

The Role of the Bar and the Judiciary in the Democratic State

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QUOTATIONS

- (i) Dick: "The first thing we do, let us kill all the lawyers."
Jack Cade: "Nay, that I mean to do."
-Shakespeare, Henry IV.
- (ii) "Not a profession but a conspiracy."
-Bernard Shaw.
- (iii) "Moghul justice had a silver lining: it had no lawyers."
-Dr. Beni Prasad (in his book on Jehangir) .
- (iv) "They are nothing but leeches."
-Napoleon on lawyers.
- (v) "Sir, I do not care to speak ill of any man behind his back, but I believe the gentleman is an attorney."
-Dr. Johnson.
- (vi) "The role of the lawyer in economic and social development in the United States has been generally negative and even obstructionist."
-Article in the Journal of the International Commission of Jurists.
- (vii) "The leading lawyers of today are extremely skilled technicians in the service of economic groups. The complete commercialisation of the American bar has stripped it of any special functions it might have performed for individuals without wealth."
-Encyclopedia of Social Sciences.
- (viii) "Judges should not live in ivory towers."
-Prime Minister Nehru.
- (ix) "Time has proved that the judgment of the U. S. Supreme Court was wrong on the most outstanding issues upon which it has chosen to challenge popular branches."
-Attorney General Jackson on the role of the U. S. Supreme Court in American History.
- (x) "The standards in the profession have reached an all-time low."
-Mr. M. C. Setalvad, former Attorney General of India and President of the Bar Association.
- (xi) "Englishmen owe their liberties to their judiciary and the bar."
-Winston Churchill.
- (xii) "The bar and the judiciary in India are the joint guardians of the Constitution and the rule of the law."
-Presidential address before the U. P. Lawyers Conference.
- (xiii) "Lawyers have a creative role in the formation of our socialist system."
-A Soviet book on the role of the Bar in the U. S. S. R.
- (xiv) "No foreign exchange will be sanctioned for studies abroad in unimportant subjects like tailoring and law."
-Official communique published by the Ministry of Finance, Government of India.

There exist on this planet more than a hundred sovereign States which have accepted the ideal of democracy. But their economic and social conditions are not the same. Some are highly advanced nations which completed their industrial revolution long ago and today are overflowing with milk and honey. Others are backward nations, which have only recently emerged from a state of primitive barbarism. India does not belong to either category. She is a highly civilised nation with a great and glorious cultural heritage; but, due to centuries of neglect and exploitation under imperialist rule, she has

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lagged behind in the race for economic progress, and finds herself in the ranks of under-developed nations. Today she faces the formidable task of transforming her economy as the price of her very survival. It is the problems of a developing country like India and the role of the Bar and the judiciary in solving them which have to be primarily considered.

While discussing the role of the Indian bar and the judiciary in solving the problems which face India today, it will be unsafe and misleading to rely on the example of the American, or even the British bar in all matters, though in some matters a reference to Soviet, American, and British examples may be very useful.

The fundamental problem

Is it possible for an under-developed nation like India to achieve a rapid transformation of her economic and social system under democracy? If so, under which particular form of democracy and what is to be the role of the bar and the judiciary in this achievement? These are the fundamental questions, which face the legal profession today. Arising out of them, is the further question: Is the Indian bar with its present state of organisation and intellectual and philosophical equipment fit enough to discharge its obligations to the nation?

The challenge of communism

The questions posed above have been called the challenge of communism. I crave the permission of the reader to quote the following paragraph from my article in the First Volume which sums up the problem:

"The people of India has taken up on itself the titanic task of the transformation of her economy within one generation. Our State is determined to achieve within a few years what took Britain and other countries several centuries. There is no choice left for India in this matter. The Himalaya is no longer our shield. Industrial strength has now become a condition of our survival.

