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Justiciability and Justice: Elements of Restraint and Indifference*

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THIS IS AN ERA in which man and his institutions are showing the capacity to progress from indifference to involvement. Issues which for too long have been submerged or shrugged off are emerging increasingly on agendas for confrontation. Problems of poverty, race, sex, religion, and representation which were shunned or shunted aside for generations are in the forefront of public discussion and institutional decision.

These developments have been brought about by diverse factors, not the least of which has been the role of the judiciary in demanding that the society acknowledge and face dichotomies between the pretenses of its constitutional norms and prevalent practices of the day. In this effort, the courts may well have been mirroring the surge of concern within religious communities over the aspirations and deeds of justice.

There are, of course, those who look askance at the enlargement of concern and involvement—those who want their churches to comfort them with the assurance that the *status quo* embodies the best of all possible worlds, or, if it doesn't, that the burden for improving it rests on the shoulders of coming generations rather than on their own. They want their courts to preserve whatever is, and perhaps aspire toward but never insist upon, the implementation of the "oughts" they acknowledge. Reform, renewal, and innovation are rarely greeted with universal acclaim; nor should they be. Change for the sake of change alone is more the mark of dilettantism than of reform. But retention of all systems as they are because of fear of change alone is more the mark of cowardice than of conservatism.

My concern is not with the popularity of reformers but with one small aspect of the enlargement of legal involvement in the community of man. In

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fairness, some underlying beliefs should be declared at the outset. My view of our constitutional system of separation of powers, for example, is that it facilitates the pluralism of both leadership and control. The principle was not designed rigidly to apportion participation in the policy process. Although it is a useful introduction to American Government to say that the Congress makes the laws, the President enforces the laws, and the Supreme Court interprets the laws, we know that making, enforcing, and interpreting do have elements of overlap. As a result, change can come about in any particular era not only when the three branches act in concert but when one or two are disinterested or occupied with other matters—the third taking the initiative. If the other branches are opposed to what has been done, the separation of powers system maximizes their capacity to check and balance the branch that has seized the initiative. To the extent that any branch withdraws from participation as a coordinate member of this tripartite arrangement for leadership and control, it denigrates the objectives and functions of separation of powers.

Withdrawal from controversies by the courts on the ground of non-justiciability strikes me as one subject that merits reexamination in light of this position. Enhancing the confrontation of issues by the judiciary through reexamination and circumscription of areas of non-justiciability has been part of the movement from indifference to involvement. Although involvement is sometimes decried as tantamount to domination, in reality involvement is no less genuine or significant when exercised with restraint. It might be helpful to examine and dispose of several myths about judicial role before considering illustrations of this point.

Three myths have remained prevalent over the years in the folklore of the judicial process. One is that the role of judges is confined to finding the law and that judges have no power to formulate policy or to exercise personal discretion in disposing of cases before them. According to this view, the applicable law is both certain and immutable. The decision in any particular case would be the same regardless of the background, philosophy, or political affiliation of the individual wearing the judicial decision-maker's robe. The second myth, the antithesis of the first, is that judges are all-powerful in the formulation of policy. Variations on the remarks of John Chipman Gray that "the law is what the judges declare" and of Charles Evans Hughes that the meaning of a statute "is what the Court says it means"[1] have been echoed and re-echoed by this school of mythologists in the apparent belief that repetition could substitute for proof.

