THE CONSTRAINTS OF THE ROLE OF NEPALESE COURTS AND LAWPERSONS: A REVIEW

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Whatever the failings of American lawyers, they know that there is something more that must be said by those who hope to legitimate the exercise of authority, even as they disagree on what that something is. It is precisely this professional committment to public dialogue that must remain at the foundation of the activist state if it is not one day to collapse upon us all in some awful form of technocratic tyranny. The mere fact that the liberal activists state has survived to 1984 is doubtless, consoling, but it should not blind us to the dangers all Americans run if lawyers persist in a shallow Realism that has outlived its time. - Bruce A. Ackerman

- From "Reconstructing American Law" (1984)

A more general consideration of the appellate and supreme court judicial process has become a must in view of the rising institutional stress on courts and judges and the declining doctrinal base of our practising lawyers. One cannot deny the connection between the rising caseloads and the instability, unpredictability and vagueness of our statutory and judge-made law. Declining doctrinal standard of our lawpersons has in the same way been trivializing the quality of justice. Moreover our courts have rarely shown any great disposition after the promulgation of the new Constitution in 1990 to consider their relation to the democratic process or to recognize any special responsibility for the successful functioning of this process. The end of the autocratic era by no means has marked the end of judicial 'lethargism'.

Doctrinal Analysis:

Doctrinal Analysis, from the very beginning, has been the mainstay of legal scholarship. Since the last four decades Nepalese lawpersons have knowingly or unknowingly been borrowing Common Law principles and methodologies to study, argue, and settle questions of law and facts. Our seniors in the beginning used to be illuminated by British and American legal doctrines in their endeavour to reform, develop and modernize our indegeneous judicial system and judicial craft whereas we in this decade are gradually declining this inquisitive and receptive power. To effectively implement the new constitution which is a bundle of alien values we must resume this process and further enrich our capacity for doctrinal analysis. The status quo which springs from lack of our hearty belief in the advantage of the study of comparative law and principles, may regretfully betrary the future of our institutions giving way to a scepticism which strikes hands with personal disisnclination for the hardships of meeting the constitutional pledge for liberty, equality and justice.

It will be pitiful if our legal experts are merely experts on what the courts have said about the particular statutes they deal with. This nevertheless appears to be our case. Since our judges write (by way of judgement or otherwise) very little our practising lawyers do not find it necessary to work more than what presiding judges expect from them. The inevitable consequence of this process is that our lawyers just know how to attack. They do not know how to defend. They create a rhetoric of emotion rather than of meaning. Class biasness in this process becomes rampant. Policy choices seem based on will and emotion rather than on evidence and logic. Thus it is not uneven if one finds different judges beating a different drums in response to the same legal

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question. Even when a consensus is reached, it is highly falliable method of justification. This shows decline in institutional consciousness among appellate judges, including members of the supreme Court.

In addition to this it is also being felt these days that even the training and experience of doctrinal analysts limit the contribution they can make to the solution of what are, after all, largely economic, political and managerial problems. Dealing effectively, with these problems of judicial process will require supplementing doctrinal analysis and research by a more philosophical attention to the ambiguites of normative language. The reasons given by judges for their decisions are bewildering in their complexity; equity, fairness, efficiency, clarity, to name a few, jostle each other for prominence. None of our lawyers have attempted to reduce these complex concepts to simple explanations. This job has become difficult even in those legal systems where a great deal of doctrinal advancement has already been achieved. The need for administrable, predictable, and fair legal rules often precludes judicial attempts to reach efficient results in individual cases. Many decisional factors that may often be outcome determinative-allocation of institutional responsibilities, justiciability constraints, unquantifiable or incommensurable interests, fairness and evenhanded justice, global efficiency effects, microefficiency effects- are not adequately addressed to by our lawpersons. Moreover, to achieve justice in the long run judges must represent all of the adams and all of the eves who will be influenced by the court- chosen rule or interpretation of a statute that constitutes justice between the parties may not be so to the people at large. While the disputing parties may accept the validity of such prejudicies, the people do not. There are many legal topics which are effectively off limits to legal metaphors. Admittedly, doctrinal anlysis alone cannot exhaust the domain of legal scholarship. Economists, statisticians and other social scientists should have a far more prominent role in efforts at legal reform than has been traditional. Other disciplines have also developed to such an extent that law's claim to privilege insight into these problems can hardly be sustained. But it is important not to underestimate the value or contribution of traditional doctrinal analysis. Standing alone, such work is of intellectual and practical importance, and the contribution of anyone pruporting to the law the benefits of other disciplines will be severely limitted without an understanding of the nuances and complexities of existing legal doctrines. Therefore, while diagnosing institutional stress on courts and judges, the study or experiences of lawyers, their common sense, and their moral and political values to evaluate the practicability and justice, as well as the clarity and consistency of existing or proposed legal rules are very important but they alone are not sufficient. Intelligence, acumen, and synthetic power of other disciplines should also be seriously pressed into service.

