

The Indian Judicial System A Historical Survey

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Part A: Judicial System in Ancient India

India has the oldest judiciary in the world. No other judicial system has a more ancient or exalted pedigree.

But before describing the judicial system of ancient India I must utter a warning. The reader must reject the colossal misrepresentation of Indian Jurisprudence and the legal system of ancient India by certain British writers. I shall give a few specimens. Henry Mayne described the legal system of ancient India "as an apparatus of cruel absurdities". An Anglo-Indian jurist made the following remark about what he called "the oriental habits of life" of the Indians before the British turned up in India: "It (British rule in India) is a record of experiments made by foreign rulers to govern alien races in a strange land, to adapt European institutions to Oriental habits of life, and to make definite laws supreme amongst peoples who had always associated government with arbitrary and uncontrolled authority."¹ (italicized by me). Alan Gledhill, a retired member of the Indian Civil Service, wrote that when the British seized power in India, "there was a dearth of legal principles."²

These statements are untrue. It is not for me to guess why they were made. They may be due to sheer ignorance, or imperialist self-interest, or contempt for Indian culture and civilization which was a part of the imperialist outlook which dominated British Jurists, historians, and thinkers in the heyday of imperialism. But the effect of this misrepresentation, which has few parallels in history, was to create a false picture of the Indian judicial system both in India and outside.

We must go to the original texts to get a true and correct picture of the legal system of ancient India. The reader will discover from them that Indian jurisprudence was founded on the rule of law; that the King himself was subject to the law; that arbitrary power was unknown to Indian political theory and jurisprudence and the king's right to govern was subject to the fulfillment of duties the breach of which resulted in forfeiture of kingship; that the judges were independent and subject only to the law; that ancient India had the highest standard of any nation of antiquity as regards the ability, learning, integrity, impartiality, and independence of the judiciary, and these standards have not been surpassed till today; that the Indian judiciary consisted of a hierarchy of judges with the Court of the Chief Justice (Praadvivaka) at the top, each higher Court being invested with the power to review the decision of the Courts below; that disputes were decided essentially in accordance with the same principles of natural justice which govern the judicial process in the modern State today: that the rules of procedure and evidence were similar to those followed today; that supernatural modes of proof like the ordeal were discouraged; that in criminal trials the accused could not be punished unless his guilt was proved according to law; that in civil cases the trial consisted of four stages like any modern trial – plaint, reply, hearing and decree; that such doctrines as *res judicata* (*prang nyaya*) were familiar to Indian jurisprudence; that all trials, civil or criminal, were heard by a bench of several judges and rarely by a judge sitting singly; that the decrees of all courts except the King were subject to appeal or review according to fixed principles; that the fundamental duty of the Court was to do justice "without favour or fear".

Rule of law in Ancient India

Was there a rule of law in ancient India? Let the texts speak for themselves.

In the Mahabharata, it was laid down "A King who after having sworn that he shall protect his subjects fails to protect them should be executed like a mad dog."³

"The people should execute a king who does not protect them, but deprives them of their property and assets and who takes no advice or guidance from any one. Such a king is not a king but misfortune."⁴

These provisions indicate that sovereignty was based on an implied social compact and if the King violated the traditional pact, he forfeited his kingship. Coming to the historical times of Mauryan Empire, Kautilya describes the duties of a king in the Arth-shastra thus: "In the happiness of his subjects lies the King's happiness; in their welfare his welfare; whatever pleases him he shall not consider as good, but whether pleases his people he shall consider to good."⁵

The Principle enunciated by Kautilya was based on a very ancient tradition which was already established in the age of the Ramayana. Rama, the King of Ayodhya, was compelled to banish his queen, whom he loved and in whose chastity he had complete faith, simply because his subjects disapproved of his having taken back a wife who had spent a year in the house of her abductor. The king submitted to the will of the people though it broke his heart.

In the Mahabharata it is related that a common fisherman refused to give his daughter in marriage to the

1 History of the Constitution of the Courts and Legislative Authorities in India, by Cowell (1872), p.3.

2 Alan Gledhill: The Republic of India, p.147.

In fairness I must state that several British Indologists of eminence like E.B. Havell, A.L. Basham, Spellman, and others, do not share the prejudices of their imperialist predecessors though their approach may be different from ours. The reader is advised to study The History of Aryans Rule in India by E.B. Havell; The Wonder that was India by A.L. Basham, and Political Theory of Ancient India by John W. Spellman.

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King of Hastinapur unless he accepted the condition that his daughter's sons and not the heir apparent from a former queen would succeed to the throne. The renunciation of the throne and the vow of life-long celibacy (Bhishma Pratgyan) by Prince Deva Vrata is one of the most moving episodes in the Mahabharata.⁶ But its significance for jurists is that even the sovereign was not above the law. The great King of Hastinapur could not compel the humblest of his subjects to give his daughter in marriage to him without accepting his terms. It refutes the view that the kings in ancient India were "Oriental despots" who could do what they liked regardless of the law or the rights of their subjects.

Judiciary in Ancient India

With this introductory warning, I shall endeavour to describe the judicial system of ancient India. According to the Artha-shastra of Kautilya, who is generally recognised as the Prime Minister of the first Maurya Emperor (322-298 B.C.), the realm was divided into administrative units called Sthaneya, Dronamukha, Kharvatika and Sangrahana (the ancient equivalents of the modern districts, tehsils and Parganas). Sthaneya was a fortress established in the center of eight hundred villages, a dronamukha in the midst of 400 villages, a kharvatika in the midst of 200 villages and a sangrahana in the center of ten villages. Law courts were established in each sangrahana, and also at the meeting places of districts (Janapadasandhishu). The Court consisted of three jurists (dramastha) and three ministers (amatya).⁷

This suggests the existence of circuit courts, for it is hardly likely that three ministers were permanently posted in each district of the realm.

The great jurists, Manu, Yajñ-Valkyā, Katyāyana, Brihaspati and others, and in later times commentators like Vachaspati Misra and others, described in detail the judicial system and legal procedure which prevailed in India from ancient times till the close of the Middle Ages.