In actual practice, of course, judges must find *and* make law. They must find in the statutes and judicial precedents of the past guides to the resolu-

[1] See GRAY, THE NATURE AND SOURCES OF LAW §276 (1902); HUGHES, THE SUPREME COURT OF THE UNITED STATES 280 (1928); and HART, THE CONCEPT OF LAW 138-42 (1961).

tion of present conflicts. Judges who ignore or subvert the plain meaning of statutes and judicial precedents in disposing of their dockets invite the virtual certainty of reversal on appeal to the higher courts. The sanction for such conduct by Supreme Court Justices may not, in practice, be as swift or certain; but with neither purse nor sword in their possession and no hereditary ties to Don Quixote or Sancho Panza, the Justices have both incentive and capacity to recognize their dependence upon, and not merely their involvement in, the separation of powers system for the fulfillment of their roles. It is equally true that judges who ignore completely changing social attitudes or needs and base their decisions on mechanistic applications of precedent may also be reversed by appellate tribunals or ignored, in turn, by the public at large. This last point highlights the third myth of the judicial process, the myth of efficacy, which is more harmful than either of the first two.

The myth of efficacy assumes that knowledge about what the law *is* tells us also how people will behave. The law declared by judges may be regarded at times, however, as no more than an admonition to the people as to how they *ought* to behave. For law is only one of a number of factors, along with culture, personality, socio-economic status, power, values, faith, and others that motivate or condition human behavior. The observer of the judiciary or the judge himself who is lulled into acceptance of the myth of efficacy of judicial decisions as devices for the definition and control of socially deviant behavior is likely to produce invalid or irrelevant answers to the problems of courts and judges, if only because his acceptance of the myth keeps him from focusing on valid and relevant questions.

Law has many functions and faces, and there may well be contradictions among them. Roscoe Pound in his classic INTRODUCTION TO THE PHILOSOPHY OF LAW,[2] for example, enumerated and discussed four "ends of the law" that were not necessarily consistent with one another. These ends were (1) to help the peace in a given society, (2) to uphold the social *status quo* and maintain general security through the security of social institutions, (3) to make possible the maximum of individual free self-assertion, and (4) to make possible the maximum satisfaction of wants. Needless to say, the evaluation of any particular legal system's operations would depend in large part upon which one of these ends the system was designed to achieve. Such evaluation may hinge also upon the vantage point of the observer. As F. S. C. Northrup has pointed out, law presents a different face to differently situated viewers.

> To its practitioners, law appears as a sequence of cases pregnant on the one hand with principles and precedents and on the other with briefs and judgments that

[2] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 25-47 (1922).

> break at times with the past. To its subjects, law presents itself first as an unnecessarily prolix, dull, and impersonal necessity and finally, in one's last will and testament, as the trusted custodian of all that one can leave to those whom one holds most dear. But to the legal theorist and the philosopher, law is life itself. For in law, as in the political institutions law helps create, human experience presents itself at its worst and at its best in all its complexities.[3]

It is easy to fall into error about any given legal system, as Professor Rostow has cautioned, "by viewing it too abstractly and without reference to the social context—the whole universe of forces which brought it into being—and to the functions it actually performs, and those we think it should perform."[4] From the human experience embodied in case law has emerged the salient political fact that in many substantive areas courts rather than legislatures have been the principal developers of policy. A major reason for this is that most statutes tend to represent compromise between the conflicts of group interest.[5] It is politically unrealistic to expect legislation to embody to any considerable degree specific details that are likely to antagonize important segments of the community. A second reason was put forth by Judge Cardozo. If justice is the goal of law, he maintained, then detailed policy-making in every instance by specific legislation is not only unrealistic but undesirable. Court rulings may often be "tentative and uncertain gropings," he acknowledged, but such gropings are preferable to comprehensive legislation that would "rush blindly into darkness." Justice often is better achieved by courts than legislatures because

> justice is not to be taken by storm; she is to be wooed by slow advances. Substitute statute for decision, and you shift the center of authority, but add no quota of inspired wisdom. If legislation is to take the place of the creative action of the Courts, a legislative committee must stand back of us at every session, a sort of supercourt itself. No guarantee is given us that a choice thus made will be wiser than our own, yet its form will give it a rigidity that will make retreat or compromise impossible. We shall be exchanging a process of trial and error at the hands of judges who make it the business of their lives for a process of trial and error at the hands of a legislative committee who will give it such spare moments as they can find amid multifarious demands.[6]

