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FUNCTION OF THE JUDICIARY: NATURE, SCOPE AND ISSUES

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Introduction

Adjustment to change has been a continuing problem of the all legal system. The necessity of accommodating governmental and legal arrangements to a communal life characterized by far-reaching social and economic developments has lent impetus to the search for a method by which to assure the viability of law and its agencies. As part of that search which led to re-consider traditional legal theory and conception of the judicial function. Originally, constitutions were based upon the theory that judges merely apply the law, but do not create it. In the past years, however, there has grown up an increasingly important body of legal theory that holds that judges not only can legislate, but also ought consciously to do so, legal writers who hold these views urge in effect that judges should cease to be merely; the dispassionate oracles of the law and should assume an active role in the creation of the legal rules themselves. It is with these theories of judicial legislation that is the area of concern.[1] The philosophy of law has been undergoing a period of vigorous re-examination of fundamental ideas. This paper discusses certain phases of that reassessment as it pertains to one of the basic problems of legal system-the legislative function of the judiciary.[2]

The issues can be quite simply stated. The legal philosophy dominant when government was established did not contemplate judicial legislation in any form. Since that time, however, there has developed a sizeable volume of literature that holds as a matter of analysis that judges do legislate, whatever may be the official doctrine. Sometimes, the practice is approved, sometimes not but in any event skepticism of the original theory of legal system has become widespread.[3] The tendency to question whether the traditional conception of the judicial function is adequate, either as an explanation of legal history or as a governmental device to serve to the future, has not been an isolated phenomenon. In formulating the criticisms of standard theory and in laying down their norms for future judicial conduct, American jurists have openly and conscientiously borrowed from the work of contemporary philosophers, economists, sociologists and political scientists- not to mention physiologists.[4]

Finally, to impute legislative functions to the judiciary and at the same time to seek to hold to the premises of free and representative government is to raise questions as to the necessity of many of the mechanisms always considered fundamental to the representative process. It may be that electoral processes are inadequate, since the product of elected legislative bodies has proved to be inadequate; the advocate of judicial legislation, however, by suggesting legislative action by nonelected and formally irresponsible agencies, comes close to questioning the necessity of electoral processes as understood.[5]

Emergence of Sociological Jurisprudence in America

American legal theorists have, for obvious reasons, been greatly concerned with the issues arising from the powers of our Courts to invalidate statutes. Judicial review in this form is indeed an important problem, and it is quite understandable that it should arouse great interest, both in this country and abroad.

The distinctions and relationships between judicial review and judicial legislation are intricate. That the two are not the same is witnessed by the fact that discussions of judicial legislation both antedate judicial review as it is found in the United States and also occur in legal systems in which Courts do not exercise constitutional supervision over statutes. At the same time, the actual exercise of judicial review, as it appears from a survey of legal history, provides perhaps best example of judicial legislation in action.

This does not mean, of course, that logically, judicial review is always judicial legislation; what it does mean is that judicial review is sometimes judicial legislation. If a Court were to refuse to enforce a statute that clearly violates some explicit constitutional limitation, a statute, for example, to the effect that a person only thirty years of age may be president that

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1 *Fred V. Cahilla, available at www.repository.law.indiana.edu/cgi/article (visited on 25.02.2016).*
2 *Judicial legislation, available at: www.merriam-webster.com (Visited on 25.02.2016).*
3 *F. Bowman, available at; www.scholarship.law.cornell.edu/cgi/article. (visited on 25. 02.2016).*
4 *Supra note 1.*
5 *Ibid.*

would probably not be judicial legislation, although it would be judicial review. The difficulty is, of course, that such cases do not arise. From this point, however, one moves into areas of increasing vagueness until he finally arrives at constitutional provisions that have little or no meaning in themselves "due process of law", for example.[6] In cases involving such clauses, the invalidation of statutes become almost pure judicial legislation, although the judges themselves usually refuse to admit it and try to appear not to be legislating by being very "sure" of their reading of the provision in question. Such provisions constitute a thorny problem for those who want to retain judicial review, and yet do not like judicial legislation;

