ADDRESS

By

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Research in Law

It is in the fitness of things that this Third All India Conference has been convened under the joint auspices of the Indian Law Institute and the Bar Association of India. The Indian Law Institute, if I may say so, devotes itself to the academic study of law, whereas the Bar Association of India is a body whose members are, by and large, engaged in the practice and profession of law. This Conference, therefore, of academic and practising lawyers is, I conceive, a welcome event. Savigny observed :

> "The study of law is of its very nature exposed to a double danger; that of soaring through theory into empty abstractions..... and that of sinking through practice into a soulless unsatisfying handicraft."

It is my sincere hope that the labour of this Conference would produce a balance between the theory and practice of law.

I express my sincere thanks to the organisers of this Conference for having invited me to say something about research in law. The subject of legal research is vast, for the field of law today is co-extensive with life and society. Law is no longer a body of negative injunctions. But it represents the vital instruments of the State in shaping society and man's life according to its purpose. It is the handmaid of the State for creating those conditions which make an affluent society and the life of the common man happy and prosperous. We have moved far from the era of Laissez-faire or the Benthamite age of liberalism. We are now in the era of the positive State. The Police State has disappeared and the Welfare State has taken its place. It represents the supreme effort of man for attacking what Beveridge calls the five giants : of poverty, disease, ignorance, squalor and idleness. Jean Jaques Rousseau's laments two hundred years ago that :

> ".....it is plainly contrary to the law of nature that the privileged few should gorge themselves with superfluities, while the starving multitude are in want of the bare necessities of life"

do not need a bloody revolution to prove its truth. The legal processes of a living democracy make a revolution unnecessary. It is

now the State which, in the words of Sydney and Beatrice Webb, "blocks the downward way by income maintenance and employment service, which meets every normal need of health and education, which seeks to reform the offender, which promotes the welfare of the old and handicapped, which attempts to provide a substitute for children who have lost their own parents, which supplements the housing need of the people, which both limits hours of work and makes provision for the enjoyment of leisure in parks, open spaces, art gallaries and museums and through every kind of formal and informal adult education." And all these things the State seeks to achieve with its principal handmaid—the Law. The law today is, to use the expression of an eminent jurist, Dean Roscoe Pound, 'socialised' law. Dean Pound has enumerated the following as the principal signs of 'socialisation of law' in a service or Welfare State,—

(a) growing limitations on the owner's use of his property, and notably on the antisocial exercise of rights;

(b) growing limitations on freedom of contract, limitations which, of course, go to the heart of the social mechanism of competition;

(c) growing limitations on the owner's freedom of disposition of his property which again closely affect the competitive mechanism;

(d) growing limitations on the power of the creditor or injured party to exact satisfaction;

(e) liability without fault merging into the insurance principle of liability making the enterprises and ultimately the community as a whole responsible for agencies employed for their benefit;

(f) the increasing assertion of public rights in basic natural resources, or in Prof. Pound's own language "the change of *res communes* and *res nullius* into *res publicae*;"

(g) the growing intervention of society through law to protect dependent persons, whether physically dependent or economically dependent;

(h) a tendency to hold that public funds should respond for injuries to individuals by public agencies;

(i) the replacing of the purely contentious conception of litigation by one of adjustment of interests;

(j) the reading of the obligation of contract subject to the overriding requirement of the reasonableness, of which, despite the current confusion of grounds, the doctrine of frustration seems to be an example;

(k) increasing legal recognition of groups and persons in stable relations to each other as legal units instead of exclusive recognition of individuals and of juristic persons as their analogues. The collective labour contract and the "common rule" of an industry and the trade union itself provide examples of this.[1]

But this has not always been the case. In ancient times the vast majority of the people were denied liberty and even elementary rights. The great civilisations of Egypt, Greece and Rome were founded on slavery which was not only tolerated but was regarded as a necessary institution. The slave was not a legal person but mere property or chattel. According to Manu whatever was earned by the slave belonged to the master, because the slave himself was a chattel owned by the master. Even such a rational philosopher and scientist as Aristotle regarded slavery as a natural institution. In the ancient City States of Greece, by far the vast majority of the population were slaves who were not regarded as citizens and therefore, could not take any part in the running of the 'direct democracy' prevalent in those States. In Rome the legal position was no better as every student of Roman law knows.