Cardozo made this statement, of course, before the burgeoning of administrative agencies. There are recent indicators, nonetheless, of heavy preference for courts rather than for legislatures or administrative bodies for the resolution of certain kinds of conflict. Vincent Ostrom, for example, has examined this practice in the channeling of conflicts among local units

[3] NORTHRUP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 3 (1959).
[4] Rostow, *The Lawyer and His Client*, 28 A.B.A.J. 25 (1962).
[5] LATHAM, THE GROUP BASIS OF POLITICS 35-6 (1952).
[6] CARDOZO, THE GROWTH OF THE LAW 133-4 (1924).

of government, and has attributed the preference for resort to the judiciary to the effort "to minimize the risks of external control by a superior decision-maker."[7] The disputants prefer the precise, limited impact of judicial decisions to the amorphous, general effects of legislation. Plausible as these explanations for a judicial role in policy-making are, they are probably less significant than the single constitutional fact that the judiciary is a coordinate branch of the government. While decisions can be precise and limited, we have seen in cases like *Brown*[8] and *Baker*[9] that they can also impart seminal breadth and scope.

Baker is especially significant as an illustration of the methods of judicial innovation because of its seemingly abrupt departure from the earlier substantive norms and because of its implications for the concept of justiciability. It was generally believed prior to 1962 that suits to compel reapportionment were non-justiciable "political questions" that judges were incompetent to resolve. A line of cases extending from *Luther v. Borden*[10] in 1848 to *South v. Peters*[11] in 1950 had applied the "political question" doctrine consistently to a host of challenges to representation systems of the states. According to Justice Brennan's majority opinion in *Baker*, all of the earlier "political question" cases charged violation of the constitutional guarantee to each state of a "republican form of government." This case, on the other hand, alleged violations of the right conferred by the 14th Amendment on every person to the "equal protection of the laws."[12] Brennan distinguished the "political question" line of precedents from the present case and classified *Baker v. Carr* with the other "equal protection" cases that have traditionally been justiciable.[13] His interpretation of the political question doctrine reduced the efficacy of non-justiciability claims from sweeping, "close Sesame," exclusionary devices to narrow excisions from jurisdiction where the invoker of the particular claim of non-justiciability has sustained the burden of proof.

There should be no dismissal for non-justiciability on grounds of a political question's presence unless one of the Court's new formulations of criteria was "inextricable" from the case at bar. The criteria as spelled out by Justice Brennan were:

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manage-

[7] Ostrom, Tiebout, and Warren, *The Organization of Government in Metropolitan Areas*, 55 AM. POL. SCI. REV. 841 (1961).
[8] Brown v. Board of Education, 347 U.S. 483 (1954).
[9] Baker v. Carr, 369 U.S. 186 (1961).
[10] Luther v. Borden, 17 U.S. (7 How.) 1 (1848).
[11] South v. Peters, 339 U.S. 276 (1950).
[12] Baker v. Carr, *supra* note 9, at 209-10, 226-7, and 194 n. 15.
[13] *Id.* at 226-9.

> able standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[14]

In the opinion of dissenting Justices Frankfurter and Harlan, the challenge to Tennessee's malaportionment should have been ruled non-justiciable. They maintained that questions are political and non-justiciable whenever their resolution by judges would impair the judges' "complete detachment in fact and in appearance from political entanglements."[15] Charging their colleagues in the majority with asserting "destructively novel judicial power," they predicted not only that this act of judicial intervention would be futile but that it might impair "sustained public confidence in its moral sanction," on which the Court's authority ultimately rests.[16]

