge of an objective world unless we place everything in *spatio-temporal* contexts and synthesise our sensations. This inquiry is possible by our transcendental-self and not by empirical-self. Transcendental-self is a condition of knowledge and not an object of it. Hence it cannot be known. The idealist theories of law, therefore, proceed from fundamental ideas discovered through an inquiry into the human mind. The idealist theories of law comprise of the following:

- Law as Harmonizing Voluntary Actions: Immanuel Kant (1724-1804 AD)
- Law as the Idea of Freedom: Hegel (1770-1831 AD)
- Law as Adjustment of Purposes: Rudolph Stammler (1856-1938 AD)
- Law as the Principle of Legal Evolution: (Del Vecchio (1878-1970 AD)

The Empiricist Epistemology claims that the sources of knowledge lie in experience and not in reason. Experience is an unorganized product of sense perception and memory. There is another sense of the term experience which indicates sensation, feelings *etc.* What is crucial to empiricism is the view that knowledge depends upon the use of sense and upon what is discovered through them. The empiricist epistemology can be derived in three ways:

1. That all knowledge directly comes from sense experience (learning, association *etc.*).
2. All knowledge is derived immediately from experience.
3. All materials for knowledge are ultimately derived from experience. Hence all concepts of law are *posteriori.*

Phenomenology is a field concerning the study related to philosophy, such as logic, ethics or aesthetics. It denotes the illusory features of human experience (Lambert 1728-1777). It attempts to know the mind as it is in itself. It does so through studying the ways in which it makes it appear to us (Kant-Hegel). In the mid-nineteenth century, phenomenology became purely descriptive study of a subject matter. Hamilton (1788-1856) spoke of it as a purely descriptive study of mind. Hartmann (1842-1906) thought its objective as rendering a complete description of moral consciousness.

The following are the seven steps of the phenomenological method: **a.** Investigating particular phenomena, **b.** Investigating general essences, **c.** Apprehending essential relationships among essences, **d.** Watching the constitution of phenomena in consciousness, **e.** Suspending belief in the existence of the phenomena and **f.** Interpreting the meaning of phenomena.

The Phenomenological Theories of Law display three main approaches:

1. An approach that proceeds from the key concept of 'nature of the thing' and is seen in the works of some German philosophers *viz.*, Gustav Radbruch, Helmut Coing, Gustav Fechner and Werner Mainifer. They believe that phenomena have certain immanent values. It translates the reality of phenomena into the world of legal institutions.
2. An approach that derives from the German phenomenological value philosophy and is adopted by some Latin American philosophers. Max Scheller maintains that values exist in a scale. Hartmann clarifies that the hierarchy of values is not an invariable and absolutely valid good. Everybody has a choice between good and evil.
3. Positivist and Existentialist Approaches: Amselek's (French) aim is to establish a phenomenological positivism. His theory is anti-metaphysical. He says that the juridical phenomenon consist in the application of a norm to an object. Since norms are models of occurrence in the course of things they are models as existential content. They are, thus, opposed to concepts that are mental modes of structural content.

Questions of theory constantly spring up in legal practice, though they may not be given very sophisticated answers. Both the law as a system of norms, and as a form of social control based on certain patterns of human behaviour, are equally legitimate fields of study and inquiry. It is suggested that it is an unduly narrowing attitude to limit jurisprudence rigidly to one approach derived from one or other of these viewpoints alone. Each represents a vital aspect of the legal process, and any attempt to exclude one in favour of the other must result in an incomplete picture of the subject-matter of jurisprudence.

Indeed, even if a preference is felt for a more generalized form of Court's jurisprudence, it must be borne in mind that the search for universal elements, whether in the realm of concepts or in that of actual patterns of

social behaviour, may prove somewhat unrewarding. Moreover, judicial choices, like other social choices, may well be just as interested in diversity as in uniformity.

Law is explicated as a constraint-generating concept, one that can satisfy claims of knowledge by individuating reasons non-skeptically in the context of a reflexive practice of judging and acting. The reflexive character of rule-following is explicitly endorsed by N. MacCormick (*Institutions of Law*). But Stefano Bertea vehemently opposes the premiss that rule-following can be automatic or unconscious. Some argue that the philosophical analysis of intentional content is irrelevant or futile with respect to law. This argument seems to have taken shape as a reaction to recent positivist strategies that argue for an understanding of legal practice as an instance of automatic or non-reflexive rule-following. This strategy purports to block reflexivity in understanding and applying the law, with an eye to disrupting the chain of justification which would make inevitable an extension of legal reasons into the domain of general practical reason (including morality). It seems that both the positivist thesis and the anti-positivist objection are wrong headed. In particular the anti-positivist objection would be much better off if it appropriated the philosophical critique of bad or skeptical versions of determinants of content and instead elaborated an account along the lines of pragmatic rationalism.

Exploration of the formal procedures of public decisions and their underlying normative presumptions began even during the days of Aristotle and Kautilya in their books on Ethics and Politics. Those issues can be found in Social Choice Theory elaborated by Prof. Amartya Sen as well as in the works of legal philosophers. The hiatus between the 'Relational Approach' and the 'Transcendental Approach' to justice seems to be quite comprehensive. The basic connection between judicial choice, on the one hand and the demands of the legal philosophy on the other, is the central theme not just to the practical challenge of making judicial choice more effective but also to the conceptual problem of basing an adequately articulated idea of social justice on the demands of pragmatic legal philosophy and fairness.