# TOWARDS MORE PURPOSEFUL LEGAL RESEARCH

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MUCH HAS been written on the techniques which a researcher in law should follow to achieve both depth and clarity in his presentation. The intensity of research demanded by the highly specialised nature of legal studies today can only be achieved by a close regard to the detailed methodologies that have been worked out in the field of legal research. I do not propose in this article to expand on any of these aspects, which will no doubt be the subject of adequate and expert examination in the other contributions to this volume.

I wish, however, to use this opportunity to make a plea for some aspects of research which in my view tend all too easily to be neglected owing to the current pressures for deep research into black-letter law. The compelling demands of black-letter legal research can sometimes be counter-productive especially in an Asian context, for the social milieu against which the laws researched have their operation is too important to be neglected. This is often vastly different from the social milieu against which corresponding European law might have had its origin and it is not uncommonly a warped result that can ensue from an exclusive concentration on the black-letter aspects alone.

I would stress in the first instance the importance of cross-cultural research. Very often a piece of legislation or a judgment might involve a basic principle of natural law which can be related to the local cultural context. A question such as the right to just and fair condition of work is not adequately researched if one looks to the black-letter law alone. Lawyers all too often tend to ignore the fact that the religious and cultural heritage of the people they work for, may often offer valuable insights into the manner in which that particular community traditionally approaches these questions. If for example the ancient literature is surveyed, one would find in the Hindu writings many references to the just treatment of servants and employees. Buddhist literature likewise contains clear-cut delineations of the duties of employers and employees towards each other[1]. To research the question of the rights of workers

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1. T.W. and C.A.F. Rhys Davids (Eds.), *The Dialogues of the Buddha* 180-183 (*Pali Text Society*, 1977 ).

entirely in the context of the modern European and international discourse on this topic, is an approach which at the least is defective and inadequate.

Likewise, the notion of the welfare state with all the obligations this imposes upon the government is not a modern Western invention but goes all the way back to the *Shantiparva in the Mahabharatha*, to Kautilya's *Arthasastra* and many other writings. If one goes further afield into Chinese literature, the writings of Mo Tzu (470-390 B. C.) strike a similar note: " ... to be an upright ruler of the world one should first attend to his people and then to himself. Therefore when he finds his people hungry he would feed them, and when he finds them cold he would clothe them. In their sickness he would minister to them, and upon their death he would bury them. Such is the word and such is the deed of the universal ruler".[2]

This traditional and cultural background cannot fail to be of value to an Asian judge called upon to administer modern rules in an intensely traditional society. Indeed our perception of the rule of law cannot but be enriched by such illuminating discourses as that of the Buddha on the Ten Duties of a King.[3] The Fourth Duty—freedom from fear or favour and the Tenth Duty—conformity with the will of the people—have intense relevance to the entire concept of the rule of law. So also the ensuing advice of Khalif Omar, thirteen centuries ago to one of his judges, cannot but be of relevance to modern judicial practice. "If yesterday thou hast given a judgment but upon reflection thou findest reason today to correct thy opinion, do not hesitate to follow the truth as thou seest it, for Truth is eternal and it is better to change to the Truth than to persist in error."[4] The relevance of the principle involved cuts across differences of culture and legal methodology. An Asian country fashioning its own jurisprudence cannot be insensitive to such deep currents running through its justice traditions. Too great a dependence on formalistic Western rules can hinder our legal systems from evolving the indigenous jurisprudence which ought to be each country's legal goal.[5]

The advancement of this view is not intended for a moment to suggest any unbridled license to follow the traditional at the expense of

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2. Y.P. Mei (Tr. and Ed.), *The Ethical and Practical Works of Motse*, Vol. I, 70-73 (Arthur Probsthain, London, 1929).

3. W. Rahula, *What the Buddha Taught*, 84-6 (The Gordon Fraser Gallery, 1959).

4. de Slane (Tr.), *Les Prolegomenes D'Ibn Khaldour*, Part I at 449 (Geuthner, Paris).

5. The author has explored some perspectives regarding the cross-cultural approach to legal studies in his *An Invitation to the Law* (Buttetworths, 1982), while perspectives of justice in Third World jurisdictions have been more extensively explored in his *Equality and Freedom: Some Third World Perspectives* (Hansa Publishers, Colombo, 1976).

the modern. It only suggests that in many instances the traditional can add depth and richness and can supply a sense of perspective and direction to our considerations of the problems of the present. We would be at fault if we were to disregard the deep roots of our justice traditions merely because the basic framework within which we now function is Western.