Methodologically, the majority and minority of the Court agreed that precedent is binding; they disagreed, as judges frequently disagree, on the meaning and application of particular precedents. The Brennan-Frankfurter dichotomy was a salient illustration of Llewellyn's notion of "leeways"—that is, that the choice of techniques of reasoning, which leads in turn to the choice of applicable precedents to govern current cases, is one of the principal leeways of the law. Common to all judicial opinions, Llewellyn said, are lines of "compulsion in the precedents" that operate to limit and control judicial action. Nonetheless, he maintained, when the "urges of justice and policy" are clear enough, judges can avoid or whittle away almost any precedent. The actual final control over the leeways available to the judges "lies not in any rules of law or rules of precedent but lies instead in a combination of judicial conscience, judicial judgment, and what I can best describe as the net lines of force of the particular field of law."[17]

An item of key significance in the dispute over judicial role was the relationship of remedy-potential to justiciability. Brennan's criteria for asserting non-justiciability of any issue at hand included "lack of judicially discoverable and manageable standards for resolving it."[18] Frankfurter's norm was similar, though it stressed efficacy rather than manageability. Weighty in determining non-justiciability, he said, "has been the difficulty or impossibility of devising effective judicial remedies in this class of cases."[19] So as to incur

[14] *Id.* at 217.
[15] *Id.* at 267.
[16] *Ibid.*
[17] LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 120 (1962).
[18] Baker v. Carr, *supra* note 9, at 217.
[19] *Id.* at 327.

favor with neither camp, I wish to dissent from both. Certainty of efficacy in resolving conflict through judicial action is unattainable. Predictions of compliance with judicial decisions are tenuous and indeterminable at best. That the myth of judicial efficacy can mislead laymen is understandable; that it should be invoked by judges as a criterion of justiciability is a paradox, if not a product of sheer whimsy.

The dissenters in *Baker* shied from considering legal problems of malapportionment on the merits—a task of legal interpretation for which lawyers are schooled from the moment they first reach Alma Mater. They declined on the basis, in part, of their determination that any remedy they might propose would be vitiated by societal indifference or rejection—a conclusion that must be anchored to social-scientific predictions which lawyers are notably unequipped to make by training, tradition, or professional experience.

The majority would exclude a case from judicial consideration if the issue involved were shown to lack judicially discoverable or judicially manageable standards for resolving it. But why—especially in a system of separation of powers which the majority recognize as a prime factor underlying the political question doctrine—must standards for the resolution of issues in conflict be *judicially* discoverable or *judicially* manageable as a precondition of judicial involvement in the issues? The judiciary does not have to dominate in order to participate in the governmental process. Management, compliance, and enforcement are primary concerns of the executive. Alexander Hamilton, in his discussion of judicial power in THE FEDERALST stressed that the judiciary has "neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[20] While problems inherent in securing obedience may be relevant in fashioning the precise remedies for particular delicts, they are irrelevant to whether an alleged delict can or should be adjudicated.

Indeed, the very development of our system of judicial review had one point of origin in the certainty of *Marbury v. Madison*[21] that the Secretary of State would not obey any court order to deliver the judicial commission to Marbury. Had Chief Justice Marshall made the adjudication of delict contingent on the showing in advance of an efficacious judicially conceived and administered remedy, the case might have gone into our history books as a prime example of judicial abdication instead of the historic affirmation of the power of judicial review. Marshall's admonition on judicial role in *Cohens v. Virginia* is also worthy of note in this respect. Rejecting the contention of the state that the Court had no jurisdiction to review a state criminal case, Marshall asserted:

[20] THE FEDERALIST, No. 78, at 490. (Wright Ed. 1961).
[21] 5 U.S. (1 Cranch) 137 (1803).

