

An analysis on the process of adjudication



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Law is a “ *strange compound which is brewed daily in the caldron of the Courts*” Hon. Benjamin N Cardozo[1].

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Benjamin Cardozo begins his *Judicial Process* with these words which with lyrical lucidity show what goes on in a court. It is ‘deciding’ cases. To a layman, adjudication presents a picture of a court where a judge presides, listens to arguments of rival parties through their counsels and in the end, renders a decision which holds a person liable or acquits him of the charges that were labelled against him. To a lawman who is not “untutored in the craft”, adjudication means something more.

When courts decide cases, they perform two distinct, though interrelated, functions. First, they settle the controversy between the parties: they determine what the facts were and apply the appropriate rules to those facts. This is the function commonly known as *adjudication* [2] . While performing their second function, courts “decide what the appropriate rules are and how they fit in a particular case. Deciding what rules are applicable often requires the courts to reformulate and modify the scope of existing rules. The second function is sometimes referred to as *judicial lawmaking* [3] . While adjudicating cases, a judge may be faced with a question of law or a question of fact or a mixed question of law and fact. Besides, he may come across a case which the existing law does not cover, that is the question to be decided by the court was unforeseen by the legislature while enacting the law. Tools available to a judge while deciding a question generally include

the statutory provisions, precedent laid down by an earlier court, and the certain overarching principles like that of natural justice and equality.

Judicial function performed by the judges requires them at times to use their discretions and rely on certain -principles that lie extraneous to the realm of the enacted law. This is one aspect of adjudication that has stirred much jurisprudential waters over a long period. Questions invariably asked have been: whether judges only declare the law; whether they only interpret the law; whether they only discover the law or whether they make law also.

There are two aspects of judicial function that come to fore: “ The first-which can be traced back to at least Hale and Blackstone-is that judges merely find and declare the law rather than create it. Thus, judges are, allegedly, not a source of law”.[4]The second aspect of judicial juristic techniques that receives much publicised attention is the doctrine of precedent.[5]The function of adjudication subsumes certain intricately intertwined issues.

The tool of interpretation plays an important role in adjudicatory process. It may be said that “ Adjudication is interpretation”[6], given the fact that “ Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text.[7]Interpretation, whether it be in the law or literary domains, is neither a wholly discretionary nor a wholly mechanical activity. It is a dynamic interaction between reader and text, and meaning the product of that interaction.[8]To recover an old and familiar idea, namely, that adjudication is a form of interpretation would build bridges between law and

the humanities and suggest a unity among man's many intellectual endeavours. A proper regard for the distinctive social

Function of adjudication, and for the conditions that limit the legitimate exercise of the judicial power, will require care in identifying the kinds of texts to be construed and the rules that govern the interpretive process; the judge is to read the legal text, not morality or public opinion, not, if you will, the moral or social texts. But the essential unity between law and the humanities would persist and the judge's vision would be enlarged.[9]The words and phrases are symbols that stimulate a mental reference to referents.[10]And it becomes relevant given the fact that the problem of interpretation is a problem of words and their effectiveness as a medium of expression to communicate a particular thought. One of the important aspects on interpretation is to find the intention of the members of the legislature whose creation, that is the enactment, outlives them. Salmond says that the " true duty of the judicature is to act upon the true intention of the Legislature-the *mens* or *sententia legis*." However, the way this duty is to be performed becomes tedious in that judges have only the barren words to confront with and to find the intention of the legislature. The question of interpretation also brings forth the question: do judges make law while interpreting the law? Does the finding of intention amount only to discovery of law or does it mean creation of law? Interpretation often is instrumental in the birth of new precedents, and there have been arguments put forth that say precedents are clearest examples of judicial law making. Dworkinian thesis of how judges decide cases avers that judges merely discover law;

they do not make law. However, it has been argued that when judges discover legislative intent, they in fact invent it instead of discovering it[11].

The growing complexities of modern day life throw new challenges and problems in myriad manifestation before the judges, who at times may be tempted to cross the restraints of written words of law, besides being confronted with question of morality and needs of justice. There may surface a problem which the law when enacted could not foresee. Or the law relating to a particular issue is shrouded in ambiguity. Many a time, a judge may have to trace that golden thread from the labyrinth of legalese and factual matrix that will help him reach the desired goal of rendering justice. Often, it is very difficult to do so. The process of adjudication requires a judge to be attentive and aware of the several factors which at times may have a telling impact upon the rights of people, besides jeopardising the cherished goal of doing justice.