One principle of justice which modern jurisprudential thought has made crystal clear is that legal institutions and concepts, when transplanted from the land of their origin into an alien soil, must in their development take on the flavour and traditions of their new home. Though the common law was once thought to be an identical organism whether developing in England, Australia, Canada or India, all jurisdictions now recognise that it must develop differently in its different homes. If this principle is now jurisprudentially incontrovertible, its natural extension is that the sources of nourishment lying deep in its new soil must be tapped, however Western-oriented a system might have been at the time of its transplantation. Perhaps we do not delve deep enough, having regard to the richness of our native soils.

Indeed it happens not infrequently that concepts and procedures which we consider to be totally alien to us are deep-rooted in our ancient institutions. An outstanding example readily coming to mind from the sphere of parliamentary practice, relates to the procedure of the ancient Buddhist councils of India. In the words of the Marquis of Zetland, a former Viceroy, "It is, indeed, to the Buddhist books that we have to turn for an account of the manner in which the affairs of these early examples of representative self governing institutions were conducted. And it may come as a surprise to many to learn that in the Assemblies of the Buddhists in India two thousand years and more ago are to be found the rudiments of our own Parliament practice of the present day. The dignity of the Assembly was preserved by the appointment of a special officer—the embryo of Mr. Speaker, in the House of Commons. A second officer was appointed whose duty it was to see that when necessary a quorum was secured—the prototype of the Parliamentary Chief Whip in our system. A member initiating business did so in the form of a motion which was then open to discussion. In some cases this was done only once, in others three times, thus anticipating the practice of Parliament in requiring that a Bill be read a third time before it became law. If the discussion disclosed a difference of opinion, the matter was decided by the vote of the majority, the voting being by ballot."[6] If this example comes as a surprise to us it shows how far we have lost contact with our cultural roots.

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6. G.T. Garratt, *The Legacy of India*, with an Introduction by the Marquis of Zetland (1937).

No suggestion must be inferred from the foregoing remarks, of any plea for a return to any kind of cultural or national insularity. The reverse is the case, and the plea set out here is for a broadening of perspectives through intercultural research.

The need for such research is all the greater in the face of the constant assertion that the enterprise of modern law making in a country such as India often necessarily runs counter to the ingrained Volksgeist of the Indian people.[7] Contrary to such suppositions there is no inherent inconsistency between the traditional Indian wisdom regarding justice and the most advanced justice thinking of the West. The ideals of justice implicit in the context of *dharma* or of the noble eightfold path embody the very ideals towards which the most sophisticated Western jurisprudence is striving. The black-letter rules of modern legislation are only a mechanism towards reaching that goal, but the yardstick by which their acceptability must always be tested is the concept of justice, towards an understanding of which traditional Indian learning can make an outstanding contribution. As one who is interested in the cross-cultural aspects of justice, I would like to see more intensive research done by the younger generation of legal scholars on this aspect of India's rich juristic inheritance.

At another level, the thesis here advanced is that legal research ought not to content itself with the strictly legal, but should explore also the interface areas between law and the other disciplines. These interface areas are many, and without some little attention to them we would fail to see the proper dimensions of a legal problem. Today we are becoming increasingly aware of the largely untilled border lands between law and sociology, law and history, law and technology, law and political science, and many other disciplines. The longer we delay working in these fields the longer the lawyer will earn for his profession the criticism that it is parochial, narrow and self centred.

It is true that the presentation of a matter in court still centres largely around the strictly legal, and it is a rare judge who would entertain a sociological argument such as forms the subject matter of the well-known Brandeis brief prepared for Mr. Justice Brandeis of the U.S. Supreme Court and involving much information of a sociological nature.[8] However the time is fast coming when, if not in the direct presentations before a court of law, at least in the literature which helps to mould

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7. See the thoughtful comment on this aspect by Julius Stone, *Social Dimensions of Law and Justice* 112-114 (Maitland, 1966). The present author does not read this reference as suggesting an inherent antipathy between the Indian Volksgeist and modern legal ordering, but only as suggesting that the materialist basis of modern Western legal ordering is contrary to the Indian ethos.

