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# JUDICIAL PROCESS AND SOCIAL CHANGE *

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## I

"IT IS surprising but true," it has been observed, "that thirty years since independence the juristic community in India has yet to develop an adequate set of approaches to the linkages between judicial process and social change." Let us ask ourselves the question, "why is this so?"

By juristic community, I take it as meant legislators who make the laws, judges and lawyers, academic and practising, who interpret and assist in the interpretation of the laws and the executive which implements the laws. The juristic community of legislators, judges, lawyers and administrators are drawn essentially from the elitist classes and those that are not so drawn very soon hasten to join the elitist class. The so-called juristic community as a whole is class oriented and when its members talk or think of social change it is generally in a patronizing and superior, abstract, suspicious or even insincere way. Hence the failure of the juristic community to propound and develop a legal ideology explaining the connection between law and social change; hence the failure of law until now as an effective instrument of social change. That is why, the judicial process has unwittingly been giving, gives even now, and will continue to give for a while longer an effective alibi to the executive for not implementing the social and economic policies initiated by the legislatures with full knowledge that it has been so and perhaps in the hope that it will continue to be so.

But let me assure you that it will not be so for long. Already strong and strident voices of dissent are heard, their volume is growing, and insistent demands for economic and social equality and security are being made. There is too a whiff and violence in the air, and like everyone

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else, the juristic community is also showing an awareness of the great issue of social change and the use of law as an instrument of social change. There is now recognizable every where a pervasive social consciousness inspired often enough by a deep sense of justice.

There was a time when law was undoubtedly a manifestation of the will of the dominant social class, determined by economic and political motives. The ideals of justice had little to do with law which was often instrument of oppression. All of you are familiar with Ihering's classic work—*The Struggle for Law*—where he remarked:

> Every State punishes those crimes most severely which threaten its own peculiar conditions of existence, while it allows a moderation to prevail in regard to other crimes which, not infrequently, presents a very striking contrast to severity as against the former. A theocracy brands blasphemy and idolatry as crimes deserving of death, while it looks upon a boundary violation as a simple misdemeanour (Mosaic Law). The agricultural State, on the other hand, visits the latter with the severest puninhment. While it lets the blasphemer go with the lightest punishment (Old Roman Law). The Commercial State punishes most severely the uttering of false coin, the military State insubordination and breach of official duty, the absolute State high treason, the republic striving after regal power; and they all manifest a severity in these points which contrasts greatly with the manner in which they punish other crimes. In short, the reaction of the feeling of legal right, both the States and individuals, is most violent when they feel themselves threatened in the conditions of existence peculiar to them.

In other words, according to Ihering, the pressure of the social interest and the general security is a compelling force in law making. It cannot be doubted that in the past it was true of most legislation and perhaps it is true of much modern legislation. Freudian psychologists may tell us that the motive of a modern social welfare legislation is to preserve the status quo in the broad sense and to forge an armour against bloody revolution; pink laws to prevent red revolution. Whether such an interpretation is valid or not it must now be recognized that legislators, lawyers and judges are now undoubtedly showing greater sensitivity to social philosophies.

Neither Marx nor Engels developed a complete legal theory of socialism. Marx in his introduction to *Critique of Political Economy* made the famous pronouncement: "The totality of these relations of production constitutes the economic structure of society, the real foundation on which rise legal and political super-structures and to which correspond definite forms of social consciousness. With the change of the economic foundation the entire immense super-structure is more or less rapidly transformed."

He also said, "society is not based upon law; this is a juridical fiction. On the contrary the law must rest on society." Marx's theory was that law was but a mere superstructure on an economic base and that made law appear wholly dis-autonomous with no constructive function whatever in socialist society. Marx's friend and collaborator Engels recognized, however, the reciprocal effect which law may have on the economic base. He observed: "Such ideological superstructures have a tendency to detach themselves from their economic origin and react in turn upon the economic bases of society." Vyshinsky, the Russian jurist, put forward his theory of law, the most characteristic feature of which was that "it openly and expressively presented law as an effective instrument of the Soviet Government, directed at the abolition of capitalism and the realisation of socialism."

