

Role of the Bench and the Bar

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Broad purpose of Bench and Bar

The body of persons which operates the machinery through which justice is administered, composed mainly of the Judges and the Advocates who help them in discharging their difficult duties, has existed and functioned both in ancient and modern times. Its broad purpose throughout has been to realise all those goals which are labelled "Justice" according to the law which has to be administered in a society whether it is ancient or modern, capitalistic or socialistic, feudal or industrial. Concepts of justice, however, have changed vastly in the course of time. And, as between different States in modern times too, Justice, as embodied in the law, has different contents and connotations. Such differences as we find between different States as regards the functions of the Bench and Bar are, I suggest, mainly due to the some what differing basic concepts of justice found in the laws of different States. These concepts have been produced and moulded by the operations of complex and interconnected, constantly acting and counter-acting, sets of factors in the course of our histories.

Shrunk and organically interlinked modern world

A basic factor moulding life and thought in every country today is what has been called the shrinking of the modern world. The various parts of the world are becoming increasingly organically interlinked and interdependent. Distances have vanished. Space time relationships have altered vastly. Modern science has made it possible for us not only to communicate quickly with each other and to share ideas and thoughts with ease, but its practical applications have produced a uniformity in patterns of thinking, behaving, and living, cutting across all barriers of political organisation and ideology, culture, race, creed, and colour. The operation of these factors has produced a progressive development of uniform basic notions of justice as well as common patterns of law in various parts of the world.

In spite of the unifying trends operating in the modern world, there are differences in origin, in traditions, in organisation, in aims sought to be achieved, and in the means adopted for achieving even the same objects through the machinery for the administration of justice under different systems in the modern world. Hence, the need to study these differences so that we may benefit by mutual exchange of experiences and ideas and notions, and improve, where possible, our own systems.

Two Law Commissions

In this country, at any rate, there has been considerable hard thinking about the basic structure and the operations of our machinery for the administration of justice. An All-India Commission, under the Chairmanship of Mr. M. C. Setalvad, who conferred upon us a great favour by presiding at the sessions of our Seminar at Allahabad, during the Centenary Celebrations of the High Court, produced a voluminous and exhaustive report after three years of collection of information, intensive study, and deliberation. A Law Commission appointed by the Government of Uttar Pradesh had also made its comprehensive study and surveyed the conditions under which Justice is administered in this State. I am sure that we will benefit greatly if we could have access to similar mines of information about their machinery of justice and its operations in other countries.

Common Scientific approach to Justice

In this modern age of science, the approach of all Jurists to the problems of justice is certainly that of scientific humility. It cannot be dogmatic. They do not see justice descending in the form of divinely inspired dictates or their collections, the "Themistes" of early law, as Sir Henry Maine called them, but as Del Vecchio, a famous Italian jurist, saw it at the conclusion of a historical and philosophical essay on 'Justice': "that idea of justice which, inherent and always springing up anew in our spirit, is found in all laws but is exhausted in none".

Changing Concepts

Our concepts of Justice do not consist of a body of eternal, abstract, immutable, unchanging norms, but they will be found to be the products of an interchange of shifting pulls and forces which spring from changing social, political, cultural, and economic conditions. New moral values, ultimately translated into law, emerge in the process. Our notions of Justice are relative and results of empirical knowledge of what satisfies certain needs believed to be basic. The satisfaction which these needs demand is only permitted in legally recognised modes. One may mention here that what is legally sanctioned should not be viewed apart from what is morally sound and right. This is the approach of a growing school of legal thought powerfully represented by the English Judge Lord Devlin today.

Sense of Dedication

I may here quote a conclusion reached by Professor Del Vecchio in the essay already mentioned above: "He who consecrates himself truly to the ideal of justice overcomes himself as individual, since he identifies himself universally with 'others', beyond the sphere of physical appearances, and following that inner vocation which proclaims to him the law of his spirit as a rational being he enters the kingdom of the eternal and the absolute."