Hierarchy of courts in Ancient India

According to Brihaspati Smiriti, there was a hierarchy of courts in Ancient India beginning with the family Courts and ending with the King. The lowest was the family arbitrator. The next higher court was that of the judge; the next of the Chief Justice who was called Praadivivaka, or adhyaksha; and at the top was the King's court.⁸

The jurisdiction of each was determined by the importance of the dispute, the minor disputes being decided by the lowest court and the most important by the king. The decision of each higher Court superseded that of the court below.⁹

According to Vachaspati Misra, "The binding effect of the decisions of these tribunals, ending with that of the king, is in the ascending order, and each following decision shall prevail against the preceding one because of the higher degree of learning and knowledge".¹⁰

It is noteworthy that the Indian judiciary today also consists of a hierarchy of courts organized on a similar principle—the village courts, the Munsif, the Civil Judge, the District Judge, the High Court, and finally the Supreme Court which takes the place of the King's Court. We are following an ancient tradition without being conscious of it.

The institution of family judges is noteworthy. The unit of society was the joint family which might consist of four generations. Consequently, the number of the member of a joint family at any given time could be very large and it was necessary to settle their disputes with firmness combined with sympathy and tact. It was also desirable that disputes should be decided in the first instance by an arbitrator within the family. Modern Japan has a somewhat similar system of family Courts. The significance of the family courts is that the judicial system had its roots in the social system which explains its success.

The fountain source of justice was the sovereign. In Indian jurisprudence dispensing justice and awarding punishment was one of the primary attributes of sovereignty.¹¹

Being the fountain source of justice, in the beginning the king was expected to administer justice in person, but strictly according to law, and under the guidance of judges learned in law.¹²

A very strict code of judicial conduct was prescribed for the king. He was required to decide cases in open trial and in the court-room, and his dress and demeanour were to be such as not to overawe the litigants. He was required to take the oath of impartiality, and decide cases without bias or attachment. Says Katyāyana: "The king should enter the court-room modestly dressed, take his seat facing east, and with an attentive mind hear the suits of his litigants."¹³ He should act under the guidance of his Chief Justice (Praadivivaka), judges, ministers and the Brahmana members of his council. A king who dispenses justice in this manner and according to law resides in heaven".¹⁴

These provisions are significant. The king was required to be modestly dressed (vineeta-vesha) so that the litigants were not intimidated. The code of conduct prescribed for the king when acting as a judge was very strict and he was required to be free from all "attachment or prejudice"¹⁵ Says Narada: "If a king disposes of law suits (vyavaharan) in accordance with law and is self-restrained (in court), in him the

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seven virtues meet like seven flames in the fire"¹⁶ Narada enjoins that when the king occupies the judgment seat (dharmasanam), he must be impartial to all beings, having taken the oath of the son of Vivasvan. (The oath of Vivasvan is the oath of impartiality: the son of Vivasvan is Yama, the god of death, who is impartial to all living beings).¹⁷

The King's Judges

The judges and counselors guiding the king during the trial of a case were required to be independent and fearless and prevent him from committing any error or injustice. Says Katyayana: "If the king wants to inflict upon the litigants (vivadinam) an illegal or unrighteous decision, it is the duty of the judge (samya) to warn the king and prevent him."¹⁸

"The judge guiding the king must give his opinion which he considers to be according to law, if the king does not listen, the judge at least has done his duty.¹⁹ When the judge realizes that the king has deviated from equity and justice, his duty is not to please the king for this is no occasion for soft speech (vaktavyam tat priyam natra); if the judge fails in his duty, he is guilty."²⁰

Delegation of Judicial power by the King

As civilization advanced, the king's functions became more numerous and he had less and less time to hear suits in person, and was compelled to delegate more and more of his judicial function to professional judges. Katyayana says: "If due to pressure of work, the king cannot hear suits in person he should appoint as a judge a Brahmin learned in the Vedas."²¹

The qualifications prescribed for a judge were very high. According to Katyayana; "A judge should be austere and restrained, impartial in temperament, steadfast, God-fearing, assiduous in his duties, free from anger, leading a righteous life, and of good family."²²

In course of time, a judicial hierarchy was created which relieved the king of much of the judicial work, but leaving untouched his powers as the highest court of appeal. Under the Maurya Empire a regular judicial service existed as described above.

Quality of the Judiciary: Integrity

I shall now say a few words about the quality of the Judiciary and the code of conduct prescribed for judges. The foremost duty of a judge was integrity which included impartiality and a total absence of bias or attachment. The concept of integrity was given a very wide meaning and the judicial code of integrity was very strict. Says Brihaspati: "A judge should decide cases without any consideration of personal gain or any kind of personal bias; and his decision should be in accordance with the procedure prescribed by the texts. A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna."²³

The strictest precautions were taken to ensure the impartiality of judges. A trial had to be in open court and judges were forbidden to talk to the parties privately while the suit was pending because it was recognised that a private hearing may lead to partiality (pakshapat). Shukra-nitisara says: "Five causes destroy impartiality and lead to judges taking sides in disputes. There are attachment, greed, fear, enmity, and hearing a party in private."²⁴

Another safeguard of judicial integrity was that suits could not be heard by a single judge, even if he was the king. Our ancients realized that when two minds confer, there is less chance of corruption or error, and they provided that the King must sit with his counselors when deciding cases, and judges must sit in benches of uneven numbers. Shukra-nitisara enjoined that "Persons entrusted with judicial duties should be learned in the Vedas, wise in worldly experience and should function in groups of three, five, or seven."²⁵ Kautilya also enjoined that suits should be heard by three judges (dharmasthstrayah). Our present judicial system, created by the British, does not follow this excellent safeguard. Today every suit is heard by a single Munsif or civil Judge or District Judge for reasons of economy. But the state in ancient India was more interested in the quality of justice than economy.

Integrity

Every Smriti emphasizes the supreme importance of judicial integrity. Shukra-nitisara says: "The judges appointed by the king should be well versed in procedure, wise, of good character and temperament, soft in speech, impartial to friend or foe, truthful, learned in law, active (not lazy), free from anger, greed, or desire (for personal gain), and truthful."²⁶

Punishment for corruption

Corruption was regarded as a heinous offence and all the authorities are unanimous in prescribing the severest punishment on a dishonest judge. Brihaspati says: "A judge should be banished from the realm if he takes bribes and thereby perpetrates injustice and betrays the confidence reposed in him by a trusting public."²⁷ A corrupt judge, a false witness, and the murderer of a Brahmin are in the same class

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of criminals.²⁸ Vishnu says: "The state should confiscate the entire property of a judge who is corrupt."²⁹ Judicial misconduct included conversing with litigants in private during the pendency of a trial. Brihaspati says: "A judge or chief justice (Praadvivaka) who privately converses with a party before the case has been decided (anirnite), is to be punished like a corrupt judge."³⁰