> With whatever doubts, with whatever difficulties a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which one would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant and we cannot insert one.[22]

It is interesting, of course, to note that the dire predictions of the dissenters in *Baker* have not come about. Far from meeting hostile obstinacy in the states, the decision has renewed public interest and participation in local political processes and institutions. The recent description of legislative reapportionment by a state attorney general as "pervasive in its scope, profound in its impact and historic in its accomplishment," is a tribute not to the Court's predictive powers, but to the capacity of professional politicians and ordinary people to respond to adjudications that spur the conscience and urge observance in practice of the principles we profess.[23]

The exercise of jurisdiction by the judiciary may be governed appropriately by such judicially determinable criteria as the case or controversy test, standing, ripeness, and primary jurisdiction; but judges are not equipped to measure or predict manageability and efficacy of the norms they formulate or apply. To the extent that there is expertise at all in such prediction, it is in the domain of social scientists rather than judges. It is dysfunctional—a negation of the judicial function—for courts to condition access to redress on a guarantee that the redress, if granted, will be self-enforcing.

Restraint as a hallmark of judicial behavior should be manifested especially in matters that are beyond judicial knowledge and competence. To label as "judicial restraint" exclusion from access to the judicial process founded on judicially contrived assumptions of noncompliance comes close to engaging in Orwellian "doublethink." Such exclusions, at best, become instruments of indifference to the legal components of emergent social and individual problems. At worst they embody the very antithesis of judicial restraint; they are aggressive and inaccurate intrusions into issues of predictability which, if resolvable at all, call forth every nuance of social scientists' skills. Professor Reich recorded a truism which judges as well as laymen should recognize when he said "...law now permeates every activity.

[22] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

[23] Sills and Handler, *The Imbroglio of Constitutional Revision*, 20 RUTGERS L. REV. 1, 29 (1966). See also MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 273-458 (1965).

This trend is inevitable as society rapidly becomes more institutional and bureaucratic. Today's social problems necessarily become legal problems."[24] In large measure, Reich was merely implementing Roscoe Pound's observation more than forty years ago that

> if in any field of human conduct or in any human relation the law, with such machinery that it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation to stand in the way of its doing so.[25]

A recent district court case warrants consideration as a prototype of post-*Baker* judicial response to a claim of non-justiciability. Julian Bond, Communications Director of the Student Non-Violent Coordinating Committee, was nominated by the Democratic Party to represent the voters of House District No. 136 in the Georgia House of Representatives. The district contains approximately 6,500 registered voters of whom 6,000 are Negroes. Bond received 82% of the vote. He sought to take up his duties on January 10, 1966, the first day of that session of the Georgia General Assembly, but was not allowed to take the oath of office and was denied his seat. Challenges to Bond's qualifications had been filed by seventy-five of the 205 members of the House on the grounds that statements and actions by Mr. Bond in support of controversial SNCC resolutions and with regard to draft-card burners gave aid and comfort to the enemies of the United States, violated the Selective Service laws, tended to bring discredit and disrespect on the Georgia House of Representatives, and disqualified him from taking the oath to support the Constitution of the United States and the Constitution of Georgia as required of a member of the House of Representatives.

The controversy arose following the issuance of a statement on Viet Nam by SNCC on January 6, 1966, which included the declaration that "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country." On the same day, in response to a newspaperman's question, Mr. Bond stated that he would not burn his own draft card but admired the courage of those who did. A committee designated by the speaker of the Georgia House to hear the challenges to seating Bond recommended after a hearing in which Bond, among others, appeared and was represented by counsel, that he not be seated. The House then voted 184 to 12 to deny Bond his seat. Dr. Martin Luther King and Mrs. Arel Keyes, residents of Bond's district, joined Bond in seeking "for themselves jointly and severally and for all others similarly situated" to enjoin the officers of the

[24] Reich, *Toward the Humanistic Study of Law*, 74 YALE L. J. 1402, 1407 (1965).
[25] POUND, *op. cit. supra* note 2, at 46-7.

Georgia House of Representatives from excluding Mr. Bond from membership. They alleged that the provisions of the Georgia Constitution authorizing the House to judge the qualifications of its members and the House Rule under which Bond was excluded are unconstitutionally vague or unconstitutionally administered, that Bond was barred because he was a Negro, and that he and the residents of the district were denied rights under the first, fourteenth, and fifteenth amendments.