The only other country in the world which was able within a single generation to transform itself from a backward rural and agricultural community into a modern industrial and highly powerful State is U. S. S. R. But the political system of the Soviet State is very different from that of India. We are living under a Constitution based on the principle of the parliamentary democracy which has the merit of acting as a brake on the arbitrary exercise of power. *But a brake is brake; it provides safety, not speed. And what India needs is speed in social and economic revolution, because our very survival as a nation depends upon the speed of our economic development. Is it possible to achieve a rapid economic transformation under the present system of laws? This is the fundamental question facing not only India but the whole of the non-communist world.*"

The title challenge of communism is not my invention. It is an old challenge which was first proclaimed by Karl Marx himself. In his *Critique of Political Economy* he prophesied that one day democracy would become incapable of keeping pace with technological advance because its laws (which include property relations) would become out of date and obsolete and prevent further economic progress—"fetters on production", he called them. This challenge was re-stated a few years ago by an American journal 'News Week' in these words: "And as the Fifties give way to the Sixties the question that India faces is: can these poor people, multiplying at the rate of 9 million a year be kept alive under a system of free parliamentary government? Or will India be forced, in a desperate attempt to keep its masses from starving to throw aside its democratic institutions (as much of Asia already has) and adopt in their place the ruthless methods of Communist China".

Is the legal profession in India—under which title I include the judiciary—intellectually and spiritually equipped to take up the communist challenge and prove to the world that economic progress under a parliamentary democracy can keep pace with communism? I regret to have to express my doubts whether the legal profession in its present condition has this capacity.

I shall first deal with the bar. At the outset, I must state a number of postulates. (A postulate is a thing assumed or taken for granted as the basis of reasoning: a fundamental condition. For example, the right to property and to personal freedom are postulates). My first postulate is that the bar is a social institution which was created to serve social needs. Mahatma Gandhi once observed in the case of

individuals that every fundamental right, including even the right to live, accrues from a pre-existing duty well performed. What is true of individuals is equally true of institutions created by associations of individuals. The very right of a social institution to exist is a conditional right-the condition being to fulfill a social need. History is littered with ancient institutions which were thrown into the dust-bin because they no longer served any useful purpose-empires, monarchies, princely orders, aristocracies, parliaments, zamindaries, managing agencies, private enterprises, and so on. The bar is no exception to this fundamental condition of its survival. Under the Moghul Empire there were no lawyers, as the late Professor Beni Prasad wistfully observed.

The present condition of the bar is in a deplorable state. First and foremost, the scale of values prevailing in the legal profession has become out of date and anti-social. For example, our test of a great lawyer is the size of his income. A new entrant to the profession is encouraged to dream that his income one day will be that of the stars, past and present. By contrast, in the Soviet Union, the test of a great lawyer is not the size of his income but his ability, integrity, and capacity for social service. In clinging to obsolete values in the modern world, the Indian bar places itself at a disadvantage when compared with the other professions which make service to society the test of its members' greatness.

Secondly, the organisation of the bar is completely out of date. The profession is organised on the principle that for every lawyer there shall be a long period of waiting to be followed by a burst of prosperity. A stranger to the profession visiting any law court on a normal working day will witness a strange scene. He will observe that the majority of lawyers are sitting idle. They are doing nothing, literally nothing-except indulging in idle gossip of course. This is supposed to be their normal "period of waiting". A profession which is so organised that the majority of its members are condemned to idleness stands self-condemned. *By contrast, a lawyer in the Soviet Union is entrusted with work from the very day when his period of training ends and he is enrolled as a qualified lawyer.* Every member of the Soviet bar is guaranteed a minimum income from the very start. This is so because the entire bar is organised on a co-operative basis so as to make it compulsory for senior members to provide work for the juniors. But in India, thanks to the anarchical organisation of the bar, the Seniors monopolise the work and the juniors are left to pick up such crumbs as may drop from the Seniors' table. From my experience extending over twenty-five years at the bar and nine at the bench, I can say that it is difficult to imagine a more selfish and self-centred class than the "seniors" of the Indian bar. (There are honourable exceptions). Thanks to the present organisation of the bar, the Seniors are safely entrenched in their selfish monopoly of work. Our High Court, I regret to say, by its rules providing for an almost unlimited right to obtain adjournments, is a party to this antisocial monopoly. By contrast, even in England the Senior's right of adjournment on the scale permitted in our High Court is unknown. I respectfully suggest that the profession should be re-organised on a co-operative basis so that the present anti-social monopoly of a few lawyers "at the top" is broken and every member of the bar is guaranteed the right to work with payment. This can be done only if two conditions are fulfilled: first, the principle of compulsory partnerships is introduced, and secondly, the entry into the profession is restricted by the imposition of a very high educational qualification as in England and the U. S. S. R. The practical implementation of these reforms will not be free from difficulties, and we must learn from the example of other countries. I suggest that teams of eminent jurists, lawyers, and judges should visit Britain, the U. S. S. R., and other countries, where the bar has been or is being re-organised, to study the organisation of the bar, with special emphasis on the practical working of the reforms which have been introduced there in recent years.