8. Julius Stone, *Legal System and Lawyers' Reasonings*, 48, 68 (Maitland, 1968).

professional and legal opinion, there is a place for this sort of research. An early instance was the judicial use of divorce statistics by the majority of the court in *Fender* v. *Mildmay*.[9] From the professional angle, extra legal data have been presented 'as appendices to appellants' briefs in U.S. cases, as for example in *Brown* v. *Board of Education*,[10] where there was an appendix on the effects of segregation and the consequences of desegregation. Such instrusions into the strictly legal arenas of extra legal material require interdisciplinary research skills if the information is to be controlled and usefully presented. There can be little doubt that we are moving into an age when the insights afforded by other disciplines will not so readily be declined by the bench as they have been in the past, but this throws on legal researchers a more onerous task than has been imposed on them by prior research requirements. The adequate legal researcher of the future will need to have interdisciplinary skills as well, and in particular, skills which will enable him to breach the walls currently separating legal from sociological expertise. Indeed, I venture to hope that the law schools of the future will add to their curriculla some item of compulsory exposure to the methodologies of sociology, without which the future lawyer will be inadequate to the tasks before him. Over a period of time this will necessarily help in forming judicial and professional attitudes which after all are the fountainhead from which the strictly legal opinion derives.

A useful illustration of such forward-looking judicial attitudes is the practice by which the Supreme Court of Japan has available to it the services of a judicial research arm. This consists of around 40 experienced officers drawn mainly from the minor judiciary, who have expertise in various areas of law and sociology and make their knowledge available in the preparation of briefs for the justices. In the famous *Iyenaga* case,[11] where a university professor challenged the right of education department to interfere with his script for a school textbook on politics, the judges of the Supreme Court had the benefit of the researches of the judicial research arm. The researchers placed before the judges information regarding similar matters in every country of the world, so as to give them a comprehensive background to the current internal approaches to this question.

The idea underlying this institution of the Japanese Supreme Court is one which is well worthy of examination by countries such as India before whose Supreme Court the most varied and far-reaching questions of law arise. It is beyond the competence of even a most erudite and

9. (1938) AC I.

10. (1954) 347 US 483.

11. See Itoh and Beer, *The Constitutional Case Law of Japan : Selected Supreme Court Decisions* 14, 20 (University of Washington Press, 1978).

painstaking judge to research adequately the multitude of legal and law-related aspects which surface in the course of the hearing of such a case, and there can be no doubt of the continuing contribution to the law that can be made by such an institution. All other considerations apart, it will also help the judges to see the problems before them in context—an ability which purely legal research may sometimes fail to supply.

Of course an important judicial and perhaps constitutional question arises when one seeks such extraneous aids to interpretation and to judicial decision. However we do not today take the same rigid and narrow view of the judicial function as was customary a generation ago, and the time has come for a broadening of judicial perspectives. Scholars like Julius Stone have been at pains to point out that the judicial process is not truly what it has long been purported to be,[12] and that a large number of other factors than the strictly legal and logical come into the mix of considerations which result in a judicial decision. In the tempestuous times in which we live, it may well be damaging to the judicial institution for the judges merely to honour outmoded fictions and shibboleths regarding the judicial function and to shut their eyes to the social and other realities which surround the subject matter of their decisions.

I am not for a moment suggesting that the judges should take into account matters other than those on which they have been addressed. I do plead however for an attitude which will permit the citation to court of material which according to traditional views might not have been permissible. We are now well into an age when the interaction between law and sociology is well recognised, and we cannot let our judiciary discharge the high task entrusted to them within narrow legalistic confines and without a view of matters whose relevance to their determination is now well admitted.

I know this view treads on .controversial ground but I am putting it forward as a matter for serious debate and consideration at a time when the question of judicial and legal research is specifically under examination in the context of an age which demands a broader view of the concept of justice.

If, as Stone and others point out, the social realities and the judges' appreciation of them are in fact factors that enter into the judicial decision, though this fact is not specifically admitted, one can see no reason why the fiction should not be discarded and the fact more frankly admitted.