At base, the traditional American theory of the judicial function is negative. This is not to say that the Courts are not expected to do positive things. Courts are expected to and do put people in jail, extend protections to property, and can even halt the Congress of the United States. But in theory, at least, it is not the Courts that do these things. Rather it is the law operating through the Courts that is responsible. In relation to that law, the Courts are purely passive. They merely discover and apply it. And, to carry the argument one step further, the extraordinary protections with in which the Courts operate were devised in order to guarantee that the responsible element in the process would always be, in so far as we cold humanly arrange it, the law and not the Courts. The Courts were not protected in order that they might, in their wisdom, govern us; they were protected so that there would be no interference with the law's governing people. Mr. Justice Frankfurt recognized, as would all Americans, that in the scheme of American government an oligarchic power is anomalous. The problem presented by an oligarchic judiciary can be solved in either of two ways: by removing those protections that render the Courts oligarchic, or by endowing the Courts with those powers only that can safely be entrusted to an oligarchy. The latter represents the traditional American approach to the problem.

Whether in the light of legal development in U.S. such a theory can be accepted as a serious description of what the Courts have actually done is not so important as the fact that it has held its place throughout its history as the official doctrine of the judicial function.

There are indications that the traditional, negative theory of the judicial function has been seriously accepted in the United States for the greater part of its legal history. There are two sorts of data that appear to suggest this acceptance. The first is that, although the discussions of the judicial function in American jurisprudence are not as extensive as might be hoped, when American writers do discuss it, their consideration of it tends to be along the lines indicated. The second is that it is very difficult to find evidence among American legal writers that any other theory was accepted. Both of these statements are subject to the reservation, of course, that they do not include the sociological jurists and the legal realists whose theories of the judicial function are interesting precisely because they are not orthodox. [7]

The simplest way to approach Pound's theory of the judicial function is through his idea of the form of law. He reasserted the common distinction between statutes and judicial decisions. In most of Pound's writings these are referred to as, respectively, the imperative and traditional elements. Only in outline, however, does this analysis correspond to the customary division of law. In asserting that both were law, he separated himself, on the one hand, from the historical jurists, to whom statutes were merely expression of the law[8] and, on the other hand, from the orthodox school, which did not accept the idea that judicial utterances could be more than evidences of law. Still more unorthodox was his assertion that judicial activity is really the creative element in law.

The position of Benjamin N. Cardozo in the development of socio-logical jurisprudence is equal to and possibly even greater than that of Pound. His expositions of the functions of the modern judge are classics of American juristic literature, and his great prestige as a judge adds support to the sociological view of the nature of law and of the creative theory of the judicial function. Although much that he said was not new, his statement of the sociological position undoubtedly contributed to a widened public appreciation of the role of the judiciary in modern government.

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[6] . *There is broad disagreement among judges how to find the "meaning" of the Constitution. Compare the clash of views in Home Loan Assn. v. Blaisdell, 290 US 398 (1934), in which Chief Justice Hughes appears to be saying that the Constitution means (or ought to mean) what the Founding Fathers would do in present circumstances (p.443). Mr. Justice Sutherland, on the other hand, maintains that it "means" now what it meant in 1789. Later, in India in 1978, in Maneka Ghandhi's Case it was advocated that "any procedure prescribed by law has to be a due process of law".*

[7] *Arthur L. Goodhart, "Some American Interpretations of Law", Modern Theories of Law, (1933).*

[8] *There are some intimations of this attitude in James C. Carter, "The Province of the Written and Unwritten Law",24 American Law Review,1 (1890)*

Writing principally in the mid-1920's, Cardozo's immediate concern was with the growing volume of criticism to which the Courts were being subjected. In his view, much of this criticism was based upon the outmoded conception of law as a body of unchanging principles in some fashion beyond the reach of human agencies. This misconception both hampered and obscured the necessary functioning of the Courts. In the first place, it prevented understanding of the Courts' shifts in doctrine, and second, to it could be attributed the widespread inability to appreciate the essential similarity of the legislative and judicial functions in the common task of legal development.