Performance of judicial function is an onerous task given the kind of responsibility a judge has to shoulder within the constitutional and statutory constraints that hedge him or her from all sides, though leeway for creativity does exist given the tools of interpretation a judge is armed with. ¹³

Innovation comes to the rescue of judge when confronted with a novel case that demands that the judge acts in a way that justice is done: The discussion and deliberation that follow in the coming chapters focus on some of the key aspects of adjudication primarily that of Dworkin's, and an effort is made to critically analyse the various facets of Dworkin's theory of adjudication before reaching a conclusion in the light of criticisms levelled against them.

3. 2ADJUDICATION *vis-a-vis* SEPARATION OF POWERS

Within the realm of law, adjudication enjoys a place of prominence. Primarily the task of the courts is to adjudicate upon the issues that arise in disputes between parties which may be an individual, at times, state, and on occasions both the state and individuals. In the modern era, the role of the judges has become more complex and it is now a far cry when compared with the role a judge had to play eons ago. The evolution of the society and the legal system has entrusted the judges with newer powers and functions. Now their area of operation is not confined to decide questions that arise between individuals as Geoffrey Rivlin reminds that “ First, where there is any dispute about constitutional law, the judges must decide what the law is. Their most important role, however, is to act as an independent check on the power of the executive. Only the courts have the authority to stop any individual or body of persons from exceeding their powers, or making improper use of their powers. This is known as preventing an abuse of power.”

When we speak of judges, it means the entire hierarchy of judges who operate in different courts. The problems arising before the courts and decisions to be rendered are different in nature depending upon the courts. The factors that influence the outcome of an adjudicatory process vary greatly, and so do the decisions of the court. Be that as it may, there are a score of issues that need to be dealt with when we consider the process of adjudication.

3. 3DISPUTE REVIEW BOARD/DISPUTE ADJUDICATION BOARD

This method of international dispute resolution, first tried successfully in the 1980s in Central America, is now regularly used in respect of large international construction and infrastructure contracts. These contracts provide for the appointment of a panel of experts, generally construction practitioners (engineers, lawyers, economists), either at the time of signature or in the course of the execution of the contract.

For example, contracts relating to the construction of the Vasco Da Gama bridge, over the River Tagus in Portugal, provided for the appointment of two panels (technical and financial) of three experts each. For the Channel Tunnel, between France and the United Kingdom, the designation of a panel of three experts and two alternates was provided for in contracts.

Members of the . dispute review board/dispute adjudication board (DRB/DAB) are appointed by the parties in the same way as an arbitral tribunal is constituted, with one major difference. The panel is generally appointed at the very beginning of the project and for its whole duration, whereas arbitrators are appointed only in the context of a dispute. Each party nominates its experts and the two appointed experts designate the third - that is, unless the parties have agreed on a different appointment mechanism. A one-member DRB/DAB may also be appointed

DRB/DABs typically follow a project from beginning to end (through site visits, study of monthly reports, exchanges of correspondence, miscellaneous reports, etc.), This-is so that they are able, upon the request of a contracting party; to react promptly and knowledgeably and, if necessary, to issue an opinion, recommendation or decision in written form.

DRB/DAB experts are usually paid monthly or, for on-site interventions, by the hour.

The DRB/DAB may intervene in either a flexible ' or a more formal manner. In the former, it acts as an advisory body. A party or several parties may, by a simple and informal request, ask for a preliminary written opinion. This opinion is considered provisional in that it does not bind either the parties or the DRB. In the latter, the DRB/DAB plays a more formal role, insofar as it issues either a decision or a recommendation, on a procedure that enables each of the parties to express its ideas fully.

Once the panel of experts has handed down its opinion, decision or recommendation, each of the parties indicates, generally within a fixed time limit, whether or not it accepts the decision or recommendation. If the decision is not accepted, recourse to the jurisdictional procedure (before a State court or an arbitral tribunal) remains possible.

3. 4DWORKIN'S THEORY OF ADJUDICATION

“ The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets.”