The defendants claimed that the issue was non-justiciable. In the absence of a showing by the plaintiff of purposeful and systematic exclusion of legislators for racial or religious reasons or the showing of a long standing abuse for which there would be no other remedy than that available through judicial intervention, the Georgia House of Representatives possessed sole and exclusive authority to judge the qualifications of its members, they maintained. They moved alternatively to dismiss Dr. King and Mrs. Keyes as plaintiffs for lack of standing and answered the complaint on the merits. By stipulation, the district court could render final judgment on the pleadings.

The letter of *Baker v. Carr* would not have been violated if the three-judge district court had distinguished it on its facts from the Bond case. Similarly, while the Supreme Court's ruling in *Gomillion v. Lightfoot*[26] requires involvement by the federal judiciary where a state legislative body seeks to exclude or limit the power of Negroes generally, the Bond case could have been differentiated from *Gomillion* by stressing the fact that seven other Negro legislators were seated at the time Bond was refused his seat and that two of the Negro legislators were appointed to the special committee hearing the challenge. The court declined to follow this path. While splitting two to one on the merits, the justices agreed that the issue was justiciable. The court disposed of the non-justiciability argument in three sentences: "It could hardly be argued that the House could refuse to seat a member because of his race or for any other reason amounting to an invidious discrimination under the equal protection clause of the fourteenth amendment. The denial of a seat to a Negro representative-elect would also violate the fifteenth amendment. We think it follows that the court has jurisdiction over a denial of first amendment rights by the state, and that the federal rights asserted here are not so insubstantial as to warrant our refusing jurisdiction."[27] Holding that the complaint of Mr. Bond alone would resolve every conceivable issue, the court agreed with the state that Dr. King and Mrs. Keyes did not have standing to bring the complaint.

This is not the occasion to discuss the merits of the court's decision on the merits. The significant point is that the case was decided on the merits and that the judiciary instead of acting, like Cerberus, as an instrument of ex-

[26] 364 U.S. 339 (1960).
[27] Bond v. Floyd, Civil No. 9895, N.D. Ga., Feb. 10, 1966, at 8.

clusion served as conduit for redress of a significant grievance. By providing channeled access to centers of decision-making for otherwise alienated individuals and groups, courts enhance commitment of those individuals and groups to the processes and institutions of democracy. Bond lost two to one on the merits in the district court. But the momentary substantive outcome, at least for purposes of this discussion, is less significant than the process. If the court had ruled the issue non-justiciable and clothed the Georgia House's decision with finality, it might very well have closed off Bond's only opportunity to seek vindication of his rights. The very existence of a meaningful channel of redress maximizes the likelihood of reasonable action by the institution subject to challenge. A body that knows its power and is accountable to no one is not likely to function with the same regard for the niceties of equity as a body accustomed to functioning within an operational system of checks and balances.

I would not confine this stance to substantive issues of apportionment and civil rights. Indeed, I would join with Justice White's statements on justiciability in his dissent in the *Sabbatino* case[28] and with Judge Jessup's concurring opinion in the *South West Africa Cases* before the International Court of Justice.[29] In the *Sabbatino* case, White dissented from the majority's ruling that the Act of State doctrine prohibits inquiry by United States courts into the validity of a foreign government's expropriation of property within its own territory, even if such expropriation violated international law. Justice White expressed his dismay over the Court's construction of its powers with regard to the application of international law and affirmed his own view of what he "thought to be unassailable propositions: that our courts are obliged to determine controversies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law."[30]

Judge Jessup, in response to preliminary objections raised by the Union of South Africa to the justiciability of proceedings instituted in the International Court of Justice in 1960 by Ethiopia and Liberia alleging that South Africa had violated its obligations under its mandate, supported strongly the justiciability of the issues in the case. "There is no reason," he said, "why

[28] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[29] South West Africa Cases, [1962] I.C.J. Rep. 319.