Although concepts of justice are not unchanging and eternal, the spirit of consecration and dedication which impels human beings towards what they believe to be 'Justice' certainly appears to be a part of the eternal and the unchanging human nature. Of course, the urge to see justice done to others, viewed as reflections and even as parts of one's own self, is often submerged by other powerful drives and passions. The effort, however, of those who consciously seek justice, as members of both the Bench and the Bar must always do, will be to overcome the passions and prejudices which interfere with such a disinterested pursuit of justice. Justice, in a sense, may be conceived of as an eternal quest of every being who deserves to be called human. As Mr. Du Cann puts it, in his book entitled "Miscarriages of Justice", "the need for justice raises in every human heart a cry as imperative as the blood of murdered Abel crying from the ground, or Rachel in Rama weeping for her children slaughtered by Herodian soldiers".

The Specialist's approach

The difference, however, between the quest of the man in the street and that of the Judge and of the Advocate for justice is that the latter class of persons is meant to be dedicated to the pursuit of justice and seeks it scientifically by employing ordered knowledge contained in the form of law and by scientific means found both inside and outside the law. I believe that such a sense of dedication or consecration combined with a scientific technique constitutes the common ground between the members of the Bench and the Bar and in every country and in all ages.

The Persona

According to H. G. Wells, writing in his work entitled "The Work, Wealth and Happiness of Mankind", every individual performs his role in life for a reason which impels him to do so. That reason is to be found in the concept which the individual has of himself and of his mission in life. The concept is described by the term "persona" in the language of the psychologist Yung. This term is derived from the mask which the Greek and Roman actors wore on the stage. The "persona" stands for one's character as one conceives it and propels one to perform one's role in life. H. G. Wells has divided these persona into three kinds and shown them as emerging in the course of the development of the modern western society. But, this very process is found in the histories of other nations too.

The first he calls the "peasant persona", the "distinctive character of which is the complete acceptance of

the idea that toil is virtue, and its close intense adhesion to property and the acquisition of property". An individual with such a persona is prone to envy and displays possessiveness although his soul may be equalitarian. The second type of persona is that typified by the nomad and the robber baron with a predatory tradition. The individual with such a persona is adventurous, fond of display and ostentation, and is mercenary. He does, however, possess a code of honour and considerable pride and vanity. He is attached to notions of class and chivalry. His spirit is inequalitarian and exploitative. The third and the most valuable type of persona is that of the educated and refined individual which may be called the priestly persona. For such a person, the driving force is the sense of duty and the feeling of dedication. In this last and most valuable class of persons H. G. Wells places the Judge and the lawyer. He observes: "Under this heading we shall have to deal not only with priests and ministers of religion, but with a vast world of quasi-disinterested effort, with teachers of every class, with writers and creative artists, with scribes and journalists, with doctors, surgeons and the associated professions, with Judges and lawyers generally, with administrators, and particularly that excellent type, the permanent official, with technical experts, and finally, most hopeful, various and interesting of all, with the modern scientific worker". The most distinctive element of such a persona is its detachment from money-making motive. Its motivating concepts are those of service and self-denial in order to attain what is considered the superior inner satisfaction from high intellectual and spiritual achievement and the recognition of the value of such a person by Society.

Before leaving this fascinating analysis of human types and the roles they perform in life, due to what have been called their personae, I may quote an interesting passage from H. G. Wells:

"All these types of persona have characteristics in common that mark them off quite definitely from either the proliferation of the varieties of acquisitive peasant townsman soul, or from the royalties, aristocrats, robbers and genteel social parasites, who constitute the predatory classes. In the modern professional soldier we have perhaps a type intermediate between the predatory and priestly group and deriving more and more from the latter tradition, and in the modern barrister the pretensions of an aristocratic protector of a client subdued to the exigencies of a hireling bravo, and mingled too often with the unredeemed greed of the peasant."

The Judge's Persona

The persona of the Judge today in this country has necessarily to be of the third type because there is no financial charm at all left in the emoluments of judicial office. It is only individuals with the last and the most advanced type of persona who can completely detach themselves from the pursuit of private gain and from selfishness of every kind and rise above pettiness, passions, prejudices, obsessions and complexes of every type by means of ruthless self analysis and broad human sympathies and culture, and preserve an unruffled temper even when faced with the most trying of situations. Only such individuals can perform the role of the judge satisfactorily.