Legal education

Thirdly, the present standards of legal education are horribly low-in fact, about the lowest of all civilised countries. The result is that our legal profession-jurists, judges, and practising lawyers alike-are intellectually ill-equipped for the responsibilities entrusted to them. The problem of legal education is: how to integrate legal studies and legal training with the study of social sciences.

In the matter of education of judges, ancient India was in advance of us. According to all the Smritis, justice was to be administered by judges who were highly educated not only in law but also politics, economics, and social sciences (dharmashastra kushalairathashastra visharadaih). Our ancient

rulers, unlike our present ones, were conscious that a judge who knows the text of the law but little else will make a poor judge. I regret to say that our government after independence have not realised their responsibilities in the matter of providing education for our judges and lawyers. The sentence from an official communique quoted at serial No. XIV of the head of this Article describing the study of law as unimportant, reveals the contemptuous attitude of our government to legal studies. It was obviously drafted by an ignorant bureaucrat, but it shows to what extent the present rulers have departed from our ancient ideals.

Our government have not yet realised that their neglect of legal education is not only harmful, but violates the policy and spirit of our Constitution. Under the Constitution, the Supreme Court and the High Courts have been invested with vast powers, including the power to invalidate and declare illegal any act of executive or law passed by the legislatures; It is now settled law that there are no limits to the powers of interference conferred on the Supreme Court and the High Courts, except those of a territorial nature. Commenting on the nature of these powers, the Supreme Court has observed: "The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all"-The State of Madras vs. V. G. Row, A. I. R. 1952 S. C. 196 at p. 200.

Now, if the soundness of judicial decisions depend on the social philosophy and the scale of values of the judges their knowledge of the prevailing social conditions, and their sense of responsibility and self-restraint, it is obvious that a government which neglects to provide a high standard of education for the judges and lawyers is guilty of neglecting an important duty impliedly imposed on it by the Constitution itself. In the matter of legal education, judges and lawyers must be bracketed together for, under the Constitution, the bar is the main source of recruitment for the Supreme Court and the High Courts. An ill-educated bar means an ill-educated judiciary.

Recent judicial history proves that the interference of our superior courts has not always been on the side of wisdom. In Golak Nath's case the Supreme Court propounded the astounding doctrine that Parliament has no power to amend Part III of the Constitution because the rights of the individual guaranteed under this Part are meant to be so sacrosanct and eternal. A little knowledge of Indian jurisprudence would have saved the Court from this error, for the concept of a fixed eternal law is foreign to our jurisprudence and to the genius of our civilisation.¹

Our government have not yet realised the importance of the psychological, sociological, and educational atmosphere in which lawyers and judges function, and this is the main reason for the neglect of legal education in this country. This education consists of memorising the civil and criminal codes and a few reported decisions, No attempt is made to provide any sociological and philosophical education which will create in our future judges and lawyers an awareness of the social and economic problems and their own role in solving them.

India is an undeveloped nation which is attempting to bring about in a single generation an economic transformation which took England and other countries several hundred years to achieve. But our progress is slowed down because various conflicting interests are contending for recognition in our political, economic and social schemes at all levels, including our courts of law. Our planners have tried to sort out the scale of preferences in dealing with these contending interest. Have our Courts of Law evolved a method to classify and adjudicate between these interests all of which may rely on the guarantees provided by the Constitution? They will not be able to do so until our system of legal education recognises the need for evolving a philosophy of law-if I may borrow a phrase from the late

¹See the quotations from Parashar and Manu in my article in Volume I.