Jurors

The most noteworthy feature of the judicial system was the institution of sabhasada or councilors who acted as assessors or adviser of the King. They were the equivalent of the modern jury, with one important difference. The jury of today consists of laymen- "twelve shopkeepers"-whereas the councilors who sat with the Sovereign were to be learned in law. Yajanvalkya enjoins: "The Sovereign should appoint as assessors of his court persons who are well versed in the literature of the law, truthful, and by temperament capable of complete impartiality between friend and foe."³¹

These assessors or jurors were required to express their opinion without fear, even to the point of disagreeing with the Sovereign and warning him that his own opinion was contrary to law and equity. Katyayana says: 'The assessors should not look on when they perceive the Sovereign inclined to decide a dispute in violation of the law; if they keep silent they will go to hell accompanied by the King.'³² The same injunction is repeated in an identical verse in Shukr-nitisara.³³ The Sovereign-or the presiding judge in his absence-was not expected to overrule the verdict of the jurors; on the contrary he was to pass a decree (Jaya-patra) in accordance with their advice. Shukr-nitisara says: " The King after observing that the assessors have given their verdict should award the successful party a decree (Jaya-patra)."³⁴ Their status may be compared to the Judicial Committee of the Privy Council which "humbly advise" their Sovereign, but their advice is binding. It may also be compared to the peoples' assessors under the Soviet judicial system who sit with the professional judge in the Peoples' Court but are equal in status to him and can overrule him.

But there was one exception. If in a difficult case the jurors were unable to come to a conclusion, the Sovereign could decide the matter himself. Shukra-nitisara says, "If they (the assessors) are unable to decide a dispute because it raises difficult or doubtful issues (sandigdha-roopinah), in such a case the Sovereign may decide in the exercise of his Sovereign privilege."³⁵

Criminal Trials

In criminal trials it appears that the question of innocence or guilt of the accuse was decided by the judge or the jurors, but the quantum of punishment was left to the King.³⁶ In the trial scene in Mrichhakatika, The Little Clay Court, the judge after pronouncing Charudatta guilty of the murder of Vasantasena, referred the question of punishment to the King with the remark, "The decision with regard to Charudatta's guilt or innocence lies with us and our decision is binding (Pramanam), but the rest lies with the King."³⁷

Interpretation of the Text of the law

Principles of interpretation were developed to high degree of perfection. Judges were required to decide cases, criminal and civil, according to law (samyak, yath-shastram, shastro ditena vidhina). This involved interpretation of the written text of the law-a task which created many problems such as the elucidation of obscure words and phrases in the text, reconciliation of conflicting provisions in the same law, solution of conflict between the letter of the law and principles of equity, justice and good conscience, adjustment of custom and smritis, and so on. This branch of law was highly developed and a number of principles were enunciated for the guidance of the courts. The most important of them related to the conflict between the dharm-shastra and the artha-shastra.

Three systems of substantive law were recognized by the court, the dharm-shastra, the arth-shastra, and custom which was called sadachara or charitra. The first consisted of laws which derived their ultimate sanction from the smritis and the second of principles of government. The border line between the two often overlapped. But the real distinction between the smritis and arth-shastra is uniformly secular, but that of the dharm-shastra not always so. IN fact so remarkably secular is the arth-shastra in its approach to the problems of government that this has induced some writers to advance the theory that the artha-shastra (literal meaning: the science of 'artha' or pursuit of material welfare), did not evolve from the dharm-shastra but had an independent origin and developed parallel to it.

Whatever their respective origins, in several matters the arthashastra and the dharm-shastra are in conflict. How did the law courts resolve this conflict when it arose in particular suits? The first principle was that of avirodha: the court must try to resolve any apparent conflict between the two.³⁸ (This is called the principle of harmonious construction today. But if the conflict could not be resolved, the authority of the dharm-shastra was to be preferred. Bhavishya purana provides : "whens mriti and artha-shastra are inconsistent, the provision in the artha-shastra is superseded (by smriti); but if two smritis, or two provision in the same smriti are in conflict, whichever is in accordance with equity is to be preferred."³⁹ Narada smriti lays down a similar rule of interpretation according to reason in case of conflict between two

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33 Shukra, IV, 5,275

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36 The State and Government in Ancient India, by A.S. Alkhar, p.249. I am indebted to this work for several valuable ideas.

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texts of the smritis.⁴⁰ But while interpreting the written text of the law, the court was to bear in mind that its fundamental duty was to do justice and not to follow the letter of the law. Brihaspati enjoined: " The court should not give its decision by merely following the letter of the shastra for if the decision is completely devoid of reasoning, the result is injustice (dharma-hani)."⁴¹ Brihaspati further says that the court should decide according to the customs and usages of the country even if they are in conflict with the letter of the law,⁴² and he gives several remarkable illustrations which incidentally throw a flood of light on contemporary social conditions.

He points out that the maternal uncle's daughter is accepted in marriage by brahmanas of the south; in Madhya desha (Central India), brahmanas become hired labourers and craftsmen and eat cow's flesh; eastern brahmanas eat fish and their women are addicted to drinking and can be touched by men even when in their monthly courses. On account of the acts specified these communities, in their respective countries, should not be liable to undergo penance or incur judicial punishment.⁴³

Changing customs: Changing laws

In view of the vital part played by custom (achara, sadachara, charitra) in society, the State was required to maintain an authenticated record of the customs observed in the various parts of the country. Katyayana enjoins: "Whatever custom is proved to be followed in any particular region, it should be duly recorded as established (dharya) in a record stamped with the seal of the Sovereign."⁴⁴ But even an established custom could be formally "disestablished" if in course of time it became inequitable. In fact, it was the duty of the Sovereign to remove from time to time the dead or rotten branches of custom. Katyayana enjoined: "When the Sovereign is satisfied that a particular custom is contrary to equity (nyayatah) in the same way-that is in the way it was established- it should be annulled by a formal decision of the Sovereign."⁴⁵ This remarkable provision indicates how highly developed was the judicial and legal system of ancient India. The state was required to keep an authenticated record of all valid customs prevailing in the different regions of the realm.

Very often the decision in a suit depended on proof of the existence of a custom. Narada says, "The basis of a judicial decision (vyavahara) may be: (i) Dharma-shastra, (ii) (previous) judicial decisions (vyavahara) or custom (charitra) or the decrees of the Sovereign. The authority of these four is in the reverse order, each preceding one being superseded by the one following it."⁴⁶ The artha-shastra contains an identical provision.