Karl Renner, the Austrian jurist and socialist, expressed the view that law was not merely a superstructure but could actively express and influence the trend of social development. Renner explained in careful detail how legal forms were the superstructure under which the real relations of capitalist production went on and how the forms were used to serve and foster such relations. He exposed the coercive reality behind the bourgeoisie legal facade of "free choice and fairness." Let us now peep into the legal facade in India and see if there is any lesson for us to learn.

## II

We are at a critical stage of the history of our country. A process parallel to the one which preceded the bourgeoisie rise to power is under way. Even as feudal legal ideology was challenged by the bourgeoisie in the course of its rise to power, the bourgeoisie legal ideology is now under repeated challenges, and claims for justice are being made by the exploited and the underprivileged groups, demanding interpretation of the laws in ways advantageous to them. The anti-monopoly, egalitarian values of the bourgeoisie ideology are being converted into claims to equal access to national wealth. The bourgeoisie's claims of freedom of association and procedural fairness are used for purposes of organization and for defending themselves against attack from the institutions of state power. There are many examples of confrontation between bourgeoisie legal ideology as administered today and the insistent demands of workers, peasants and students. The system of organization and production of private profit is unable to meet the needs of these rules and the existing ideology is unable to accommodate the demands for freedom and fairness. While the rising proletariat in its confrontation with the bourgeoisie relies upon the very principles and freedom earlier championed by the bougeoisie, the ruling class will naturally attack and curtail those very principles and freedom. It is for the juristic community to address itself to the

question of the challenges to the existing system of social relations and its legal ideology, the articulation of those challenges and the effective transformation of legal ideology to accommodate and spearhead fundamental changes.

Let us take a cursory look at recent legal history to explain my point. Over 30 years ago, the forces of change spearheaded by the emerging Indian bourgeoisie, inspired by the ideals of liberty, equality and justice, put an end to colonialism and feudalism. These were the very ideals which the colonial lords claimed had inspired them in their fight for survival against the fascist forces of Germany, Italy and Japan. The colonial rule of the British came to an end with the passing of the Indian Independence Act 1947 and the feudal authority of the princes similarly ended with the signing of the instruments of accession by the princely states. The same forces of change led by the same but triumphant bourgeoisie gave us the Constitution. Their memories still green and fresh from the battles with colonial and feudal forces, the Constitution makers recognized certain freedoms and rights as basic and incorporated several articles in the Constitution guaranteeing as fundamental rights, the right to equality before the law, right to equal opportunity, freedom of speech and expression, freedom of assembly and association, freedom of movement, right to life and personal liberty and so on. The bourgeoisie, however, was careful enough to forge an armour for their protection, first, by subjecting some of the fredoms to reasonable restrictions; second, by including the right to property among the fundamental rights; third, by providing for preventive detention; and fourth, by relegating rights of great importance such as the right to an adequate means of livelihood, right to share the material resources of the community, right to equal pay, right to easy access to justice, right to work and right to a living wage to the category of directive principles which could not be enforced in a court of law. It was apparently through that the judiciary, steeped in the British tradition but ready, when necessary, to borrow from American jurisprudence (sorry, I am not referring to lease-lend or other American aid programmes), could always be relied upon to assert and expound all the maxims of interpretation perfected by the bourgeois in Britain and America. The Supreme Court was especially entrusted with the task of protecting fundmental rights.

## III

A careful and critical examination of legislative and judicial events during the last three decades or so will reveal how the battle between the bourgeoisie and the freshly developing forces of change has been continuously going on the legal front.