— Dworkin, *Law's Empire*, 407(1986)

Introduction

In law's empire, judges enjoy a prominent position. They are entrusted with the task of adjudication, which affects the lives of people in ways both seen and unseen. Rights of people who approach the apostle of justice stand to

lose or gain depending upon how the judge presiding over the court views a case. Importance of judges in legal arena is reflected in Dworkin's writing when he begins his *Law's Empire* with these words: " It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court." [12]

The difference between dignity and ruin may turn on a single argument that might not have struck another judge so forcefully, or even the same judge on another day [13]. A single nod of a judge may rob a person of his liberty or protect his liberty. It may mean life or death for a person. [14] The role played by judges assumes more importance today. Given the fact that they perform one of the tedious tasks in a society,

it becomes desirable to see and analyse how they do what they do. In view of the foregone discussion in the previous chapter that touched upon the vexed question of ' what is law' and the myriad facets of adjudication that are crucial to the understanding of how law operates in law's empire, the theory of adjudication as developed by Dworkin assumes due importance, especially given the parallels that are perceptible in the time that preceded Dworkin's theory. One such parallel can be seen in Blackstone's declaratory theory that dealt with the famous account of judging " which holds that judges find (or declare), rather than make, law. In the introduction to the *Commentaries*, Blackstone states that the judge's job is to determine the law " not according to his own private judgment, but according to the known laws and customs of the land;" the judge is " not delegated to pronounce a new law, but to maintain and expound the old one."

3. 4. 1ADJUDICATION: DWORKIN'S APPROACH

To Dworkin, “ law is an interpretive concept”. By making this claim, he tries to distinguish his philosophy from what he calls “ semantic theories of law”, which refer to positivist theories, like that of John Austin and Herbert Hart. According to him, these theories suppose that “ that ‘ law’ has a meaning which is shared by lawyers and others. This shared meaning consists of rules for using the word ‘ law.’ These rules, in turn, tie law in positivist theories to historical facts, such as the enactment of a statute or the decision of a case. Dworkin suggests that disagreement about the law, under positivist theories, would invoke legal argument in adjudication only about the historical fact made relevant by the shared meaning of law. He considered three theories of law-‘ conventionalism’, ‘ pragmatism’ and ‘ law as integrity’ -in *Law's Empire*. Only the last of these is interpretive, but each, he argues, is compatible with his interpretive theory of meaning, which he describes as the view that ‘ the doctrinal concept of law is an interpretive concept’.

3. 4. 2ADJUDICATION OF HARD CASES

The theory of hard cases provided by positivism, according to Dworkin, envisages that when a particular law suit cannot be brought under a clear rule of law, laid down by some institution in advance, then judge has ‘ discretion’ to decide the case either way. He says the opinion of the judge “ seems to assume that one or the other party had a pre-existing right to win the suit, but idea only is a fiction. In reality, he has legislated new legal rights, and then applied them retrospectively to the case at hand.[15]

Dworkin tries to provide an alternative method of adjudication which he calls naturalism. It is noteworthy how he builds up his theory of adjudication in the following manner:[16]I shall start by giving the picture of adjudication I want to defend a name, and it is a name which accepts the crude characterization. I shall call this picture naturalism.

According to naturalism, judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arguments to the details of, for example, the private law of tort or contract.

Prior to elaborating further on the methodology adopted by Dworkin, it will serve some purpose to see how he disagrees with the general understanding of how judges go about doing what they actually do. He believes that the ‘common story’ about the way judges function is misleading, and misses certain notable points. He finds a “further level of subordination” in such a story which goes unnoticed. It is expected that when make law, they will act not only as a deputy to the legislature but also as a deputy legislature.

However, Dworkin reasons:[17]

They will make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own. This is deeper level of subordination, because it makes any understanding of what judges do in hard cases parasitic on a prior understanding of what legislators do all the time.

According to him, this subordination is both conceptual and political. He believes that judges are not deputy legislators, and they should not be as well. It is misleading to assume that they are legislating when judges go beyond the political decisions which have been made already by someone else. He argues that such an assumption misses the fundamental distinction between arguments of principle and arguments of policy. It is noticeable, Dworkin argues that the distinct outline here is an improvement upon the distinction between principle and the policy that he made under chapter two of *Taking Rights Seriously*, one of the virtues among others being that this formulation “ prevent the collapse of the distinction under the artificial assumption described before[18].