[30] Banco Nacional de Cuba v. Sabbatino, *supra* note 28 (dissenting opinion). Justice White did not deny that political matters in foreign affairs are part of the exclusive domain of the executive branch, but he saw such matters primarily in issues for which there are no available standards or which are textually committed to the executive by the Constitution. Thus, such issues as whether a foreign state exists or is recognized by the United States, whether foreign states or their representatives have status entitling them to sovereign immunity, or whether representatives are authorized to engage in state-to-state negotiation would be classified as within the executive's exclusive domain. "But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question."

this Court should be unable to determine whether various laws and regulations promote the 'material and moral well-being and the social progress of the inhabitants' of the mandated territory."[31] In this respect, Jessup drew analogies to judicial review by United States courts of basic constitutional rights. He contended that states have a *legal* interest in the general observance of rules of international law.

What I am advocating, in short, and what I would contend is embodied in the enlargement of the justiciability concept in these views of Justices White and Jessup and in cases like *Baker* and *Bond* is the institutionalization within the judiciary of Fuller's central principle: "Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire."[32] Furthermore, although I would not wish, by suggesting that they are really in agreement, to place obstacles in the path of the verbal missiles Fuller and Hart direct to one another, I believe the enlargement of justiciability is consistent with Hart's insistence that the officials of the legal system must regard those rules of behavior which are valid according to the system's ultimate criteria of validity as common standards of official behavior and must "appraise critically their own and each other's deviations as lapses." Hart's "ultimate rule of recognition," in terms of which the validity of other rules is assessed, becomes a "public, common standard of correct judicial decision."[33]

The judiciary is a primary and coordinate, though not plenary or exclusive, channel for the communication and critical appraisal of men's attitudes, latitudes, lassitudes, and achievements. It functions, of course, within a disciplined and stylized framework of preconditions and procedures, and sometimes serves constituencies different from those of legislature and executive. But communication and confrontation are preconditions of justice; and, to the extent the judiciary provides access to our central decision-making mechanisms for individuals or groups otherwise excluded from effective participation, it enlarges the practicability of justice as well as the commitment of the otherwise alienated populations to justice as ideal and ideology.[34] In taking this stance, I accept Jenkins' threefold conception of justice

[31] [1962] I.C.J. Rep. 319, at 429. The *South West Africa Cases* are examined comprehensively in a Symposium in 4 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 47 (1966). Therein see especially Aaron Etra's searching analysis, *Justiciable Disputes: Jurisdictional and Jurisprudential Issues*, 86-118.

[32] FULLER, THE MORALITY OF LAW 186 (1964).

[33] HART, *op. cit. supra* note 1, at 112-3.

[34] Professor Jenkins maintains persuasively that any working idea of justice must always be an ideology as well as an ideal.

> For law depends on—and so must be adapted to—the human population with which it deals, the type of political organization that it administers, the interests and pursuits that concern men, and the way of life that men have already established among themselves and with their surroundings. These together constitute the actual matrix within which law is to function; they condition the ends that their law is to seek. Law is a

as sentiment or motivating force for human conduct, as general substantive ideal for the structure and values of the good society, and as rules and methodologies intended to promote the realization of the substantive ideal.[35]

We, along with Glaucon and Adeimantus, should be interested in how justice and injustice "inwardly work in the soul"; and evaluation of the allocation of specific rewards and sanctions by particular institutions should be undertaken in terms of substantive criteria of justice. My focus here on the justiciability concept as an impetus and guide to judicial behavior requires emphasis, however, on the rules and procedures for promoting justice. In this regard, the observations of Hart and of Ginsburg seem central to me. Hart tells us that

> justice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which classes of individuals are treated. It is this which gives justice its special relevance in the criticism of law and of other public or social institutions. It is the most public and the most legal of the virtues.[36]