What the Judge requires from the Advocate

The effectiveness and usefulness of an Advocate is determined by his capacity to satisfy the needs of the Judge. It is clear that what the Judge requires from an Advocate is assistance in the performance of his own role. It is impossible for an Advocate to give that assistance unless he has probity or all those qualities which are discussed in the chapter on the "Honest Lawyer" in a rather illuminating little book entitled "Road to Justice" containing a series of essays of Lord Denning, at present the Master of Rolls in England.

Power of Judge and Advocate over the Judicial Process

Coming now to special features of our judicial process, I would like to point out that the power exercised by the Judge in this country over the fate of a litigation, whether on the criminal or civil side, is really enormous. Similarly, the power of the advocate for good or evil is rather prodigious in determining whether justice will hit or miss its mark. In England as well as in America a large number of cases, both civil and criminal, are tried with the aid of jury, which gives its verdict on questions of fact. There, the function of the Judge, although capable of being so performed as to lead the "jury by the nose" (as Francis Bacon put it), is yet only that of an umpire and instructor in law. And, in other cases, all matters of any importance are decided by Courts presided over by more

than one Judge. The legal profession, too, both in England and America, is severely controlled by powerful currents of professional and public opinion supported by the exercise of judicial discretion in such a way as to penalise those practitioners who have been black-listed or have tarnished reputations. Rules of professional ethics and etiquette cannot be violated there with such impunity as they can be, and are sometimes, unfortunately, broken here. No one who has been a practising lawyer on the original or even the appellate side or a Judge of facts in this country for any length of time, with a desire to see the highest standards of honesty and integrity maintained in litigation, would fail to remember lurid instances of how justice was either done by the use of very questionable methods by those conducting cases or failed to be done because of the use of such methods.

A Source of Miscarriages of Justice

The best of institutions can be misused and human frailties cannot be entirely eliminated anywhere. A whole host of American cases in which wrong persons were convicted due to either perjured or honestly mistaken evidence are found collected in Mr. Earle Stanley Gardner's "Court of Last Resort", and in Judge Jerome Frank's "Not guilty". Mr. Du Cann's book entitled "Miscarriages of Justice" gives similar instances from Britain. The danger, however, in this country of such miscarriages of justice is much greater due to the development of practically in unwritten tradition or convention which, as our very astute and venerable Advocate, Dr. K.N. Katju, has pointed out in his illuminating little books, "Experiments in Advocacy", seems not only to tolerate and condone but almost to permit use of perjury in litigation by applying there the rule- "all is fair in love and war". This is a perversion of the noble traditions of the legal profession which, whether it reveals the inroads made by the predatory persona or instincts of the robber baron or condottiere type of individual into the legal profession or just indicates a fall in professional standards due to an intensified struggle for existence, certainly discloses the need for a more stringent control over and a strict regulation of professional standards. Such control is possible, under the present state of law after the new Advocates Act, only by the representatives of the legal profession themselves. I confess that I have, at times, felt so perturbed at some of the tendencies noticed today that I have wondered whether a largely controlled and nationalised bar, on the lines on which it is organised in the U.S.S.R. Is not very necessary in this country today. Such a proposal has been seriously discussed by no less respected and erudite an American Judge than Judge Jerome Frank, who has, in his works, such as "Law and the Modern Mind" and "Courts on Trial", indicated that problems and defects similar to those which have revealed themselves in this country in the sphere of administration of justice have arisen even in so economically advanced a country as America. The pitfalls and snares which beset the path of justice in American courts are depicted rather scathingly by an American citizen, Mr. Callison, in a recent book entitled "Courts of Injustice".

A Source of Great Pride

In spite of the flaws in our system and failings of some, it has to be remembered that there is a powerful tradition of rectitude, honourable conduct, and dedicated service to the cause of justice built up by members of the Bar in this country. Mahatma Gandhi, the father of the Indian nation, came from the legal profession, and, in the course of his professional career, he observed the highest possible standards of honesty and probity. From the ranks of the legal profession rose men with the most glittering records of dedicated service to the nation both professional and political, such as Pandit Ajodhya Nath, Pandit Moti Lal Nehru, Sir Tej Bahadur Sapru, Pandit Jawahar Lal Nehru to mention only a few of the giants of the past who practised at the Allahabad High Court. We can justly feel very proud of the intellectual and moral stature attained by such members of the Bar of this country.