Evolutionary concept of law

The significance of these provisions can not be overemphasized. By gearing law to changing customs Indian jurisprudence gave the concept of law a secular content. Moreover, it developed the evolutionary concept of law and rejected the concept of an absolute, eternal, never-changing law. Both Manu and Parashara say: "The laws of kritayuga are different from those of treat and dwapara, and the laws of kali yuga are different from those of all the previous; ages- the laws of each age being according to the distinctive character of each age (yuga roopanusaratah)."⁴⁷

Mode of Proof (Law of Evidence)

The law of evidence (the mode of proof) is an index of the quality of a judicial system. In this respect, the Indian judicial system was in advance of any other system of antiquity.

In ancient societies proof by supernatural devices, such as trial by ordeal, was quite common. In England it prevailed till the very close of the middle ages. But our judicial system prohibited resort to supernatural devices, if oral or documentary evidence was available.⁴⁸

Discovery of truth is real test

The real test of any judicial system is that it should enable the law courts to discover the truth, and that of ancient India stands high under this test. "In disputes the Court has to ascertain what is true and what is false from the witnesses," enjoins Gautam.⁴⁹ All available evidence indicates that in ancient India bearing false witness was viewed with great abhorrence.⁵⁰ All the foreign travelers from Megasthenes in the 3rd century B. C. to Huan Tsiang in the 7th century A. D. Testified that truthfulness was practiced by Indians in their worldly relations. "Truth they hold in high esteem", wrote Megasthenes.⁵¹ Fa Hien and Huan Tsiang (who visited India during the reign of Harsha) recorded similar observations. A virtue practiced for a thousand year became a tradition.

The procedure and atmosphere of the Courts discouraged falsehood. The oath was administered by the judge himself, and not by a peon as today. While giving the oath the judges were required to address the witness extolling truthfulness as a virtue and condemning perjury as a horrible sin. Brihaspati says, "Judges who are well-versed in the dharmashastra should address the witness in words praising truth and driving away falsehood (from his mind)".⁵² The judges' address to the witness did not consist of set words

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50 A.L. Basham: The Wonder that was India, p.116.

51 Ancient India as described by Megasthenes and Arian, by Mc. Rindle, p.6.

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but a moral exhortation intended to put the fear of God in him. All the texts are unanimous on this point.⁵³ According to Narada, "The judges should inspire awe in the witness by citing moral precepts which should uphold the majesty of truth and condemn falsehood".⁵⁴ All the smirtis were unanimous in holding that perjury before a law court was a heinous sin as well as a serious crime.⁵⁵ There were other provisions, calculated to reduce the changes of false evidence being given. Katyayana enjoined, with much common sense that there should be no delay in examining witnesses- obviously because delay dims the memory and stimulates imagination. "The Sovereign should not grant any delay in the deposition of witnesses; for delay leads to great evil and results in witnesses turning away from the law."⁵⁶

Administrative Courts

An important feature of the judicial system of ancient India were the Special Courts of criminal jurisdiction called the Kantakasodhana Courts. The artha-shastra says, "Three commissioners (pradeshtarah) or three ministers shall deal with measures to suppress disturbance to peace (kantakasodhanam kuryuh).⁵⁷ According to the artha-shastra these courts took cognizance not only of offences against the States but also violations of the law by officials in the discharge of their official duties. Thus if traders used false weights or sold adulterated good, or charged excessive prices, if the labourer in the factory was given less than a fair wage or did not do its work properly, the Kantakasodhana courts intervened to punish the culprits. Officers charged with misconduct, persons accused of theft, dacoity and sex offences had to appear before the same court. These Courts had all the characteristics of administrative courts. The existence of an Administrative Code is indicated in the Fourth part of the Artha-shastra.

Administrative Code

The State in ancient India had a public sector of huge dimensions engaged in commerce and industry. The modern capitalist notion that there should be no industries run by the State would have appeared idiotic to our ancients. Under the Mauryan Empire there was a State mercantile marine, a state textile industry, a state mining industry, and a state trading department in charge respectively of a Superintendent-General of Shipping (navadhyaksha). Textiles (Sootradhyaksha), mining (akaradhyaksha), and commerce. The regulation of each state industry was under its own rules and all the rules were compiled and classified in the artha-shastra and may be regarded as an Administrative Code. I shall give a few illustrations.

The artha-shastra provides a complete Administrative Code prescribing rules of maritime and riparian navigation. It enjoined that the State should have a Superintendent-General of Navigation whose duties are defined thus: "The Superintendent of ships shall examine the accounts relating to navigation not only on the oceans and mouths of the rivers, but also on lakes, natural or artificial, and in the vicinity of Sthaniya and other fortified cities."⁵⁸ The chapter contains a provision for the ships to have adequate few for ships. There were strict regulations to ensure the safety of vessels: "For navigation on large rivers which cannot be forded (atarya) even during winter and summer season, there shall be a service of large boats (mahanavo), with a captain (shasaka), pilot (niyamaka), a crew to hold the sickle and the ropes, and to clear the boat of water."⁵⁹

The artha-shastra also contains regulations indicating that the state mercantile marine operated on the high seas and it provided that "passengers arriving in port on the royal ships shall pay their passage money (yatra-vetanam)."⁶⁰ The rates were to be fixed by the Superintendent-General. Incidentally, the existence of this code proves beyond doubt that the people of India were a sea-faring people with extensive trade relations with foreign countries.

Similarly, the manufacture of textiles and cotton yarn, which was a huge industry exporting textiles to foreign countries had a public as well as a private sector. The public sector was under a Superintendent-General of Textiles (Sootradhyaksha). He had a large organization under him. The artha-shastra prescribed the duties of the Sootradhyaksha and the other officials working under him. It enjoins: "The Superintendent-General of Weaving shall employ qualified persons to manufacture treads (sutra), coats (varma), clothes (vastra), and ropes."⁶¹ One of his duties was to give employment to women in their own homes. Cotton was distributed among them and spun into tread and either collected by the department or delivered by the women themselves. But the artha-shastra contains strict regulation against the taking of liberties with such women or withholding their wages. It prescribed: "If the official of the Superintendent stares at the face of such woman or tries to engage her in conversation about matters other than her work (in other words, makes what an American would call a pass at her) he will be punished as if he is guilty of a first assault."⁶² "Delay in payment of wages shall be likewise punishable."⁶³ Another regulation made it a punishable offence to show any undue favour to a women worker. It provided; "If an official pays wages to a woman for no work done, he will be punished."⁶⁴

Collection of taxes and import duties

There was a code prescribing rules governing the collection of taxes and import duties. This development was in charge of the Superintendent General of taxes (Shulkadhyaksh). The merchants at the customs

53 Manu, VIII, 79-87; Narada I, 200-228, Katyayana, 388-390; Yajnaa-II, 273-74.

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55 Brihaspati V, 34; Manu VIII, 80-87; Yajna II, 73-74; Narada I, 220-228; Baudh I, 13,14,19.