Stone came to accept the sociological position only after a rather vigorous rejection of its assumptions. The change in his views can be seen by comparing two of his books that are separated in time by some twenty-two years. In his Law and Its Administration,[9] although he agreed with some of the basic assumptions of sociological jurisprudence, the limits of his acceptance are clearly indicated. He concurred in the idea that law is justified only in terms of its ends: The law is pre-eminently a practical system administered by human agencies. The only justification for its existences is the accomplishment of its ends-social order and well-being. [10]

He even went so far as to say that the common law is a product of the judicial process: To summarize the matter, the law is what the judges having jurisdiction of the case declare it to be. The sources of the law are statues, precedents, custom, the opinion of experts, and public policy tempered and judged in the light of experience.[11]

In determining those principles by the method which we have described, the duty of the judge should be that of the patient investigator and seeker for scientific truth. To that extent, at any rate, he is a discoverer, and the rule which he discovers is a rule which is profoundly influenced, if not controlled, as it is in the great majority of cases, by established principles of law.[12]

The emergence of sociological jurisprudence marks the formulation of a general legal theory for the modern state in America. Its emphasis on judicial legislation, together with the concurrent attempt to state, a theory by which to mitigate the rigors of judicial review, indicates the increasing acceptance of positive governmental action in economic and social affairs. The power of government, whether exercised through the legislature or through the judiciary, is to be used consciously to effect the adaptation of the legal system.

The aspects of sociological jurisprudence are in part explained, of course by the fact that sociological jurisprudence began as a program of reform and received its strongest statement as a theory of dissent. In the circumstances, the major changes it tried to effect were sufficiently agreed upon, so that there was little need for discussing what must have seemed obvious. If the position is taken, however, those at least on the constitutional level most of these problems have been solved. Further, it remains open to question whether sociological jurisprudence ought to be credited with more than an indirect influence in the solution of these problems. Although, therefore, the theory provided a strong basis for dissent, it remains to be seen whether it can sustain a more positive program. It is not the least of the paradoxes in the field of legal theory, that law joined the social sciences at about the time that the social sciences began to be measurably less sure of themselves, and it might be suggested that a good deal of the confidence in the social sciences displayed by the sociological jurists was the confidence of lawyers moving in relatively unfamiliar disciplines.

The Beginning of Legal Realism

Legal realism is capacious enough to include several types of sociological jurists, a group of psychological jurists, several statistical jurists, and some who call themselves institutional jurists. As we have said, jurisprudence became a social science just at the time that it was becoming increasingly difficult to define the social sciences. In truth, legal realism is bless a description than a slogan and carries emotional connotations rather than precise meanings. "Realism" was used in the literary rather than the philosophical sense; and allegiance to "the facts" has proliferated into almost as many varieties of jurisprudence as there are observers of "the facts". In the end legal realism comes very close to being what legal realists discussed.[13]

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[9] *Ibid*
[10] *Id. at 8*
[11] *Id, at 19*
[12] *Id. At 23*
[13] . *Legal realism was largely an academic affair which resulted in an ever-increasing number of "legal realists", and this in turn contributed to the diversity so characteristic of later American legal theory. The student has some help here*

John Chipman Gray was one of those who early dealt with the problem of judicial legislation. Interested, among other things, in the conventional problems of jurisprudence, he chose as his point of attack the orthodox distinction between "the law" and judicial decision, according to which a judicial decision was merely an exposition of the rules of law discovered by the judge.

Judicial Function and British Theory

It will be well to begin with what was said by the English writers. The American bar was originally trained in the British tradition-either in England, or, if in America, from British books-and can be expected to have absorbed British ideas on the judicial function as well as on other points. And of the British writers available to Americans at the time of the adoption of the Constitution, a time at which original constitutional theory was being formulated, none was more important than Blackstone.[14]

Blackstone's views on the judicial function emerge clearly in his discussion of the authority of custom and how customs are to be determined. To him this was a responsibility of the judges, whom he described as "the depositories of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath a decide according to the law of the land…."[15] Even that the judges at times changed their rulings on points of law did not, to him, imply any legislative function on their part:

Alexander Hamilton's classic statement in The Federalist, His premise was the notion that the construction of the Constitution falls naturally to the judges because it was merely another aspect of the application of the law in the decision of cases, an activity essentially judicial.