In the feudal age, slavery gave place to serfdom. The most characteristic form of life then in England and the rest of Europe was that of the manor, a village unit, comprising the lord's castle, the huts of the serfs and the adjoining fields. The serf was bound to the land and to the service of his master. Feudal lordships were everywhere defined by status, rigid and inflexible. There was no freedom, no enterprise, no initiative, no worth or respect for the personality of man. Every man was born in the feudal society with a status fixed for himself from which there was no escape and which could not be cast off. The apprentice was bound to his master, the serf to his local chief, the vassal to his lord and the noble to his king. In this state of society formed by status and class there was hardly any scope for changing law. Law, fixed as it then was, was sufficient to sustain that society. For about one thousand years from the fifth century to

1. ROSCOE POUND, *Outlines of Lectures on Jurisprudence* (Fifth Edition, 1943), pages 43-49, cf also Stone, *The Province and Function of Law*, pages 475-476.

the fifteenth century, feudalism along with the Church had absolute sway over the whole of Europe and law remained almost static.

Invention of the printing press aided enormously in the spread of new ideas among the peoples scattered over vast distances. Bright vistas of progress were opened up by the scientific discoveries with which the names of Roger Bacon, Copernicus, Galileo, Kepler and Newton are associated. Against these, and the growing body of knowledge in physics, medicine, mathematics and engineering, the established dogmas of medieval thought slowly dissolved. The effect of these developments was immediately felt in philosophical and political thought as is evinced by the writings of such men as Erasmus, Francis Bacon, Bodin, Thomas More and Machiavelli.

The final great impetus was given by the Industrial Revolution which started about the end of the 18th Century. The shackles of feudal society were completely broken in the upsurge of technological advance. Machinery and steam power completely changed the processes of production and new relationships in the field of production were created. The Industrial Revolution brought people together in factories and industrial towns. Such close contact of men and women drawn from diverse fields naturally taught them to discuss matters of common concern. By exchange of thoughts and ideas they had a new awakening within themselves. They began to feel that their position was not fixed by status. Freedom from status, as under the feuda system, meant freedom of choice, freedom of contract and freedom to bargain. It meant in the economic field individual liberty to organise business, produce goods without limits, negotiate contracts, carry on trade, seek unrestricted profits and exploit productive resources without State interference. There was, therefore, the emergence of the doctrine of Laissez-faire, classically expressed in Adamsmith's Wealth of Nations published in 1776. In the same year the blessings of liberty were enshrined in the famous American Declaration of Independence of which Jefferson was the principal author. At about the same time the rights of man were declared under the *new regime* in France. They were based upon the doctrines of liberty, equality and fraternity preached by Jean Jaques Rousseau. Shortly thereafter came Bentham and his followers with their ideas of liberalism and individualism.

Under the impact of all these forces the individual discovered himself. Laissez-faire, rights of man, individualism and liberalism were held everywhere as freeing the individual from his age-long

bondage. Law as the handmaid of society took up the cause of these forces. But in no time it was found that this freedom of the individual which was so much acclaimed was not an unmixed blessing. Its baneful effects began to be felt very soon; for this unrestricted freedom became the freedom of the economically powerful. It was freedom more in name than in reality. For how could there be real freedom as between a powerful factory owner and a half-fed unorganised labourer under his employ? No doubt the doctrine of unrestricted freedom of the individual led to rapid economic progress. But the State ceased to play any positive role. The State became a Police State only to maintain law and order. Police, justice and the army became the main departments of the State. But society is never static and law can never be fixed. Historical forces compel both society and law to adjust themselves to the changing needs of life. By the inexorable operation of new forces the State was compelled to assert itself from the middle of the 19th Century in different fields of life until it started invading every walk of life and converted itself into the Welfare State. The slums created by a free enterprise had to be destroyed. The broken health of the masses caused by overwork and sweated labour had to be repaired. The illiteracy generated by unfettered child labour had to be removed. A thousand and other evils brought by laissez-faire had to be uprooted.

Legislation today is nothing but translating the policies of social and economic welfare into effective directives. It represents what the Russian Jurists say "the superstructure". The superstructure includes all social ideas and the institutions corresponding to them: state, law, political parties, political ideas, morality, art, philosophy, religion, the Church, etc. In carrying out research in law, whether it is international law, public law or private law, we must not lose sight of this basic fact—the superstructure. On the contrary, those who are ready to face the strict and rigorous discipline of the law and venture to enter her portals must try to see that law is made to subserve the ends of society which we may choose at any given time. A law which fails to serve the social purpose of the people becomes merely oppressive. It is not enough for the jurist to know, as the great German Jurist Jhering said, that law is a development. The Jurist must perceive not merely how law has developed but for what purpose and to what end. Every research in law should, therefore, be based upon sound realism and an objective analysis of the 'superstructure'.