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were liable to declare their merchandise which had to bear a seal when imported. Penalties were prescribed for making a false declaration. One rule enjoined: "If the merchandise bears no seal, their duty shall be doubled".⁶⁵ But in case of counterfeit seal, the merchant was liable to pay a penalty amounting to eight times the normal duty.⁶⁶ If the seal was torn, the merchant was liable to be detained in a lock-up reserved loiterers.⁶⁷

The Administrative Code in the 4th Section of the artha-shastra contains detailed regulations for the control of the other departments of the state. These regulations were not enforced by the ordinary courts but by Commissioners (Pradeshtarah) who functioned as Kantak Shodhana courts.

I shall sum up the fundamental principles on which the judicial process in ancient India was founded: The trial was always in public⁶⁸ and always by several judges collectively. Cases were heard in their serial order except in case of urgency.⁶⁹ Delay in the disposal of cases was condemned by all authorities and judges who were guilty of such delay were liable to be punished.⁷⁰ The Sovereign was not to interfere with the judiciary but on the contrary the latter was under a duty to interfere in case of a wrong (judicial) decision by the king.⁷¹ The Judges were to be impartial ; during the pendency of the suit they were forbidden to have any private talks or relations with the parties. If a judge was guilty of partiality, or harassment, or deliberately violated the prescribed procedure, he was liable to be punished. Corruption was the most heinous offence in a judge and a corrupt judge was banished from the realm and forfeited all his property. The procedure for suits was prescribed by law, and every suit was initiated by a complaint or plaint filed by the aggrieved party who prayed for the redress of a legal wrong.⁷² Citizens were strictly forbidden to instigate or finance or file complaints in which they were not interested, and champerty was a punishable offence. I cannot do better than quote the verdict of a very recent English writer: "In some respects the judicial system of ancient India was theoretically in advance of our own today."⁷³

Part B: Judicial System in Medieval India

After the disintegration of the Harsha empire a veil of obscurity descends on the history of India which does not lift till the Muslim invasion. The country was divided once more into small kingdoms. But this did not result in any great change in the judicial system which had taken roots during the preceding thousands of years. The standards and ideals of justice were maintained in each kingdom, in spite of political divisions, the unity of civilization was preserved, and the fundamental principles of law and procedure were applied throughout the country. This is indicated by the fact that the great commentaries on law like Mitakshara and Shukarneeti Sar were written during this period and enjoyed an all-India authority. But the establishment of the Muslim rule in India opened a new chapter in our judicial history. The Muslim conquerors brought with them a new religion, a new civilization, and a new social system. This could not but have a profound effect on the judicial system.

The ideal of justice under Islam was one of the highest in the Middle ages. The Prophet himself set the standards. He said in the quran, "Justice is the balance of God upon earth in which things when weighed are not by a particle less or more. And He appointed the balance that he should not transgress in respect to the balance; wherefore observe a just weight and diminish not the balance". He is further reported to have said that to God a moment spent in the dispensation of justice is better than the devotion of the man who keeps fast every day and says prayer every night for 60 years.⁷⁴ Thus the administration of justice was regarded by the Muslim kings as a religious duty.

This high tradition reached its zenith under the first four Caliphs. The first Qadi was appointed by the Caliph Umar who enunciated the principle that the law was supreme and that the judge must never be subservient to the ruler. It is reported of him that he had once a personal law suit against a Jewish subject, and both of them appeared before the Qadi who, on seeing the Caliph, rose in his seat out of deference. "Umar considered this to be such an unpardonable weakness on his part that he dismissed him from office."⁷⁵ The Muslim kings in India brought with them these high ideals. It is reported by Badaoni that during the reign of Sultan Muhammad Tughlaq the Qadi dismissed a libel suit filed by the King himself against Shaikhzada Jami, but no harm was done to him. (This however did not prevent the Sultan from executing the defendant without a trial).⁷⁶ Individual Sultans had very high ideals of justice. According to Barani, Balban regarded justice as the keystone of sovereignty "wherein lay the strength of the sovereign to wipe out the oppression".⁷⁷ But unfortunately the administration of justice under the Sultans worked fitfully. The reason was that the outstanding feature of the entire Sultanate period was confusion and chaos. No Sultan felt secure for a long time. One dynasty was replaced by another within a comparatively short period, and the manner of replacement was violent. Consequently the quality of justice depended very much on the personality of the sovereign.

As a modern writer says, "The medieval State in India as elsewhere throughout its existence had all the disadvantages of an autocracy-everything was temporary, personal, and had no basic strength. The personal factor in the administration had become so pronounced that a slight deviation of the head from

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" When a person who is the victim of a wrong in violation of the Smritis and the custom of the realm files a plaint (or complaint) before the sovereign, this is the commencement of a law suit (Vyavahara)".

73 Political Theory of Ancient India: John W. Spellman, Clarendon Press, Oxford, p.128.

74 Fakhr-ud-din Mubarak Shah, Edited by D.Ross, p.12.

75 Abdul Rahim : The Principles of the Muhammedan Jurisprudence, page 21.

76 Badaoni : Muntakhab-ut-Tawarikh, quoted by M.B.Ahmad in the administration of Justice in the Medieval India, p. 278.

77 Brani : Tarikh Firuz Shahi, p. 77.

the path of duty, produced concomitant variations in the whole 'trunk'. If the King was drunk 'his Magistrates were seen drunk in public'.⁷⁸ Justice is not possible without security, and the Sultans of India never felt secure. Consequently, the democratic ideal of government preached by Islam was obscure in India.⁷⁹ During the Sultanate, Islamic standards of Justice did not take root in India as an established tradition, unlike the judicial traditions of ancient India which had struck deep roots in the course of several thousand years and could not be uprooted by political divisions.