Thus judicial review has been attacked, for example, because of its inconsistency with majoritarian democracy. A strong proponent of this viewpoint was the late J. Allen Smith who contended that the framers of the Constitution had deliberately set up judicial review as a counterweight to democracy. The result was more than a minority check on the majority; it was minority government against the majority under the influence of arguments drawn from English experience, it was to make the Courts independent. American Supreme Court succeeded only too well, but with the result that achieved "an independent legislative and judicial body combined".

In the course of the twentieth century there has been fairly widespread adoption of this position. It should be understood, therefore, that in referring to the writing of Goodnow, Thayer, and Frankfurter, it is not intended to imply that they are unique in holding these views. Statements of equal cogency might be taken from the works of C.G. Haines, E.S. Corwih, Thomas Red Powell, as well as a number of others.

Position in India

Beginning in the early 1980s, the Supreme Court of India waived traditional doctrines of standing and pleadings to permit concerned citizens, public interest advocates and non-government organizations (NGO's) to petition it on behalf of individuals or communities suffering violations of constitutionally protected rights. As a consequence, the Court entertained

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in the form of a semi-authoritative listing of legal realists in Karl N. L. Lewellyn. "Some Realism About Realism". A comparison of Llewellyn's articles with Pound's. "A Call for a Realistic Jurisprudence", 44 Harvard Law Review, 697 (1931),to which it was a reply, gives rise to the suspicion that neither of them was very clear on the point of dispute. Jerome Frank, in the Preface cited above, redefines his position and expresses a preference for dropping the term "realist". Some substantial differences between his list and L Lewellyn's are apparent, although he assisted Llewellyn in the preparation of the article. In Frank's list, for example, some doubts are cast on Llewellyn's realism.

[14] *There can be no doubt of the popularity of Blackstone's Commentaries in America. It has been estimated that in the years before the Revolution probably 2,500 copies of his work were sold in this county. The 1,000 copies of the first edition sold in America exceeded the number of sales in England, Francis R. Aumann. The Changing American LegalSystem,31(1940). There was an American edition of the work published in 1771-72 and another in 1773. The first American edition had a prepublication sale of 1,40 copies, David A. Lockmiller, Sir William Blackstone (Chapel Hill, 1938), Chap. X See also Two Centuries of Growth of American Law. 1791-1901(New York, 1901); James B. Thayer, Legal Essays, 367 (1908); Roscoe Pound, The Spirit of the Common Law, 96, 100-102 (1921).*

[15] *Sharshwood George (Ed.), 69 (1872).*

applications for constitutional protection on behalf of a wide range of traditionally powerless persons, including bonded laborers, rickshaw drivers and pavement dwellers, inmates of mental infirmaries and workhouses and victims of environmental damage. In conducting these cases, the Court created its own fact-finding commissions to investigate alleged violations, and dramatically expanded its remedial powers to include detailed supervision of government institutions and the ordering of programs to mitigate the effects of systematic injustice. Through the development of its 'Public Interest Litigation' (PIL) jurisdiction, the Supreme Court of India came to act as a 'combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implement its decisions. PIL provides a model for courts struggling to balance the transformative aspect of law against the law's natural tendency to favour those rich enough to invoke it.[16] The values and impact of these judicial decisions are given below.[17]

In the case of Kharak Singh v. State of U.P.,[18] it was alleged that the appellant was being harassed by the police under Regulation 236(b) of UP Police Regulation, which permitted domiciliary visits at night. The Supreme Court held that the part of Regulation 236[19] dealing with domiciliary visits, was violation of Article 21[20] of the Indian Constitution and as there was no law on which the same could be justified it must be struck down as unconstitutional, and the Petitioner was entitled to a writ of mandamus directing the respondent not to continue domiciliary visits.[21] However, in order to same honest and innocent citizens from the unregulated powers of the Police, in that case it was further held that:

"The entire Regulation 236 is unconstitutional on the ground that it infringes both Articles 19(1) (d) and 21 i.e. right to move freely and right to life or personal liberty respectively, of the Indian Constitution. He observed that both of these fundamental rights are independent, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Art. 19. If a person's fundamental right under Art.21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art.19(2) so far as the attributes covered by Art. 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution".[22]

In the case of Bandhua Mukti Morcha v. Union of India,[23] the petitioner through a letter to Supreme Court claimed that in some of the stone quarries in Faridabad district near the city of Delhi, a large number of labourers from Maharashtra, Madhya Pradesh, Uttar Pradesh and Rajasthan were working under 'inhuman and intolerable conditions' and many of whom were bonded labour. Giving suitably direction to the State of Haryana, the Supreme Court held that: Right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Article 41and 42 and at the least, therefore, it must include protection of the health and strength or workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions for freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. There are the minimum requirements which must exist in order to enable a person to live with

16 *B. Neubome, "The Supreme Court of India", 503 LJCL,(2003)*
17 *Ibid*
18 *AIR 1963 SC 1295*
19 *It reads:- Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:-(a) Secret picketing of the house or approaches to the houses of suspects;(b) Domiciliary visits at night; (c)through periodical inquires by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expends and occupation;(d) the reporting by constables and chaukidars of movements and absences from home;(e) the verification of movements and absences by means of inquiry slips; and (f) The collection and record on a history-sheet of all information bearing on conduct.*
20 *It reads protection of life and personal liberty.*
21 *Supra Note 20 at 350*
22 *Id at 351,356-357*
23 *AIR 1984 SC 802*

human dignity.[24] The Bonded Labour System (Abolition) Act, 1976 was enacted with a view to giving effect to Article 23 of the Constitution which prohibits traffic in human beings and beggar and other similar forms of forced labour.[25]

In the instant case, the Supreme Court of India gave following directions to the Central Government and the Government of the Haryana State as well as various authorities mentioned therein for the effective implementation of labour welfare legislations so that these poor unfortunate workmen who lead a miserable existence in small hovels, exposed to the vagaries of weather, drinking foul water, breathing heavily dust laden polluted air and breaking and blasting stone all their life, may one day be able to realize that freedom is not only the monopoly of a few but belongs to them all and that they are also equally entitled along with others to participate in the fruits of freedom and development.

While dealing with the right to privacy enshrined under the Constitution of India, The Supreme Court in the case of State of Maharashtra v. Madhukar N. Markikar[26] held that:

Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open t any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.' Gender Equality' requires that women should be provided with a non-discriminatory and safe atmosphere at work places. It fosters the relationship between women and society. It is only under such protective ambience that a woman would be able to attain personal autonomy and respect for the modesty.

Further, for the protection and effective enforcement of fundamental rights as provided under Article 21 and 22(1) of the Indian Constitution, the Apex Court in the case of Joginder Kumar v. State of U.P.,[27] issued following requirements:-

1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained;[28]
2. The police office shall inform the arrested person when he is brought to the police station of this right; and an entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow fromArticles21 and 22(1) and enforced strictly;[29]
3. It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.[30]
4. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various police manuals.[31]
5. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements.[32]

In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.

In addition, dealing with the right to privacy as provided under the Part III of the Constitution of India, in the case of People's Union for Civil Liberties v. Union of India,[33] the Apex Court held that:

Undoubtedly, it was the Indian judiciary which considered phone tapping as a serious invasion of one's right to privacy. Such argument is based on the principle that the 'State' cannot impose unreasonable restrictions on one's right to life or personal

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24 *Id at 811-812, Para 10*
25 *Id at 824,Para 21*
26 *AIR 1991 SC 207*
27 *AIR 1994 SC 1349*
28 *Id. Para 26*
29 *Ibid.*
30 *ID Para 27*
31 *Ibid*
32 *Id., Para 28*
33 *AIR 1997 SC 568*

liberty. In People's Union for Civil Liberties v. Union of India,[34] the Supreme Court held that wire tapping is a serious invasion of an individual's privacy. The court observed that telephonic conversation is a part of a man's private life. And certainly, right to privacy includes telephonic conversation in the privacy of one's home or office. Thus, telephone tapping under S. 5(2) of Telegraph Act, 1885[35] would violate an individual's right to privacy unless it is permitted under the reasonable procedure established by law.