This means that law cannot be treated in a detached or isolated manner. It cannot be disposed of by merely pronouncing a ready-made formula. It must be studied in connection with, and as a part of, the combined reality of society and the world, that is, the 'super-structure'. This implies in relation to our country that research in law must be founded on the background of the changing conditions, facts and ideas of life and society which are rapidly transforming an underdeveloped country into a mighty industrial State, designed to create affluence for the common man. Any research or inquiry must take into consideration the facts of life, the vastness of the country and its problems, the varieties of life and expression flourishing on an enduring identity and unity and, above all, the unique experiment of creating a socialistic pattern of society through the rule of law and parliamentary democracy.

And here comes the question of qualification of the persons who are to undertake research in law. A true spirit of inquiry and research is what is needed combined with real learning and knowledge. That requires industry, perseverance and the courage to face the strict and rigorous exactions of law. Superficial smartness is out of place. I may quote here what Justice Holmes in his lecture before the Harvard Law School on the 5th November, 1886, said about smartness. He said—

> "I fear that the Bar has done its full share to exalt that most hateful of American words and ideals—smartness—as against dignity of moral feeling and profundity of knowledge. It is from within the Bar, not from outside, that I have heard the new gospel that learning is out of date and that man for the times is no longer the thinker and the scholar, but the smart man unencumbered with other artillery than the latest edition of the Digest and the latest revision of the Statutes.
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> The aim of a law school should be, as the aim of the Harvard Law School has been, not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the abode of the masters. If a man is great he makes others believe in greatness. He makes them incapable of mean ideals and easy self-satisfaction. His pupils will accept no substitute for realities, but at the same time they learn that the only coin with which realities can be bought is life"[2].

2. *"Harvard Celebration Speeches"* 3 *L.Q. Rev.* 118 (1887) p. 119-120.

In the course of the same lecture Justice Holmes observed—

> "Under the influence of Germany, science is gradually drawing legal history into its sphere. The facts are being scrutinised by eyes microscopic in intensity and panoramic in scope."

These are exactly the qualities which are needed for those who want to take to research in law and higher study of law. In this connection, I may place before you what Aristotle in his 'Ethics' said more than two thousand and two hundred years ago—

> "Vain men, on the other hand, are silly, not realising their own limitations. This comes out in glaring fashion when they take on an important job for which they are not qualified and are proved incompetent. It is a type which affects showy clothes and a smart manner and that sort of thing. They tell the world what successful men they are and make that the topic of their conversation as if that would win respect for them."[3]

Gentlemen, many things can be said on the subject of research in law but I do not like to try and tax your patience any longer. I only like to point out that research in any branch of law or on any topic of law must not ignore a comparative study of the various legal systems dealing with that branch or topic and from such comparative study we expect to find a wealth of wisdom and experience. We find that through the countless turns of evolution by which the ideas of law struggle to unfold themselves, there is an essential similarity in the factors of human development. We find that the legal systems of the most diverse peoples exhibit in the midst of differences a unifying principle. How could it have been otherwise? Josef Kohler, the great jurist and neo-Hegelian philosopher, says that hunger and love have been from the beginning of time—if at all the beginning of time could be conceived—the primal impulses of the human race. Solicitude for the individual as well as solicitude for the species has burrowed under human nature, producing endlessly inexhaustible conflicts. Hunger and love have everywhere given birth to society and its essential concomitant, the law; and the primitive forces of hunger and love have everywhere generated one legal institution after another.[4]

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3. Aristotle, "Nichomachean Ethics", translated by W.D. Ross in *The Pocket Aristotle* (1958), Justin D. Kaplan (ed.)

4. Josef Kohler, 'Evolution of Law' in the *Evolution of Law* Series Vol. 11.

It may be asked what is the utility of research in law and higher study of law. The ordinary lawyer in his day to day practice of law need not pursue higher study of law or research in law. He has neither the time nor the inclination and nor, I suppose, the qualification. He may justly be called the legal workman whose main concern is with the technical rules and regulations of law and who does not understand the ultimate forces of law. We may compare such a skilful lawyer with a skilful brick-layer. We may have skilful and successful lawyers who know nothing and seek nothing beyond a traditional and astute application of the legal rules and regulations, just as we may have useful, skilful and successful brick-layers who are not burdened with any knowledge of the science of engineering beyond the proper laying of bricks. And yet he may be hailed as a great lawyer if he merely succeeds in building up a heavy and lucrative practice in the courts without making any contribution to the development of the science or purposes of law. But that does not render valueless or dispensible a knowledge of the organic unity of the world, the effects of which are stated by the sciences and explained by philosophy and the 'superstructure' which shapes the destiny of man.

Gentlemen, I thank you all. I am grateful to the Indian Law Institute and the Bar Association of India for the honour they have done me by inviting me to speak on research in law. I hope by our united endeavour, we shall succeed in building up the necessary climate and equipment for research in law.