Under the Moghal Empire the country had an efficient system of government with the result that the system of justice took shape. The unit of judicial administration was Qazi-an office which was borrowed from the Caliphate. Every provincial capital had its Qazi and at the head of the judicial administration was the Supreme Qazi of the empire (Qazi-ul-quzat). Moreover, every town and every village large enough to be classed as a Qasba had its own Qazi. In theory, a Qazi had to be "a Muslim scholar of blameless life, thoroughly conversant with the prescriptions of the sacred law."⁸⁰

According to the greatest historian of the Mughal Empire, "the main defect of the Department of Law and Justice was that there was no system, no organization of the law courts in a regular gradation from the highest to the lowest, nor any proper distribution of courts in proportion to the area to be served by them. The bulk of the litigation in the country (excluding those decided by caste, elders or village Panchayats mostly for the Hindus) naturally came up before the courts of Qazis or Sadars."⁸¹ This view is not accepted by other writers.⁸²

On the appointment of a Qazi, he was charged by the Imperial Diwan in the following words:

"Be Just, be honest, be impartial. Hold trials in the presence of the parties and at the court-house and the seat of Government (muhakuma). Do not accept presents from the people of the place where you serve, nor attend entertainments given by anybody and everybody. Write your decrees, sale-deeds, mortgage bonds and other legal documents very carefully, so that learned men may not pick holes in them and bring you to shame. Know poverty (faqr) to be your glory (fakhr)."⁸³ But due to lack of supervision and absence of good tradition, these noble ideals were not observed. According to Sircar, "all the Qazis of the Mughal period, with a few honourable exceptions, were notorious for taking bribes."⁸⁴ The Emperor was the fountain source of justice. He held his court of justice every Wednesday and decided a few cases selected personally by him but he functioned not as an original court but as the court of highest appeal. There is overwhelming evidence that all the Emperors from Akbar to Aurangzeb took their judicial function seriously and discharged their duties. Jahangir made a great show of it and his Golden Chain has become famous in history. The weakness of Indo-Mohammedan Law, according to Jadunath Sircar, was that all its three sources were outside India.

"No Indian Emperor's or Qazi's decisions were ever considered authoritative enough to lay down a legal principle to elucidate any obscurity in the Quran, or supplement the Quranic law by following the line of its obvious intention in respect of cases not explicitly provided for by it. Hence, it became necessary for Indian Qazis to have at their elbow a digest of Islamic law and precedent compiled from the accepted Arabic writer. . . . Muslim law in India was, therefore, incapable of growth and change, except so far as it reflected changes of juristic thought in Arabia or Egypt."⁸⁵ After the death of Aurangzeb, the Mughal Empire collapsed within two generations. The provincial Governors and Faujdars arrogated to themselves the status of sovereigns and awarded punishment for criminal offences in their own names. A relic of this usurpation of the Emperors' power is the name Faujdari given to criminal trials even today.

After the conquest of Bengal by the British the process of replacement of the Mughal system of justice by the British began. But it took a long time. In fact, The Sadre Diwani Adalat continued to function till it was replaced by the High Courts.

The Mughal judicial system has left its imprint on the present system, and a good part of our legal terminology is borrowed from it. Our civil courts of first instance are called Munsifs, the plaintiff and the defendant are termed Muddai and Muddaliya and scores of other legal terms remind us of the great days of the Mughal Empire.

Part C: The Judicial System Today

I shall now give a very brief description of our judicial system today. Barring the Supreme Court, India has no federal judiciary like the United States. Each State has its own judiciary, which administers both Union and State laws. As during the Maurya Empire, each district in the State has its hierarchy of judicial officers- Munsif, Civil Judge, Civil and Sessions Judge- with the District Judge as its head. I shall not give a detailed description of the organization of our state judiciary, as it is the subject-matter of another article in this volume.

High Courts

At the apex of the State Judiciary is the High Court. It is a court of record and not subject to the superintendence of any court or authority, though appeals from its decision may lie to the Supreme Court. It consists of a Chief Justice and as many judges as the President of India may sanction. The number varies from 36 for the Allahabad High Court to 3 for Assam. The Chief Justice is in charge of the

78 The administration of Justice in Medieval India, by M.B. Amhad, p. 272, quoting Briggs, Rise of the Muhammadan Power in India, Volume I, p.272.

79 Ibid., p.273.

80 Encyclopaedia of Islam, Vol. II, page 606

81 Mughal Administration, by Sir Jadunath Sarkar, page 108.

82 Administration of Justice in Medieval India : M.B.Ahmad.

83 Manual of Officers Duties, a Persian Mss. Quoted by Sir Jadunath Sircar, p. 27.

84 Ibid., p. 27.

85 Manual of Officers Duties, a Persian Mss. Quoted by Sir Jadunath Sircar, p. 115. The Indian legal system today suffers from a similar weakness for its theoretical foundations are outside India.

administrative work of the Court and distributed judicial work among his companion judges. He is also consulted in the appointment of judges in his own Court. But while sitting in Court, his judicial status is no higher than that of any other judge and his decisions can be reversed by any two judges in Special Appeal, and if sitting on a bench of three Judges, he can be overruled by his colleagues. He has no administrative control over any judge and his status may be described as *primus inter pares* (first among equals).

The High Courts hear appeals or revisions from the decisions of all subordinate courts, civil and criminal. In addition, it has original jurisdiction in matrimonial, Company, and testamentary cases. A special jurisdiction was conferred on all High Courts by Article 226 of the Constitution, empowering them to prevent the infringement of fundamental rights of citizens and other rights, by issuing writs of *habeas corpus*, *quowarranto*, *prohibition*, *certiorari*, *mandamus*, or any other orders of directions. In the exercise of this power, the High Court can restrain the State from interfering unlawfully with the rights of any citizen and invalidating any act or order already done or passed. It can also declare invalid any law passed by Parliament or the state legislature in violation of the fundamental rights of any citizen. The remedy under Article 266 has proved to be a very popular remedy and several thousands of petitions are filed every year by citizens throughout India for the protection of their rights. In the State of Uttar Pradesh alone over three thousand petitions are filed in a year.

Every High Court Judge is appointed by the President. The recruitment to the High Court bench is partly from the bar and partly by promotion of district Judges of not less than five years' standing. During his tenure of office, a High Court Judge enjoys complete security of tenure which is the foundation of judicial independence. A judge can be transferred from one High Courts to another, but in practice no transfer has taken place except at the desire of the judge concerned.

Independence of Judges

The principle of judicial independence did not originate with British rule. As I have shown above, it was fully understood and enforced in ancient India. Katyayana and all other law-givers (whose injunctions have been quoted above) emphasized the Supreme importance of judges being independent and fearless even of the king. The Constitution of India adopted the English doctrine of security of tenure, and a High court or supreme court Judge can be removed only on the ground of proved misbehaviour or incapacity, and after each House of Parliament has passed by a two-third majority an address to the President for his removal (Articles 124 and 217).