In this case, the court laid down certain guidelines to regulate the government's action of wiretapping. It was directed by the Hon'ble Supreme Court that the interception order shall be issued by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. It is also required that copy of such order shall be sent to the Review Committee within one week. The order should contain every detail of the whole mechanism of interception. Name of the person to whom the order is addressed and, the person to whom intercepted information is being disclosed should be mentioned in the respective orders. The validity of the order can also be checked on ground, whether the information could reasonably be acquired by other means or not. Thus, it is necessary that reasons should be recorded before issuance of the orders. Furthermore, the order shall, unless renewed, cease to have effect after two months. The total period for the operation of the order shall not exceed six months. The issuing authority shall also maintain the records of intercepted material like for what purpose message was intercepted, which telecommunication device was intercepted, how the intercepted material was used, to whom it was disclosed, and what is the number of copies, made of intercepted material.

Concluding Observations

The modern jurist asserts that the judicial power is an, apt instrument for accomplishing the adjustments forced upon the, legal system by the dynamic character of our society. That he should turn to the judiciary for this purpose is deeply significant of the complexities of our constitutional and legal system as nation tradition and has shaped it.

The problem to which the modern jurist addresses himself has been to devise a philosophy of judicial action that would induce the Courts either to accomplish the necessary changes or, at the very least, to refrain from blocking the efforts of others to accomplish them.

The formulation of this theory of the judicial function has been deeply influenced by developments in the social sciences and in philosophy, from which the modern jurist draws concepts useful not only in the analysis of his problems but also in the guidance of the expanded judicial activity that he advocates.

In modern juristic theory, therefore, the legal system ceases to be a social adjustment and becomes a process by which social adjustment is secured. However social adjustment is defined, the task of law is to define the relations between variable points, and, it is important to note, these points are always socially defined. Modern legal theory looks to the consequences of its activities rather than to the source of its authority or to any general principle to which it must refer its decisions.

As our survey of contemporary theories indicates, however, agreement on the point that law is a social technique does not prevent considerable variation among the modern group as to how law is best to serve its function. The disagreements range from an inability to agree either on the amount of stability desirable in society, through widely varying interpretations of the actual amount of stability provided by a legal system, to the part played by legal rules in providing stability. Whatever criticism might be made of its accuracy, the traditional theory was clear on these points: law was rules, and law was stable. Whatever progressive theory of society might be held, such social change could have no effect on the general principles that

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[34] *Ibid*

[35] *It read: "On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be, recorded in writing, by order, direct that any message' or class of messages to or from any person or, class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: Provided that press messages intended to be published in India of be intercepted or detained, unless their transmission has been Prohibited under this sub-section."*

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made up the legal system. Although the modern would agree in rejecting that concept as slated, their agreement would imply no common doctrine to replace the traditional notion.

That widening the legislative power of such an institution would produce better legislation is possible, although, as we have indicated, even that is by no means a self-evident proposition. But to say that widening the legislative power of a branch of government so constituted would be to strengthen popular control over government is, on its face at least, somewhat startling. It is difficult to avoid concluding that the final recourse is, indeed, the judge.

The shift in the focus of juristic study and in the conception of has, of course, important implications for the judicial function, although on this question as on many others there is a fairly wide range of choice among the various theories. The various judgments as to the degree to which the judge should feel free to alter the rules as the cases arise broadly parallel the positions taken on the binding force of legal rules from “interstitial judicial legislation” to the concept of the judge as the “cheerful technician”.