It should be pointed out here that both the arguments justify political decisions; it is only the way they justify such decisions that differs. Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole[19]whereas the arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. [20]The justification of legislative program of any complexity, says Dworkin, will require both sorts of arguments. According to him, a program that is chiefly a matter of policy may require strands of principle to justify it[21]. Sometimes, it may so happen that a program which is generated by policy may be qualified by principle and *vice versa*.

In a hard case where no settled rule dictates a decision either way, then, Dworkin says, “ it might seem proper that a proper decision could be generated by either policy or principle.”[22]He cites the case of *Spartan*

Steel & Alloys Ltd. v. Martin & Co. f02. In this case, the employees of the defendant company had broken the electric cable which belonged to a company which supplied power to the plaintiffs factory, which was shut down during the period the cable was repaired.

Whether to allow recovery for economic loss following negligent damage to someone else's property was the question to be decided before the court. Here, there are two ways open before the court. Dworkin says " It might have proceeded to its decision by asking whether a firm in the position of the plaintiff had a right to recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way plaintiff suggested, which is matter of policy.

Dworkin lays down his thesis:

Judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically are and should be generated by principle not policy.

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[1] Benjamin Cardozo, *The Nature Of The Judicial Process*, 10 (1921)

[2] James L. Houghtling, *The Dynamics of Law* 13 (1963)

[3] *Ibid*

[4] Rajeev Dhavan *et. al.* (ed), *Judges and the Judicial Power* 1 2 (1985)

[5] *Ibid.*

[6]Owen M. Fiss, “ Objectivity and Interpretation”, 34 *Stan. L. Rev.* 739.

[7] *Ibid*

[8] *Ibid.* Fiss says, “ It is an activity that affords a proper recognition of both the subjective and objective dimensions of human experience; and for that reason, has emerged in recent decades as an attractive method for studying ‘ all social activity. The idea of a written text, the standard object of legal or literary interpretation, has been expanded to embrace social action and situations, which are sometimes called text-analogues.”

[9] *Ibid.* “ Indeed, interpretation is defined as the process by which the meaning of a text is understood and expressed, and the acts of understanding and expression necessarily entail strong personal elements. At the same time, the freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e. g., words, history, intention, consequence), as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.” *Id.* at 744.

[10]G Williams, “ Language and the Law”, 61 *LQR* 73.

[11]For a detailed analysis see, Chapters 4 and 5. Also see, Upendra Baxi, “ On How Not to Judge the

Judges: Notes towards Evaluation of the Judicial Process”, 25 *JLLI* 210 (1983).

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[12] Ronald Dworkin, *Laws Empire* 1 (2002, Indian Reprint)

[13] *Ibid.*

[14] Dworkin says, “ People often stand to gain or lose more by one judge’s nod than they could by any general act of Congress or Parliament.” *Ibid*

[15] *Supra* note 70 at 81

[16] Ronald Dworkin, “ Natural Law Revisited”, 34 *University of Florida Law Review* 165 at 165-

166(1982). “ Suppose the question arises for the first time, for example, whether and in what circumstances careless drivers are liable, not only for physical injuries to those whom they run down, but also for any emotional damage suffered by relatives of the victim who are watching. According to naturalism, judges should then ask the following questions of the history (including the contemporary history) of their political structure. Does the best possible justification of that history suppose a principle according to which people who are injured emotionally in this way have a right to recover damages in court? If so, what, more precisely, is that principle? Does it entail, for example, that only immediate relatives of the person physically injured have that right? Or only relatives on the scene of the accident, who might themselves have suffered physical damage?” *Ibid.*

[17] *Supra* note 70 at 82

[18] *Ibid*

[19] *Ibid.* For example, “ The argument in favour of a subsidy for aircraft manufacturers, that the

subsidy will protect defense, is an argument of policy.” *Ibid.*

[20] *Ibid.* For instance, “ The argument in favour of anti-discrimination statutes, that a minority has a

right to equal respect and concern, is an argument of principle.” *Ibid.*

[21] *Ibid.*

[22] *Supra* note 70 at 83. Emphasis added.