The Indian Law Institute has always been in the forefront of legal research in India, and I am especially pleased and honoured to have the opportunity of making a contribution to a publication of this Institute ... devoted to the question of legal research. The debates which originate

12. See *supra* note 8.

in this centre of research must necessarily produce their impact throughout the vast and varied range of academic and judicial discussion in India. Working as it does on the frontiers of legal thought on the sub-continent, this Institute has provided, and will continue to provide, stimulation and inspiration to the ongoing legal debates in what must surely be one of the most interesting and varied jurisdictions in the world.

This brings me to another aspect of my presentation. There are more diverse cultural, religious, racial, social, economic and political problems in India than perhaps in any other country of the world. There is at the same time in India an immense and skilled reservoir of legal talent—forensic, academic and judicial—for handling this vast variety of problems. The Indian judiciary has an international reputation for its independence, integrity and scholarship. It may well be that a heavy responsibility devolves upon the academic fraternity in India to assist the judiciary in taking a broader view of the matters before it and increasing the relevance of the judicial decision to the practical problems which it seeks to solve.

A narrow methodology of *stare decisis*, as practised by the English judiciary, combines in the hands of the Indian judiciary with a plenitude of constitutional power as exercised by the American. Provided the academic branch of the Indian legal profession back it up with a strong body of socially integrated legal research, the Indian judiciary can stride ahead on a path of its own, carving out for itself a unique and distinctive role among the judiciaries of the common law tradition. Situated in the midst of the world's richest mix of cultural traditions, at the heart of the issues involved in the North-South debate, at a confluence of Eastern and Western jurisprudence, amidst the challenge of harmonising legal precept and social need, the Indian judiciary can afford to do no less. If it encounters difficulties in striking out on such a realistic and pioneering path, the confinement of legal research within the straitjacket of the *stare decisis* tradition will be one of the principal causes. For this the academic world may have to take some share of the blame.

It is essential that those undertaking legal research in our time do not capitulate to the demands of excessive specialisation. One of the requisites of our time in relation to study and research of any description is extreme specialisation. One needs to become more and more expert in an area which becomes progressively ever smaller. Even within this limited field the pressures are such that more intensive work is demanded if one is to hold one's own against competition. These pressures constrict horizons and attitudes in a manner which was not true of research a century or even a generation ago.

A fundamental need therefore in relation to modern researches is to caution our researchers that while much will be expected of them within

their speciality, it will be insufficient for them to become one-eyed workers in their narrow fields. The danger of falling into this trap is greater today than ever before. Institutions like the Indian Law Institute have an unrivalled opportunity to draw attention to this danger and to warn against it.

Psychologists tell us of the distinction between "convergent" and "divergent" approaches to knowledge.[13] A converger homes in on his chosen topic, investigates it with a fierce intensity, and within the confines of his topic becomes a master of his field. All his skills and knowledge converge upon the area of investigation, and he is too busy to look outwards from it.

The diverger on the other hand commences from his given topic and looks outwards rather than inwards. He attempts to trace interrelationships between the principles he studies and those of other disciplines. He sees his task in its proper setting, against the background of relevant knowledge and moves outwards from the particular to the general.

Either attitude by itself is insufficient. The two exist to complement each other, and without their interaction, we are indulging in research that can only be regarded as lopsided.

The influence of positivism in jurisprudence as well as more generally in the field of intellectual activity has been particularly responsible for cramping and confining such intellectual attitudes in the law. While positivism teaches us that we must be analytical, specific and precise, it also tends to induce a belief that philosophical speculation and the search for broader perspectives have no place. Indeed, Bertrand Russell has observed that there is within the positivist movement a shared contempt for metaphysics and "the rejection of all philosophic speculation as gibberish."[14] Such an attitude can be dangerous in the law, and we must avoid the peril of our young researchers losing the perspective of the wood for the trees.

Unfortunately, research in the context of legal practice, tends all too often to be positivistic under the stress of the immediate needs of the case. This is where universities and, in particular, an institution of the stature of the Indian Law Institute, can help to correct the balance.

In short, I would like on this important occasion to make a plea for research that is both thorough and broad, research whose precision does not impair its appreciation of the perspectives, research which is both convergent and divergent, research which is both interdisciplinary and intercultural. This is an urgent demand of our times and it is a challenge which the lawyers of India with the guidance of the law schools and the Indian Law Institute should be ready to meet.

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13. Liam Hudson, *Contrary Imaginations* (Methuen, 1966).
14. *The Wisdom of the West* 306-7 (Crescent Books, 1959).