

The restructuring of the legal profession

K.G. Kannabiran

After the Constitution was brought into force, the lawyers who were entrusted with the task of interpreting the Constitution, started functioning with the usual colonial vision in the matter of liberty and began championing the interests of the propertied classes and upper caste privileged people. The organs of the State—the judiciary, executive and legislature are yet to be restructured in terms of the Constitution. At one stage all laws enacted by the British for containing freedom struggle were adapted without even discarding the statement on object of these laws. The administrative system still continues the tradition of the British days when allotment of cases to various judges still vest with Chief Justice of the Court. Not only that the appointment of judges of the High Court and their elevation to higher positions is done neither through a selection process nor through the process of election. Even though the one-million strong legal profession supplies all judicial officers and judges of the High Court and of the apex court, the profession has got no role to play in staffing the judiciary. It is high time that the Bar Council Act was amended and the All India Bar Association was given a statutory consultative status in the appointment of judges.

ALEXIS DETOCUEVILLE, in his *Democracy in America* wrote "If I were asked where I place the American aristocracy, I should reply without hesitation ... that it occupies the judicial bench and the bar. Though a couple of centuries separate us from this statement it has, yet, a very contemporary ring. More so after the arrival of globalization which is currently having an untrammelled run despite the Constitution or the judicial system which is presumed to aid governance towards the limited social transformation the Constitution has mandated. Our Constitution was born at the time of capitalist system's initial collapse leading to great depression of 1928 that pushed leading Western economies into a crisis. It was then that John Maynard Keynes the great economist of bourgeois persuasion in his *General Theory* argued successfully that ensuring of full employment would provide the necessary scaffolding that would prevent repeated collapse of the capitalist system. It was from then on all the western countries adopted deficit financing and planning. America's New Deal, Marshal Aid were the consequence more or less of the Keynesian

theory that ruled the field then, and as imagined by some ill informed intellectuals that the country adopted socialism coming under the influence of communist countries. Out of these principles emerged the theory of a welfare state and the concept of public planning to keep up the employment level so that such employment might put the purchasing power in the hands of the people so that the level of effective demand is maintained and so on. Sir William Beveridge wrote in those days that war alone can provide full employment in western societies. The Indian National Congress at that time wrote in its manifesto at the Avadi congress that their objective is to work for structuring a socialist pattern of society. Socialism was included by the 42nd. Constitutional Amendment after twenty five years of our Constitutional politics

A very indigenous objective in the Preamble tells us the state of the country and its people and what needs to be done to better their lives. The problems were debated and they made untouchability, bonded labour and child labour constitutionally declared offences. For proper enforcement they passed laws

for their enforcement in the subsequent years. These were included in Part III to provoke us into action for eliminating the system which permits these practices and promotes them as well. The Constitution provided us with philosophy of equality to be worked out in all facets of life. The society which the Constitution found on the day it received the approval of the Constituent Assembly was unequal socially, culturally, economically and politically. There was total absence of human dignity to majority of people. The caste system and intolerance towards the other faiths in the sub continent destroyed the flowering of equality. What was given us was only political democracy That is to say, we have been given mechanics hand book to govern our selves. Our governance is intended to enable us to proceed towards constitutional objectives it listed out in the Preamble, the Fundamental Rights in Part III, Fundamental obligations of governance in Part IV of the Constitution and to A new Part on Fundamental Duties in Part IVA of the Constitution was added and a reading of it will tell us how much we progressed. It is, in fact, a quarter century progress report of our society.

When the Constitution came into force we had lawyers practising in the British Indian Courts as private practitioners and lawyers engaged in courts on behalf of the colonial rule. With the commencement of the struggle for independence from its earliest stages lawyers assumed a dual character— the anti people professional responsibilities, directly defending the colonial political and economic interests and operating the colonial laws intended to strengthen the exploitative order set up and strengthened by British laws. They were formed into an elite class set apart from the struggling people. It is a different thing that some out of them joined the freedom struggle. This they did after giving up practising law. The lawyers were subjected to biting criticism by Gandhiji for their role in an interview with *Hind Swaraj* in the early twentieth century. They came mainly from propertied classes, very feudal and obscurantist in their outlook

and habits of thought. Whatever might have been its role in the freedom struggle after Independence and after the Constitution was brought into force, the profession and the institutions of justice ought to have been totally restructured with a view to play a role in bringing about Constitutional governance and creating a jurisprudence of interpretation to realize the Constitutional Objectives. That did not happen.