Roscoe Pound.

The main cause of the comparative weakness of the judicial process in India is lack of theoretical nourishment. The law and judicial process in a mature civilisation lose their vigour if they are deprived of this nourishment. In England and the U.S.A., the judge and the lawyer have received constant inspiration, impetus, and education from the jurisprudence of their civilisation which has been developing for twenty centuries. To quote Keeton, "For over two thousand years, western civilisation has been profoundly influenced in its development by the theory of jurists. Stoic philosophy and concepts of natural law of Greek origin already transformed the content of Roman Law during the Empire. In the first half of the seventeenth century, natural law theories propounded by Grotius, Pufendorf and Bynkershock played a most important part in the foundation of modern international law, whilst the theories of Locke concerning the natural rights of man have been written into the American Constitution, with such emphasis that a century and a half of complex social development has been unable to eradicate them; again, Benthamite Utilitarianism sponsored a process of legislative reform in England which even today is not complete, whilst the efforts of two of Bentham's disciples, Brougham and Denman, placed the English Law of evidence upon a sounder basis than before. At a still more recent date the sociological theories of Duguit in France, and of Dean Pound in the United States, can be plainly traced in the trends of legal development of those countries; as for Hogel, . . . his influence upon German political life in the nineteenth and twentieth centuries has been deep and continuing. The influence of the jurist can indeed be profound, and for that reason his responsibility is great. He plays his part, and it is an important part, in shaping ideas of right and justice, which are ultimately built into the fabric of existing law by the legislature and the judges. Often, indeed, the judge or the legislator is not conscious of the source of the ideas to which he seeks to give practical expression. They are, as it were, 'in the air', part of the common legal and social tradition of a particular age, but those ideas have been derived in many cases from the teaching of outstanding legal thinkers, who have sought to sum up the main currents of contemporary legal thought in general principles. That is the extent of his function, and beyond that point, it remains for the judge to transmute the ideas of the jurist into terms of applied law". (*Elements of Jurisprudence by Keeton*).

This brings me to the question which has been agitating my mind for several years in the past. Where do the Indian judges and lawyers draw their inspiration from? Not from the jurisprudence of their own civilisation. They are taught something of Roman Law and theories of Western jurists but very very little about the development of law and jurisprudence in India. I have come to the conclusion that the foundation of legal studies in India must be the study of Indian jurisprudence.

The reform of the legal profession will not be an easy job. A lawyer has two functions. First, he has to earn his living; secondly, he has to promote the social interests. The two duties may conflict. As regards the earning of his living, he has something to sell; his intellectual and professional skill. He is "hired". This means that the lawyers are divided into economic strata. According to the nature and quality of what they sell-the corporation lawyer, the rich man's lawyer, the dacoit's lawyer, the poor man's lawyer and so on. The poor man's lawyer with a modest income has a different outlook than a corporation lawyer, who is the legal director of rich companies and who earns several lakhs of rupees a year. In view of the existence of these economic strata in the legal profession the problem of creating a common tradition and outlook for the whole bar is a real one. For example, will the Indian bar have the courage to expose the financial malpractices of some of the big corporations ?

It is not possible for me to discuss in detail the proposals which have been advanced from time to time for the reform of the legal profession and the system of legal education in India. But one reform is overdue-namely, the creation of a Ministry of Justice which shall be in charge of all matters relating to the Supreme Court and the High Courts and also the system of legal education. At present these matters are dealt with by the Ministry of Home Affairs. It is amazing that our government should not have removed this anachronism dating from the days of British imperialism. Today India is the only civilised country in the world which has no Ministry of Justice and whose Superior Judiciary is under the control of a Ministry, which has neither the time nor the inclination to devote itself exclusively to the problems concerning the judiciary and the bar. I think the legal profession should press for the creation of a Ministry of Justice.

After this reform has been achieved, it will be for the new Ministry to devote its attention and energies to the solution of urgent problems which can no longer be ignored or neglected, without danger to the future of democracy itself.