A Source of Danger

So far as the Judiciary of this country is concerned, I think we can assert that, even without any special training in what may be called the science and art of adjudication, apart from training in law, it has not only set high standards of learning and legal acumen but also of absolute integrity, probity, independence of character and judgment, and freedom from bias of every kind. It is, however, well to remember, before it is too late, that these high standards, born out of a spirit of utter and unswerving dedication, can only be preserved or improved by

keeping the Judiciary free from financial strains, stresses, and worries. Unfortunately, the Judiciary, consisting of salaried office holders with scales of pay fixed long ago, can be, like other city dwellers and salaried individuals with fixed salaries, classed with the sufferers and not with the beneficiaries of the present order of things in this country in spite of vast socialistic schemes of Governmental expenditure. The strong inflationary trends, caused by a variety of reasons which economists give, have sent up prices soaring so high in this country as to severely curtail the real incomes of members of the Judiciary at every level. We understand that, in other countries, including the U. S. S. R., judges are better paid and are not less (if not more) respected than they are in this country.

A Source of Legitimate Pride to Indian Citizens

Indian citizens take considerable pride in the Constitutional role of the Judiciary in this country as the protector of Fundamental Constitutional rights of citizens against any unjustifiable encroachment made by any person or authority in the State. Members of the Judiciary of this country have performed this role very creditably with absolute independence and utter disregard for consequences to themselves and are assisted by a strong and courageous Bar. Our Judiciary can and has questioned the validity of legislative measures of Parliament itself and has not shrunk from declaring a statutory provision invalid whenever it has found that it violates a fundamental freedom and is constitutionally unjustifiable. It has stood between the citizen and the highest authority in the State whenever it has suspected injustice. It has shielded the citizen against every kind of governmental misuse or excess or abuse of power. It has fearlessly enforced what is known as the Rule of Law. It has vindicated the supremacy of the Constitution which is legally Sovereign in this country.

The result is that an Indian citizen today could proudly speak, as Sydney Smith spoke in England more than a hundred years ago, about the effect of what the Judiciary does with the help of the Bar:

"Nations fall when judges are unjust, because there is nothing which the multitude think worth defending; but nations do not fall which are treated as we are treated And why? Because this country is a country of the law; because a judge is a judge for peasant as well as for the palace; because every man's happiness is safeguarded by fixed rules from tyranny or caprice The Christian patience you may witness, the impartiality of the judgment-seat, the disrespect of persons, the disregard of consequences."

The responsibility of the Constitutional role

The Constitutionally vital role placed upon the shoulders of the Judiciary by our Constitution carries with it a very heavy responsibility on the part of the Judges as well as the Advocates who assist them, of propounding solutions which are not out of harmony with "Justice: social, economic, and political", as the Preamble to our Constitution describes a basic Constitutional purpose. The guardianship of the Rule of Law in a democratic set-up imposes the duty to understand well the basic needs and purposes of the progressive, social, economic, and political order sought to be set up by the Constitution. It implies a keen awareness of problems of contemporary society and sufficient knowledge and wisdom to suggest their solutions together with the courage to adopt them.

Social Engineering

The "Judicial Process" in our country includes that task of "Social Engineering" which Judge Benjamin Cordozo analysed in his essay on "The Nature of Judicial Process." Prof. W. Friedmann, in his "Law in a Changing Society," thus describes the task of the modern Judge in a social order like ours: "The lot of the democratic judge is heavier and nobler. He cannot escape the burden of individual responsibility, and the great, as distinct from the competent, judges have, I submit, been those who have shouldered that burden and made their decisions as articulate a reflection of the conflicts before them as possible. They do not dismiss the techniques of law, but they are aware that" by themselves, they provide no solution to the social conflicts of which the law is an inevitable reflection". He goes on to observe: "The law must aspire at certainty, at justice, at progressiveness, but these objectives. are constantly 'in conflict with one another. What the great judges and jurists have taught is not infallible knowledge, of a certain answer to all legal problems, but an awareness of the

problems of contemporary society and an acceptance of the burden of decision which no amount of technical legal knowledge can take from us".