The Supreme Court and National Integration

The Constitution of 1950 created for the first time in Indian history a Supreme Court for the whole of India. The establishment of this Court with an all-India jurisdiction is likely to accelerate the development of a common law extending over every nook and corner of the republic. Article 141 enjoins "that the law declared by the Supreme Court shall be binding on all Courts in India." It gives the opinions of our Supreme Court a constitutional force. The judicial process can be an effective weapon for forging national integration. In England the law Courts were the most effect weapon for creating a common law for the English people. There can be no doubt that the Supreme Court by its decisions and opinions, with the authority of Article 141 behind them, shall accelerate the process of establishing a common law for the whole of India.

Judiciary has maintained its ancient traditions

After the attainment of freedom the Indian judiciary has maintained the ancient Indian tradition of judicial independence and integrity. The Supreme Court has set the pace and its record of independence is second to none in the world. The High Courts, too, on the whole, have maintained a high degree of independence, and cases of judges carrying favour with the executive have been rare. The highest praise must go to our subordinate judiciary-the Munsifs, Civil Judges, and District Judges who have dispensed impartial justice between citizens of different communities and castes, and whose record compares very favourably with that of British judges who were not always impartial between Indian and British litigants. Indian Judges have lived up to the injunction of Brihaspati that a Judge should decide cases without any motive of personal gain or prejudice or bias and his decisions should be in accordance with the law prescribed by the text.

The Weakness of Our Judicial Process

The great weakness of our judicial process is that it lacks theoretical nourishment. The impact on the judicial process of theories of jurists is profound though unseen and subconscious. A great American Judge, Oliver Wendell Homes, wrote, "The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen have a great deal more to do than the syllogism in determining the rules by which men are governed." Another great American Judge, Benjamin Cordozo, observed, "Logic, and history and custom, and utility, and the accepted standard of right conduct, are the forces which singly or in combination shape the progress of the law."⁸⁶ Roscoe Pound is also of the view that "current moral ideas and ethical customs are drown upon continually although seldom consciously."⁸⁷ The Supreme Court of India has observed that in determining whether any restriction on a fundamental right was reasonable, there was no abstract of reasonableness and it was inevitable that the prevailing conditions at the time, and the social philosophy and the scale of values of the judges participating in the decision should play an important part.⁸⁸ In ancient India the judges were required to be well versed in all branches of knowledge (vidya) as well as jurisprudence and the science of government (dharma-shastrartha kushalai

86 Nature of the Judicial process (1921) Cordozo, pp. 133-11 quoted by Roscoe Pound in Jurisprudence (1949) Vol. 3.p. 470.

87 Jurisprudence, Vol. 1, p. 474.

88 V.G. Rao vs. State of Madras, AIR 1952 Mad. 297

rartha shastra visharadai).⁸⁹ But what about today? What is the legal and social philosophy on which the Indian judges are brought up today?

In England, Western Europe, and the U. S. A., the judge and lawyer have received constant inspiration and education from the jurisprudence of their civilization which has been developing for twenty centuries. Similarly, the judicial process in the U. S. S. R. derives nourishment from Marxian Jurisprudence which is constantly evolving. But where does the Indian judge or lawyer receive his inspiration from? Not from the jurisprudence of his own civilization. He knows something of Roman Law and of the theories of western jurists but very little about the evolution of the law and jurisprudence of his own civilization. The syllabus for the law degree in an Indian University does not include Indian Jurisprudence or the theory of the State in ancient India or the History of Indian Law. Consequently our judicial process is an edifice constructed without theoretical foundations, or rather on foundations supporting other structures in other lands. As an illustration I may cite a recent decision of the Supreme Court in which a distinction was sought to be drawn between governmental activities proper and government's commercial undertakings which (it was observed) "have no relation to the traditional concept of government activities."⁹⁰ Now, traditional concept means a concept according to tradition. But which tradition: Indian or British or American? But in India as I have already indicated the state from times immemorial has had a public sector. It cannot therefore be said that state commercial enterprises have no relations to the Indian traditional concept of governmental activities. The Supreme Court's observation is founded on a British or American but not on any Indian traditional concept. Again the moral and theoretical foundations of our penal code are foreign. To give an illustration, Manu prescribes public censure as one of the punishments for crime.⁹¹ This provision has been adopted by the Soviet Criminal Code;⁹² but the Indian Penal Code, drafted by Macaulay, ignores it altogether, though it can be an effective form of punishment in many cases. Evidently the Soviet jurists have more regard of Indian jurisprudence than Indian themselves.

The low standard of legal and juristic studies in India today creates an urgent problem. On the one hand, our High Courts and the Supreme Court are invested with the power to interpret the constitution and declare any law or act of the State invalid on the ground that it is unconstitutional or illegal or restrictive of the fundamental rights of a citizen. The law declared by the Supreme Court has a binding supremacy throughout the territory of India, and its appellate powers are wider than those of any other federal court in the world. The interpretation of the Constitution and the adjustment of the rule of law with economic progress require of our judges a profound knowledge of jurisprudence and the social science and a capacity for applying the law of social evolution to judicial process.⁹³ On the other hand, the standard of legal education in our universities and law colleges is very low. A poor legal education makes poor jurists and judges. The present disparity between the power and intellectual equipment of those who will be our future judges creates a problem which the state can ignore only at its peril.

I am all in favour of our Universities teaching the best that Western and Soviet thought and science can tell us. But the almost complete neglect of Indian jurisprudence and political philosophy leaves the education of every Indian lawyer and judge incomplete. I have come to the conclusion that the foundation of legal studies must be the study of Indian jurisprudence and every Indian University should include it as a compulsory subject for the Bachelor of Law Degree.

