JUDICIAL LEGISLATION OR IN WHAT WAY IS RELEVANCE RELEVANT TO JUDICIAL DECISION-MAKING

Samuel I. SHUMAN

It is probably not an exaggeration to suggest that an adequatly comprehensive analysis of the concept of relevance would virtually exhaust the need for any separate additional treatment for the question of judicial legislation. This is so, because with the exception of some problems about how to weigh competing considerations, the place where judges are thought to be legislating the most and the most clearly, is in finding, making or discovering the rules, principles and policies relied upon to provide the standards used to decide a case. Those who argue that judges do legislate, generally maintain that it is in connection with new principles and policies where one sees such legislation most clearly and that in almost any difficult case the judge will be compelled to find, make or discover such new sources of standards for decision. There are also those who argue that not only do judges legislate in the sense indicated, but it is important and desireable that they should do so and the higher one mounts on the appellate ladder, the more insistent becomes the demand that judges ought to legislate and be candid in doing so. It is this demand for candor coupled with the demand that at least appellate judges necessarily do or should legislate, which gives the primary thrust to the concern about relevance.

Where the issue is the relevance of the sources relied upon for the derivation for the standards for decision, then the question may be put this way: If the minimal relevance of a source is that it be authoratative, how can a judge avoid legislating since only a narrow range of sources are identifiable as relevant in this sense, prior to the actual decision ? That is, since only the valid rules of the legal system come clothed with the mantle of authority and since there are not always rules

available which will dispose of the case at hand, the judge must legislate. One of the most interesting aspects of the current jurisprudential literature on judicial decision-making has been directed towards showing how inadequate is this essentially positivistic rule-centered model in that it fails to accomodate those policies and principles which also provide sources for decisional standards. The theory here is that if the litigants (and society) have a right to expect the court to give a particular decision or at least a decision of a particular type, and if this is a right and not merely a hope, then it will be necessary to expand the model of judicial decision-making to include policies and principles as well as rules. This will be necessary because otherwise there will be no way to show that there is anything more than a hope for the right decision. But if principles and policies as well as rules are recognized as authoritative sources for the standards which entitle litigants and society to expect certain decisions from the judges, does this diminish the need for judicial legislation. Where the rule-only conception of judicial decision-making is enriched by the addition of policies and principles which are also authoritative, need judges legislate less in that now the only place where they will have to consider relevance is in weighing competing standards ?

Unfortunately the problem about legislation by judges is not much affected by substituting for the impoverished rule model, one enriched with additional authoritative sources. This is so because decisions on relevance, as well as other factors, will be necessary in order to decide which policies and principles are authoritative. While the skimpy rule model compels judicial legislation because of the poverty of authoritative sources, it did not require such legislation to ascertain what was authoritative. The enriched model, on the other hand, requires decisions of the kind which are characterized as legislative, precisely on the threshold question of which sources, apart from rules, are appropriate. In that the enriched model necessitates such decisions it is not worse than the rule model, but it is worth noticing that it is also not better, just different.

If in the absence of a mechanical decision procedure no

model will obviate the need for decisions of the type which suggest that judges legislate, it would then seem that the more interesting questions would be: (1) Do the kinds of questions about which judges legislate differ from the kind about which legislatures legislate. (2) Do the way judges legislate differ from the way legislators legislate; (3) If there are differences on (1) or (2), do these support the use of different criteria for the justification of the decisions rendered by judges or legislators — and specifically, is relevance equally relevant or relevant in the same sense for each of the two types of decisions ? For reasons which cannot here be canvassed in any detail, it seems to me that three questions must be answered in the affirmative and if for some reason it is insisted that we continue to talk about judicial legislation, then at a minimum, we should make clear the way in which such "legislation" differs from those more nearly paradigm cases with which it is compared — senates, parliaments, etc. If in addition to satisfying this minimal demand, we were to be furnished with the reasons for concluding that what judges do should be called legislating, despite the catalogue of differences which could be developed on what they decide and how, as contrasted to the paradigm cases of legislation, it may well turn-out that there are such major differences that the only good reason for continuing to speak of judicial legislation is the fact, and it is a fact, that judges like legislators, make decisions and these decisions do affect the quality of our lives and even our right to exist. But then, if that is really what is at the bottom of the controversy, then we might just as well also say that like judges and legislators, bayonets too legislate in that they too affect the quality of our lives and our right to existence. The point here is that political and social problems which are dissolved away in the acid of political realism and by stating some incontrovertable "ultimate" political fact, deprives us of the insights and understanding useful if not also necessary, for affecting the status of those ultimate political realities. If all that is wanted is an elephant tusk or tiger skin, one does not go on safari. If all one wants is proof of the obvious that all the parts of a government are parts of the machinery for

governing, then one does not study political science or how law and politics intersect.