Soon after the emergence of the bourgeoisie as the ruling force, the bourgeoisie, still retaining some of its character as a revolutionary force,

put an end to the last vestiges of feudalism by the enactment of legislations abolishing zamindaris in the various states. Zamindars fought last ditch, losing battles in courts against the onslaught of the bourgeoisie, but the rulers were quick to pass the Constitution (First Amendment) Act 1951 and Constitution (Seventeenth Amendment) Act 1964 so as to prevent any challenge to the legislations by the zamindars. The validity of these amendments was upheld by the Supreme Court in *Shankari Prasad*[1] and *Sajjan Singh*[2] respectively. In both these cases the court upheld the power of Parliament to amend the Constitution, including the power to abridge or take away any of the fundamental rights. Later, the Supreme Court went back upon its earlier view and, in *Golak Nath*[3] the majority of the court denied to Parliament the power to amend the Constitution so as to abridge or annul any of the fundamental rights. It is important and interesting to note that what was in question in *Golak Nath* was the vires of a statute imposing a ceiling on holding of land, a question vitally affecting the interests of bourgeoisie land owners. It was not an accident but, in truth, it represented the resistance successfully offered by the bourgeoisie against the invocation against them of the very principles for which they said they had fought earlier. *Golak Nath* represents the high watermark of the bourgeoisie effort to invoke the court's aid to make a fortress of fundamental rights against inroads by the forces of revolution or fundamental change by legislations to further the directive principles. What is of importance for our present purpose is that both *Golak Nath* and the earlier cases were victories for the bourgeoisie-in the one bourgeoisie taking the role of the revolutionary forces against feudalism and in the other against the revolutionary forces.

## IV

Very soon after the coming into force of the Constitution, a question affecting personal liberty came before the Supreme Court in *Gopalan*.[4] A.K. Gopalan, a communist, was detained without trial under the provisions of the Preventive Detention Act 1950 with a view, it was said, to prevent him from acting in any manner prejudicial to the security of the state and the maintenance of public order. He claimed, among other grounds, that the fundamental rights guaranteed by article 19 (1), clauses (a) to (g) generally and clause (d) in particular, had been denied to him as the law providing for preventive detention did not prescribe a fair procedure. His argument was that the provisions of article 19 should be read into the provisions of articles 21 and 22. The Supreme Court held that article 22

1. *Shankari Prasad* v. *Union of India*, A.I.R. 1951 S.C. 458.
2. *Sajjan Singh* v. *State of Rajasthan*, A.I.R. 1965 S.C. 845.
3. *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
4. *A.K. Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27.

was not controlled by article 19 and that the validity of a law providing for preventive detention could not be judged in the light of the test prescribed by clause (5) of article 19 (1) which enabled Parliament to impose reasonable restrictions on the exercise of the fundamental rights guaranteed by clauses (d), (e) and (f). In other words, it was held that the detenu could not claim procedural fairness as a fundamental right. Thus freedom was denied to the detenu. Years later, the question whether the provisions of article 19 could be read into other fundamental rights guaranteed in part III of the Constitution came up for consideration in *Bank Nationalization.*[5] The right involved was a right to property and the court, showing a greater sensitivity to the bourgeoisie concept of the right to property, went back on its view in *Gopalan* and held that a law providing for acquisition of property had to satisfy the requirements not only of article 31 but also of article 19. It was expressly observed that the assumption in *Gopalan* that certain articles of the Constitution exclusively dealt with specific matters and excluded the applicability of its other articles was incorrect. Thus procedural fairness was assured to the citizen. What is important for our present purpose is that *Gopalan* as well as *Bank Nationalization,* though enunciating contrary principles, were both victories for the bourgeoisie. How the principle enunciated in the *Bank Nationalization* has been seized upon by forces of fundamental change to demand fairness in other matters will be explained presently.

## V

I mentioned earlier how in *Golak Nath* the Supreme Court held that Parliament had no power to amend or abridge any of the fundamental rights. Soon after it was pronounced, the decision came under vigorous attack by academics, lawyers, parliamentarians and the forces of revolution. The matter was reconsidered by the Supreme Court in *Kesavananda Bharati*[6] where the full court held that *Golak Nath* was wrongly decided. Even as the forces of revolution appeared to succeed in getting *Golak Nath* reversed, the bourgeoisie appeared to score a victory by persuading the court to rule that Parliament did not have the power to amend the Constitution so as to alter its basic structure. Another citadel was thus built around the Constitution. What the basic structure was, the court did not explain. It thus reserved to itself the power to adjudicate upon every future amendment of the Constitution to decide whether or not the amendment altered the basic structure of the Constitution. Both the bourgeoisie and the forces of change are taking advantage of the decision to contend that whatever amendment is disadvantageous to them alters the basic structure of the Constitution. Recently, in the *Land*

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5. *R.C.Cooper* v. *Union of India,* A.I.R. 1970 S.C. 564.
6. *Kesavananda Bharati* v. *State of Kerala,* A.I.R. 1973 S.C. 1461.