Institutional subjects such as the selection and compensation of judges, the pyramidal structure of a court system, the distribution of cases across subject areas, the rise of judicial bureaucracy, the division of responsibilities between different courts and court systems, and the effect of the number of judges on judicial performance requires skills and methods besides those needed for analysis of legal doctrine. The incessant expansion in litigation, the widening gap between what judes are asked to do by the Constitution and what they are capable of doing, persistence of episodic and pathological events in judicial decision making are also never studied in our context. Our courts are badly overcrowded and the crisis in quantity has endangered the quality of justice.

It is also necessary to study judicial administration with the sort of issue such as the demand for and supply of litigation, the sources, significance, and limitations of judicial statistics, the recruitment, compensation, and evaluation of judges, the organization of court systems, the causes of litigation, arbitration, and other judicial substitutes and supplements, the pricing of judicial services, delay in court, the role of specialized courts, the delegation of judicial functions to administrative officer, law clerks, and other judicial

adjuncts, and methods of caseload forecasting. Some broader perspective informed by philosophical, economic, political science, and perhaps other non-legal knowledge-seems required than in the case with analyzing most substantive or procedural rules of law.

Another most important thing about our law-persons is that they do not study legislation with the same emphasis as judicial decisions. Moreover, few study legislation as an object of systematic inquiry comparable to the case law. Contemporary legislatures alocate resources, create administrative agencies, issue vague quidelines or general grants of jurisdiction to those agencies, and enact a wide range of other provisions that bear little resemblance to our traditional concept of law. We must resort to sustained analysis of the purposes of modern legislation and the methodologies by which those purposes can be achieved. We must have theories of how statutes should be designed and what makes them effective or ineffective, desirable or undesirable. Not only the economists study of interest groups but the enormous political science literature on parliament is unknown at the practical level of the legal profession. There are many emerging legal areas such as environment law, monopolistic and restrictive trade practices regulations, and public interest law which our judiciary has not been receptive to simply because of its inability to bring to its legal knowledge the benefits of other disciplines. This fact also contributes for stress on the part of courts and judges. Our judges and lawyers appear unconcerned of Parliamentary Committee reports, hearings, floor debates and legislative history which can help them to understand their nuances and complexities. In other words, thier judicial decision making generally ignores the political/economic forces that shaped it, or even the methods the courts use to interpret it, the contribution of lobbyist and administration officials, the frequency and feasibility of legislative overruling of judicial decisions. It is a fact that our legal education also aims to develop only those skills of legal analysis which are deployed by researcher or doctrinal analysts and that too in distorted forms. This has aggravated perennial problems of quality.

We also have to revitalize our system of opinion writing with an eye to the problems of organization and style, study the role of citations, foreign court precedents, etc. A languages can impoverish understanding when the vocabulary chosen is not rich enough to capture the central dimensions of the subject under consideration. Superior courts, especially the Supreme Court, should be more conscious of this thing which our young lawyers find as its by-gone legacy of Sixties and Seventies.

Institutional Stress:

The concern of lawyers in Nepal (as elsewhere) is with the study of doctrines rather than institutions. Even in the area of doctrinal research and analysis our lawpersons are not conversant and innovative. This state has painfully affected the social outcome of our recently democratized judiciary. Comparatively, the causes and consequences of court delay, litigation explosion, episodic and pathological nature of litigation, judicial craft, bureaucratization, questions of judicial selection, promotions, ethics, reapportionment and the regulation of campaign financing, and a lot of other institutional factors (incapacities) have more bearing upon the quality of judicial process and the court system than doctrinal insufficiency. Admittedly, these things affect what the Supreme Court says, why it says so and why the institutions of our courts and jural and judicial skill of our judges are lying the way they are. In other words, these variables can also explain why the status quo is unmoved despite the Herculean foundation beling afforded to the judiciary by the new constitution.