In recent times, among those who do not want only the tiger skin, but who also want to hunt, there has been much attention to one feature of the judicial process which is regarded as crucial for differentiating it from the legislative process. Even if we ignore the differences attributable to the fact that legislatures are believed to be directly accountable to the people whereas typically ultimate appellate courts are not, and the fact that legislatures are not bound by any doctrine of *stare decisis* (interpreted either as some quasi-logical demand for systematic consistency or merely as respect for prior decisions), and in view of the other features characteristic of courts but not of legislatures (e.g., the relevance of the record, deciding only the individual case before the body, reliance upon some adversary procedure, lack of power in matters of supervision or enforcement of decisions, lack of access to or control over investigations and research, waiting for cases to be presented, publicly giving the reasons for a decision and including in the official record of a case the opinions and reasons for views other than those found in the majority decision, etc.) — even if all these differences are ignored or suppresed, there is still one difference which the modern hunters have been much concerned with, and that is the difference between what is regarded as the principled character of the decisions made by courts as compared to the ad hoc decisions of legislatures. A large part of the literature from both-law-conditioned and political science-conditioned people, has been in response to the views of Herbert Wechsler, a lawyer and distinguished law professor, who insists upon the importance of what he calls "neutral principles" in the judicial decision-making process. Although he and the other writer concerned with this question have the Supreme Court (of the United States) in mind, the problem which is being dealt with is hardly indigenous only to that Court. Wechsler urges that "what are surely the main qualities of law, its generality and its neutrality" require the Supreme Court to dispose of the questions before it, "«so far as possible by neutral principles — by standards that transcend

the case at hand". As a number of commentators have pointed-out, what is really at stake here is not the expectation that the judge will maintain a certain attitude towards the parties before him, but rather that the neutrality demanded is to be seen in how the judge administers the law, in how he applies the general principles, in short, in the procedure by which the decision is made. As was the case before, where an enriched, rule-policy-principle model replaced the impoverished rule-only model without effecting any diminution in the need for judicial "legislation", so too now, even acknowledging that judicial decisions are principled and that this is seen in how such decisions are made rather than in what they decide (i.e., their content), those who wish to "solve" the problem about judicial legislation will not be much aided. Even if it be agreed that the performance of a court is judged not in terms of the social consequences which flow from its decisions, precisely contrary to what is the case for a legislature, and even if it is acknowledged that judicial performance will be assessed in terms of how the court ascertains which standards are appropriate and how it applies those standards, there would still be no basis for lessening the concern which underlies the insistence that courts do legislate. And this is so because the double generality criterion (general principles applied generally) at best suffices only to test whether a decision is principled, but being principled while a necessary condition for finding that a judicial decision is justifiable, is hardly a sufficient condition.

It is not difficult to illustrate the point. Thus a perfectly general principle applied generally might provide that in every case the taller party shall prevail and if either or both are artificial entities, then that one shall prevail whose chief executive officer is the tallest. The principle furnishes a general standard which transcends any particular case, indeed it is probably irrelevant to any case, and the standard is to be neutrally applied since it is to be applied to every case and hence to every case of the same type. Obviously something is missing; something crucial. What is missing is that principled decisions may nonetheless be wholly irrelevant. Although omission of a relevance criterion makes for a neater distinction

between judicial and legislative decision-makers, its omission destroys the possibility for developing any rational criteriology for the justification of a judicial decision.