Ginsburg affirms that "Justice in the broadest sense consists in the ordering of human relations in accordance with general principles impartially applied."[37] He reminds us also that the notion of justice is perhaps first explicitly recognized in the injunction given to judges to administer the law impartially, to "hear the causes between your brethren, and judge righteously between a man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; ye shall hear the small and the great alike . . ."[38]

The language from the Book of Deuteronomy offers a key not only to the classic notion of distributive justice but to the matter of justiciability. For it is the small who are most deprived when access to the courts is cut off. The great are sufficiently well represented in the legislature and the executive branch so that indifference to them on the part of the courts can be countered within the system of separation of powers and overcome by action of the other branches.

Law, like politics, is concerned largely with the institutionalization and resolution of conflict. In this respect, the legal process is a formalized ver-

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principle of order, and justice is the completion of law. . . . The ideal as such is never embodied or realized. It remains always a sheer concept, defining the conditions of man's being and well-being, but not determining their content. This latter is for us continually to undo and redo; for variety and change require differing accommodations in the present, and they prepare a future that we cannot wholly anticipate. It is for this reason that justice must be both ideal and ideology. Jenkins, *Justice as Ideal and Ideology*, JUSTICE 226-8 (Friedrich and Chapman ed. 1963).

[35] *Id.* at 192-6.

[36] HART, *op. cit. supra* note 1, at 163.

[37] GINSBURG, ON JUSTICE IN SOCIETY 56 (1965).

[38] *Book of Deuteronomy* 1:17.

sion of the political process. Both political and legal institutions were structured to deal with conflict within our system in ways that could maximize such elements of democracy as representation, accountability, participation, and equality. But individuals, groups, or strata of the society without organizational power can have little access to or role in directing or influencing the determination of legislature and executive. It is especially with respect to them that the judiciary can and should provide meaningful access. The judiciary's isolation from partisan political forces permits, if it does not demand, the participation of groups and strata in policy processes from which they would otherwise be excluded in practice, no matter how noble or inalienable their rights in theory. Thus, enlarging the area of justiciable questions enhances justice because it helps to equalize participation in the molding and implementation of public policy by all social and economic strata of the society. That the courts in recent years have been both shield and sword for those who might otherwise have suffered in silence and become the dupes of demagoguery and totalitarianism should be a source of comfort rather than regret. Through such actions the political process has been renewed and vitalized. As Harry Jones has noted, "Groups long inarticulate have found legal spokesmen and are asserting grievances long unheard."[39]

Our task is not to urge sovereignty over the policy process or grievance redress process by any single branch, but rather to urge that all the branches of government have significant roles to play in giving visibility and seeking solutions to the conflicts and grievances within the community of man. Minimally, determinations of non-justiciability subordinate judicial competence on points of law to judicial incompetence on prediction of consequences. They may also exclude those most in need of access from the opportunity to have grievances heard. I would urge the reappraisal of doctrines of non-justiciability with a view to eliminating them from the judiciary's weaponry of avoidance.

I hope I am doing more than echoing " A rose is a rose is a rose" when I cite in closing the words of Lord Radcliffe that "We cannot learn law by learning law." For Radcliffe stressed that if law is to be anything more than just a technique it has to be "so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life."[40]

Evaluation of any legal concept calls for analysis of its interrelations with the goals and aspirations of the larger society. This demands an end to

[39] JONES, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 2. On relationships between alienation from policy processes and commitments to democratic ideology, see McCloskey, *Consensus and Ideology in American Politics,* 58 AM. POL. SCI. REV. 361 (1964).

[40] RADCLIFFE, THE LAW AND ITS COMPASS 92-3 (1960).

indifference and a heightening of involvement—involvement that utilizes the perspectives of concern and restraint and, rather than imposing meticulously detailed and irrevocable norms, maximizes the opportunities for dialogue, confrontation, and participation in the challenges of our time.