Isolationism out-of-date

Some Judges have, particularly in the past, considered it to be essential for the Judiciary to maintain not only a detachment of mind and independence of outlook but to exhibit this by complete isolation from the rest of society. 'According to this view, a Judge must not only abstain from any direct or indirect discussion of a problem which may arise before him but must not even acquire any information or knowledge of matters in general lest his mind is affected. It is said that a British Chief Justice of the Bombay High Court adhered so strictly to this view that he would not even read newspapers let alone coming into social contact with ordinary mortals. Such an attitude of mind and course of conduct on the part of Judges would certainly invite the criticism that they live in "ivory towers". I do not think that Judges should be required to do more than to abstain from participation in partisan politics and from even academic discussions of issues which have either already arisen before them or are expected soon to arise.

When I was practising at the Bar, I expressed the following opinion on an occasion when a controversy arose about the limits on the right of a judge to express opinions outside his court-room in the course of an academic discussion: "All conventions and traditions regulating the conduct and speech of holders of judicial office must be related to the nature of their functions. The functions of our High Court Judges, as the constitutionally appointed guardians of that binding force and of all those fundamental values which are embodied in the Constitution of our secular democratic republic are far more vital and more closely connected with orderly progress than those of our High Court Judges in the past were or even those of High Court Judges in England are today. These functions are comparable to those of American Judges. Our Judges are the constitutionally authorised exponents of what may be described as the 'religion' of the secular State, summed-up by the word 'justice'. They may have to determine the reasonableness of any measure of social, economic, or political reform or change which may affect its legal validity. Therefore, on the one hand, there is a much greater call for caution and carefulness upon their part in expressing their views, and on the other hand, there is a much greater need for them, than there was in the past, to be conversant and concerned with problems of national welfare in all departments of life. They cannot possibly be required to withdraw into shells of an artificial and isolated existence, where the mind stagnates, knowledge becomes rusty, and awareness of current problems and ways of thinking vanishes. Those who recommend such isolationism on the part of our Judges forget the true needs, the right place, and the proper implications of the judicial function in our country today under the existing Constitution.

"The greatest and the most cherished tradition of the legal world, to which Judges belong, is lone which is basically moral and ethical. It is a tradition of an incessant struggle for what is right. As Sir C. K. Allen puts it, in his Aspects of Justice: 'Right comes by the struggle for Right and justice by the pursuit and practice of justice'. It was this pursuit of what was Right which enabled our jurists and Judges to subject the King in ancient India to the Rule of Law. It was dedication to what was Right, according to his conscience, that led a venerated Roman Jurist, Papinian, to sacrifice his life rather than justify the claims of a usurper. Again, Sir Edward Coke, a famous English Chief Justice, lost his office because he lectured, on bended knees, to King James of England, that the King should leave the administration of law and justice to his judges. English Judges, in the course of the constitutional conflicts of the 16th and 17th centuries, did not hesitate to advance, albeit in their judgments, essentially new legal doctrines in keeping with democratic political theories which robbed the British King of the undivided and absolute sovereignty claimed by him. The precious tradition of judicial independence may be impaired, and our expectations of sound and reasonable judgments, which are not out of harmony with existing realities and best concepts of what is just and right, particularly in the socio-economic fields, are not likely to be met more satisfactorily if Judges are required to abstain completely from invigorating academic discussions and intellectual exercises outside their courtrooms."

Conclusion

Ours is a State in which the Constitution has assigned to the Judiciary an extremely difficult and delicate

role fraught with dangers of a type which do not exist in every country. Some of the ends which mechanisms of justice must serve in a modern democratic socialistic State, such as expedition, inexpensiveness, easy availability of remedies against public servants, the reform and education of the criminal, speedy solution of difficult questions arising in the sphere of domestic relations and treatment of the mentally ill, seem to be much more satisfactorily served in other countries. Every State has to devise efficient means for tackling these problems which must arise in a modern society.