In view of what has been said perhaps it would not be misleading if the matter were put this way: we do have different legitimate expectations about legislators and judges and we therefore appeal to different criteria in assessing how well they perform their roles. Thus while both are expected to be principled in the sense that they will not take bribes, we do not expect them both to be principled in the sense that they will not favor their own state or district. On the contrary, legislators are expected to favor their constituents whereas judges may have a constituency, for example, the shifting minorities they are supposed to protect, but they have no constituents, let alone constituents whom they should favor. Further, while both decision-makers are expected to be relevant, what is expected in the name of relevance differs. Legislators are expected to provide solutions relevant to the social problems they select for attention. They are not expected to reconcile the solution with even their own prior decisions, let alone with the network of "solutions" which constitutes the political system. In other words, there is no legislative analogue to *stare decisis*. On the other hand the relevance expected of judges is not that their decisions will provide a solution to some social problem (which they do not select for attention). Rather, what is expected is that in providing a decision to the question before them, they will not ignore, but rather account for those rules, policies or principles regarded as sufficiently relevant to have been appropriatly placed before them by the written or oral arguments of the parties or which the court regards as sufficiently relevant to warrant their mention in the opinion. Perhaps the most one should ask for is that judges not deliberately blind themselves to the social consequences of a particular decision and that legislators not deliberately ignore the consequences for the system as a whole which may flow from a decision expediently solving a particular problem. But the crucial point is that the social reform accomplished

by a court is not a cardinal criterion for the justification of the decision.

This traditional, highly conservative, very unrevolutionary conception of the judicial role finds wide acceptance when applied to intermediate appellate courts. And among law trained people, who are often reacting to what they regard as the legislative "excesses" of the Warren Supreme Court, such a theory is also favored even for that final appellate Court. However, particularly among political scientists, but hardly only there, one finds considerable resistance to the idea that a final appellate court which has and exercises the power to invalidate legislation and interpret fundamental law, should not be primarily accountable for the social consequences of what it does or for what it fails to do.

Were there time available here, it would be interesting to explore the connection between protectionist conceptions of government as contrasted with welfare conceptions, in order to see if there is some intrinsic connection to the conservative conception of the judicial role. In fact I do not believe there are any such connections and on the contrary suspect that welfare conceptions about the proper role of government are more likely to support a very conservative conception of the judicial role. Were there time it would also be interesting to explore the connection between public acceptance of an ultimate appellate court role and the prevailing degree of resistance to the idea that even such courts, let alone inferior ones, are expected to comply with the principles of judicial conservatism. Were there time it might also be illuminating to consider the connection between the obviously symbolic functions of a court and the belief that even an ultimate appellate court should not be judged primarily upon the basis of its social accomplishments. These, and a substantial number of other "were there time" questions will here be passed over and I conclude by tendering a general suggestion about the meaning of relevance in the context of whether or how courts legislate.

Recently while discussing the problem of relevance with the judge of an intermediate state appellate court, he pointed out that the only thing relevant to the judges on his court, was

what the judges on the state supreme court believed. But ignoring here what for the lawyer and his client may be the only aspect of relevance which is relevant, what might be called the parochial, professional intra-institutional relevencies, it may be useful to recognize that relevance is a many-layered concept. For present purposes three of those layers are worth distinguishing: structural coherence, institutional consistency, and historical or social pertinence. Coherence is primarily a function of the way a particular decision fits into the network of decisions rendered previously by the decision-making institution. Consistency is largely a measure of the stability with which a particular conception of the institutional role endures over time. And pertinence is what is usually intended by concern with the social consequences of a decision. On the basis of such distinctions we might then say on the question of relevance, that the application of the conservative principle to the role of an ultimate appellate court results in a court for which, even if no different criteria are relevant to the justification of its decisions than are relevant to the decisions of lower courts, then there will still be no criteria suggested or implied by the conservative principle for the justification of the decisions of the appellate court, except on the questions of: (1) Is the decision principled; (2) Is it cohesive with the structure; and (3), is it consistent with the past institutional role. We are however, left with the same unanswered question which is admittedly crucial to the justification of legislative action — (4) is it historically or socially pertinent. The difference, and I suspect the only and therefore crucial difference, between justification of an ultimate appellate court decision, particularly on a constitutional matter, and the decision of a legislative body, is that as the courts decision increases in stature in terms of the first three criteria, the fourth diminishes in importance, whereas there is no comparable balancing relevant to the justification of legislative action. Another way of saying this is that the public conception of the appellate court as the primary institutional safeguard of fundamental constitutional rights and the public acceptance of the symbolic importance of the court in playing that role,

enables the court to do something the legislature cannot do — that is, trade-off pertinence for systematically cohesive, principled decisions which are consistent with (the public's view) of the court's institutional role.

Wayne State University,
Detroit, Michigan, U.S.A