*Reforms* cases[7] the Supreme Court upheld the validity of land reform laws enacted by several states—a victory for the forces of change; while in *Minerva Mills*[8] the court dethroned the directive principles from the primacy which they had been given by the Constitution (Forty-second Amendment) Act 1976—a clear victory for the bourgeoisie. It remains to be seen how the basic structure theory propounded by the bourgeoisie is going to be used by the forces of change to advance the cause of fundamental change.

## VI

Though the Supreme Court denied freedom to Gopalan, in several subsequent cases it stood firmly on the side of freedom and liberty and, therefore, on the side of progress and change by insisting that even if one among several grounds alleged against a detenu was vague or irrelevant, the detenu was entitled to be set at liberty. A great habeas corpus jurisprudence was evolved and all credit goes to those who evolved it. But a violent blow was struck to all progressive forces when, during the internal emergency, in *Shivakant Shukla*,[9] the Supreme Court pratically destroyed, for the time being, the writ of habeas corpus by shutting its very entry doors. The resurgent classes, however, soon asserted themselves and in later cases the court has been made to make full use of the principles of natural justice and procedural fairness, the latter being the principle first enunciated in *Bank Nationalization*. *Maneka Gandhi*[10] was a clear victory for the forces of change. Though seemingly the question was merely one of seizure of a passport, the basic issue considered by the court was whether procedural fairness was implied in article 21. It was held that it did and that a law which encroached upon the fundamental right to life and liberty guaranteed by this article had to satisfy the requirements of both articles 14 and 19 and, therefore, any such law could not be arbitrary, unfair or unreasonable. The withering article 21, which had been mauled severely by *Gopalan* and almost fatally by *Shivakant Shukla*, was thus rejuvenated.

The Supreme Court also evolved a whole jurisprudence around the principles of "natural justice" and "ultra vires" in the cases of *Kraipak*- and *Indo Afghan Agencies*.[12] The forces of progress and change are now armed with two formidable weapons, namely, "natural justice" and "ultra vires" against arbitrary action by the ruling classes in the name of adminis-

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7. *Ambika Prasad* v. *State of Uttar Pradesh*, A.I.R. 1980 S.C. 1762; *Nand Lal* v. *State of Haryana*, A.I.R. 1980 S.C. 2097.
8. *Minerva Mills Ltd.* v. *Union of India*, A.I.R. 1980 S.C. 1789.
9. *A.D.M. Jabalpur* v. *Shivakant Shukla*, A.I.R. 1976 S.C. 1207.
10. *Maneka Gandhi* v. *Union of India*, A.I.R. 1978 S.C. 597.
11. *A.K. Kraipak* v. *Union of India*, A.I.R. 1970 S.C. 150.
12. *Union of India* v. *Indo Afghan Agencies*, A.I.R. 1968 S.C. 718.

tration. Any administrative action taken without hearing the affected party or taken by a party who is himself interested in the lis may now be questioned in a court on the ground of failure of natural justice. Judges are so particular about these rules that even an appearance of bias has been held to be sufficient to invalidate an order even if actual bias is not proved. The other rule of natural justice is the rule known as the rule of *audi alteram partem*. In practice this is the most frequently invoked rule of natural justice. Courts have not hesitated to strike down orders passed on evidence not disclosed to the party concerned. Even if the party is unable to prove prejudice they have held that it is prejudice to any man to be denied justice, that is to say, to be denied a hearing. *Mohinder Singh Gill*[13] and *New Delhi Municipal Committee*[14] have expanded the horizons of natural justice. Similarly an administrative action affecting a party based on irrelevant grounds or without taking relevant grounds into consideration or for reasons which are mala fide may also be now questioned in a court on the ground of ultra vires. The doctrine of ultra vires is meant to keep administrative authorities within the bounds or limits of their authority.