I concede that there is much in Indian jurisprudence which is out of date today. But this is true of every system of jurisprudence. The Greek and Roman civilizations were based on slavery. The divine right of kings prevailed in Europe till the end of the 17th century. The law of reason was often identified with the law of a Christian God. There was no freedom of belief or worship in Europe, and many were burnt alive for the offence of heresy, including Jeanne D' Arc who today is worshipped as a saint. Women were tried and burnt for the offence of being witches and men for having communion with the devil. Some of the peculiar absurdities which disgraced law and justice in Western Europe are absent in Indian jurisprudence. Till the very end of the seventeenth century, trials of animals for criminal offences were taking place in Europe. I shall cite the following illustrations from Keeton's Elements of Jurisprudence.⁹⁴ In Germany, a cock was solemnly placed in the prisoner's box, and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be destroyed. In 1508, the caterpillars of Contes, in Provence, were tried and condemned for ravaging the fields, and in 1545, the beetles of St. Jean de-Maurienne were similarly indicted. So late as 1688, Gaspari Bailey of Chamberg of Savoy was able to publish a volume including forms of incitement and pleading in animal trials. These absurdities find no place in their judicial system of ancient India which according to one British writer was "in advance of our own today."⁹⁵

Rights and Duties

An important difference between Indian and Western jurisprudence is their respective attitudes to rights and duties. They are correlated in both systems, but the emphasis is different. In Indian jurisprudence the emphasis is on obligations. In fact, the word right (adhikar) does not occur even once in the whole of the Anushasan Parva or the Arthashastra. Indian jurisprudence is founded on theories which emphasise that rights are corollaries of the duties. Even freedom of speech is recognised as a duty to speak without fear.

89 Katyayana 57.

90 Kasturi Lal vs. State of U.P., AIR 1965 SC 1039; 1965(1) SCA 809

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92 Article 21, Fundamental Criminal Code of U.S.S.R.

93 Our ancient jurists had evolved the evolutionary concept of law and grasped the scientific truth that the laws must change with social conditions:

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94 Elements of Jurisprudence: Keeton, p.

95 John w. Spellman, 1964, p.128.

In Western jurisprudence, on the other hand, rights, natural or legal, are primary, though every right must have a corresponding duty. This emphasis on rights in one case and obligations in the other has had important effect on social institutions like marriage. Under Indian jurisprudence marriage was a duty, a job to be performed as one of the many social obligations, which everyone had to perform. But the pre-occupation of Western jurisprudence with rights has resulted in marriage being looked upon as an alliance from which each partner tries to get as much as he or she can. The high rate of divorce is the result of neglecting the 'duty' aspect of marriage.

Future role of Indian Judiciary

What shall be the role of our judiciary in the coming social and economic revolution. The judicial system does not operate in a vacuum. The administration of justice has a social function and the judicial process is only a part of the larger social process. Therefore the courts of law cannot function in defiance or ignorance of the social objectives or "the felt necessities of times" as Mr. Justice Holmes called them. The maxim *Fiat iusticia et peret mundes* (Justice must be done though the beams may fall) emphasizes the impartiality of the judges but does not permit the judiciary to be indifferent to social needs.

In theory the judiciary does not legislate; it only states what the law is. But as Goethe observed,⁹⁶ "the facts of life are more potent than abstract theories."

In practice the judicial process is infinitely more complex than the bare theory of separation of powers. The Judges cannot help making the law while interpreting it. Under the guise of explaining the law the U. S. Supreme Court delivered opinions which affected the destinies of the American people. A former Attorney-General of the United States writes of the U. S. Supreme Court:

"..... this Court has repeatedly overruled and thwarted both the Congress and the Executive. It has been in angry collision with the most dynamic and popular Presidents in our history. Jefferson retaliated with impeachment; Jackson denied its authority; Lincoln disobeyed a writ of the Chief Justice; Theodore Roosevelt proposed recall of judicial decisions; Wilson tried to liberalize its membership; and Franklin D. Roosevelt proposed to 'reorganize' it. It is surprising that it should not only survive but, with no might except the moral force of its judgment, should attain actual supremacy as a source of constitutional dogma.

"Surprise turns to amazement when we reflect that time has proved that its judgment was wrong on the most outstanding issue upon which it has chosen to challenge the popular branches. Its judgment in the Dred Scott case was overruled by war. Its judgment that the currency that preserved the Union could not be made legal tender was overruled by the Sixteenth Amendment. Its judgments repressing labour and social legislation are now abandoned. Many of the judgments against New Deal legislation are rectified by confession of error. In no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court."⁹⁷

Indian Constitution, a Synthesis

The role of the Indian judiciary cannot be isolated from the social objectives of the nation. Our Constitution has; set before the Indian people the ambitious goal of achieving a synthesis of the Western and the Communist way of life, individual liberty and social control, abolition of anarchy in production and preservation of democracy in Government-in a word, of political and economic freedom. I must not be understood to mean that there is absolutely no political freedom in the Soviet State or economic progress in the Western democracies. The division of the world into black and white and with no shades of grey is good propaganda for the "cold war" but a poor statement of facts. The difference is one of emphasis. The Soviet system placed economic progress before political freedom because the Soviet Government has upto now been struggling with the problem of transforming a multi-national, multiracial, multi-lingual, and multi-religious community living in a huge, sprawling, state into a modern industrial nation. Today the words "economic planning" and "political democracy" are accepted on both sides of the so-called iron curtain. Our Constitution attempts to achieve a synthesis of the two. It reflects the spirit of non-alignment in the field of constitutional law. Social control of industry is in accord with the Indian tradition. I have already indicated that the state in ancient India had a huge public sector, and the Arthashastra prohibits such trade practices as cornering the market to raise prices.

The Indian Constitution has set before our people a very ambitious and difficult goal. A Constitution is not a collection of abstract theories, nor does it operate in a vacuum. It reflects a way of life which enables a particular people to realize its objectives and ambitions. If it fails to do this, it will be amended or discarded by agreement or otherwise. The Compulsive forces of social life are irresistible in the end.

Condition of National Survival

The people of India has taken upon 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 in 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 a 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

96 *Grau, teurer freund, ist alle theorie, und grun des lebens goldner baum* (Gray, my friend, is all theory, and green the golden tree of life)- Faust, Scene IV.

97 The struggle for Judicial Supremacy: Jackson.

upon the speed of our economic development. It is 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. This problem was stated ten years ago by an American journal, in a special article devoted to India, in the following words:

"Nikita Khrushchev has challenged the West to compete against communism in the task of developing the under developed lands... 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."⁹⁸

It is no exaggeration to say that on the ability, wisdom and patriotism of our future judges depends to some extent the future of the rule of the law and parliamentary democracy in India. But wise judges do not drop like Ganga from heaven: they grow out of the social soil and are nurtured by the social atmosphere. Great judges are not born but made by proper education and great legal traditions, as were Manu, Kautilya, Katyayana, Brihasparti, Narada, Parashara, Yajnavalkya, and other legal giants of ancient India. The continued neglect of legal education is against the national interests.