## VII

In the last few years, on several occasions, the Supreme Court has been taking the bull by the horns and transforming and reorienting legal ideology. I have already referred to *Maneka Gandhi*. In *Ranganatha Reddy*[15] the court decided that "distribution of material resources of the community" fully covers nationalization of the means of production as well as the goods produced. The decision is of great significance and its effect is bound to be far reaching. There are other decisions[16] of the Supreme Court, where the equality clauses of the Constitution have been used by the court as tools to further the cause of the underprivileged classes. The court has taken a leap forward by giving suitable direction to authorities in the matter of distribution of seats in the medical colleges and appointments to the services and so on. Again, in *Ratlam Municipal Council*[17] the court took a long leap by giving directions to a municipality to make arrangements for public sanitation under the supervision of the court. The court is no longer content with striking down an offending administrative order, but is taking positive steps to ensure the working of the equality clauses in favour of the underprivileged classes. In the case of the undertrial

13. *Mohinder Singh Gill* v. *Chief Election Commissioner*, A.I.R. 1978 S.C. 851.
14. *S.L. Kapoor* v. *Jagmohan*, A.I.R. 1981 S.C. 136.
15. *State of Karnataka* v. *Ranganatha Reddy*, A.I.R. 1978 S.C. 215.
16. See, e.g., *K.S. Jayasree* v. *State of Kerala*, A.I.R. 1976 S.C. 2381; *State of Kerala* v. *N.M. Thomas*, A.I.R. 1976 S.C. 490; *Jagdish Saran* v. *Union of India*, A.I.R, 1980 S.C. 820.
17. *Municipal Council, Ratlam* v. *Vardhichand*, A.I R. 1980 S.C. 1622.

prisoners of Bihar, the Supreme Court has exposed the inherent weakness and abuse of the existing system and is in the process of evolving new techniques to deal with strange situations. In the case of *Hoskot,*[18] *Sunil Batra,*[19] *Charles Sobhraj*[20] and *Hussainara Khatoon,*[21] the Supreme Court has developed new techniques for dealing with the complaints of prisoners and their demands for humane treatment, legal assistance and justice. I may also mention here that the Andhra Pradesh High Court has, in some cases, relying on the fundamental right guaranteeing equality of opportunity in the matter of public employment, held that a person cannot be denied employment on the ground of his political beliefs.[22]

It is in this context and situation that those of the juristic community desiring fundamental change must take the initiative at every opportunity, not merely to expose the weaknesses and contradictions of the present system of social relations and the legal ideology which protects it, but to demand that the equality clauses, freedom clauses and liberty clauses of the Constitution be honoured and that the promises made in the part on directive principles be kept. Repeated attempts will be made to suppress the rights of the working classes and the peasants and it will be up to those who are committed to fundamental social change to prepare themselves for arduous legal battles to protect and conserve those rights and to evolve a new legal ideology and technique which will link the judicial process with social change.

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18. *M.H. Hoskot* v. *State of Maharashtra,* A.I.R. 1978 S.C. 1548.

19. *Sunil Batra* v. *Delhi Administration,* A.I.R. 1978 S.C. 1675; A.I.R. 1980 S.C. 1579.

20. *Charles Sobhraj* v. *Superintendent, Central Jail,* A.I.R. 1978 S.C. 1514.

21. *Hussainara Khatoon* v. *State of Bihar,* (1980) 1 S.C.C. 88, 91, 93, 98, 108, 115.

22. *A. Rama Rao* v. *Post Master General,* 9 A.P.L.J. (1975). See also *Kullur Vasayya* v. *Superintendent, Post offices* (W. P. 4037 of 1979, decided on 1 February 1980).