The lawyers who are entrusted with the task of interpreting the Constitution were functioning as before, with the usual colonial vision in the matter of liberty and in other cases they were championing propertied interests and the caste privileges of the upper castes. Nobody ever thought that their role under the Constitution needs a fresh look and a redefinition. It is necessary now to rethink these issues. When Benjamin Franklin was asked by the people who were watching Constitution making “what sort of Constitution are the constitution makers giving them”, he replied “A Republic if you can keep it.” They were not beset with the problems which we were beset with. They solved the problems of the indigenous population of American Indians by physically liquidated them. The Blacks they never thought was a problem because they considered them as chattel. Like Franklin, Ambedkar told the members present in the Constituent assembly that the Constitution gives them only political democracy, and they will have to work the Constitution for bringing about economic and social democracy. That we utterly failed to work the Constitution in the manner it was intended is evident. If the country is to be prevented from breaking up into a wilderness of arbitrariness we have to culturally and socially transform the society, We have a history of thousands of years with religions equally ancient and a caste system which has been with us for a few thousand years and a host of obscurantist practices which divided us to our detriment. Our Constitution took account of the inadequacies that hindered our progress and decided that we must commence to reverse the process.

When the Constitution came into force we did

not restructure the judiciary, the executive and the legislature in terms of the Constitution. The Parliament continued the habits of the federal legislature, the executive continued the colonial administration and the courts continued the tradition of the colonial courts. They were all institutions set up or continued by the Government of India Act 1935. We never noticed the transition made by the subjects of the British India into Citizens of free India. Justice Vivian Bose of the Supreme Court thought and wrote about the transition made by the British Indian subject into Indian Citizens, In *Virendra Singh vs. State of UP* {(1955) 1 SCR 415} he pointed out the consequence of the coming into existence of the Constitution very eloquently. "Every vestige of sovereignty was abandoned by the Dominion of India and the states and surrendered to the peoples of the land who through their representatives in the Constituent Assembly hammered out a new Constitution in which all were citizens in a new order having but one tie, and owing but one allegiance: devotion, loyalty, fidelity to the Sovereign Democratic Republic of India. At one stroke all other territorial allegiances were wiped out and the past obliterated except where expressly preserved; at one moment of time the new order was born with its new allegiance springing from the same source for all grounded on the same basis; the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction no reservation." This vision no other judge of the court had and in fact they discarded this vision and preferred the reality, namely, continuation of colonial practices in all the institutions of governance and the courts. In 1964 Justice Shah of the Supreme Court dealing with the same question said that nothing had changed at the stroke of twelve on the midnight of January 26th 1950 and the same continued and later in *Ummaji* (1986 SC) this reality was reiterated and the earlier views of Justice Shah in *Fideali* (1964 SC) was confirmed. By whatever means when power was transferred by the British there was a qualitative difference between colonial rule and Constitutional governance. The break with

the past was and is Perceptible and EVEN if such assumption is a misdepiction it has its uses. In this connection I'm reminded of Karl Llewellyn's words in the Common Law Tradition. He points out : For in all the work of men one major road to get needed things done right has always been, it always must be, the building of a faith that the work can be done as it should be done, that any right craftsmen can indeed come close to adequacy; and in order to maintain such a faith to maintain itself it seems to be well-nigh necessary for the ordinary individual craftsman, as well, that the ideal picture, in fact, is approached most of the time by many of his brethren, even if not by himself. In this aspect a complete misdepiction can have value. It can have value not only as an ideal and a symbol but as providing stimulus and spur by the very fact of its inaccuracy". If the Court recognized this as a break from the past then the debate as to how should one reorder things after the break would have taken place and would have resulted in a re-look at the Constitution. The failure at a crucial stage led. the President to adopt all laws enacted by the British for containing freedom struggle and adapted without even discarding the statement object of these laws which specifically state which stage of freedom struggle it was intended to be against. The Parliament was not able to author their privileges in terms of the Constitutional value system. Even today we have not reset the administrative system within the higher judiciary. The same colonial practice in the power of allotment of cases to various judges of the High Court still vest with the Chief Justice of the Court. In the British days the Chief Justice was invariably a British Judge. It was in the interests of Imperialism that such extraordinary power was vested in the Chief Justice. Is the continuation necessary? Should not the administration of the judiciary be democratized and made more transparent?

I think the process of reversal to sanity and sense should come from the legal profession. They have to play a key role to rid us of the tyranny of interpretation by the courts in favour of privileged classes and castes, the propertied and the wealthy

classes and in favour of the dominant community as against the poor and the minorities in the plurality of our society. The restructuring the profession will provide better men and women to the judiciary.

The strength of the legal profession as of today is ten lakhs. It is a huge and growing constituency. For many who join as lawyers the profession has become a substitute for employment. This factor has to be taken into account for purposes of regulating the profession. One has to bear in mind that the profession has been supplying all judicial officers and judges of the High Courts and the Supreme Court and all presiding officers of bodies constituted under other Acts. Despite this fact this profession has no role to play and it has not even a consultative status in staffing the High Court and the Supreme Court. For the lower judiciary there is a process of selection. For the appointment of judges of the High Court, the constitutional appointments there are neither a selection process, nor is there an election process. They are just appointees with enormous powers and are accountable to none. These have been debated perhaps more frequently from V Ramaswamy's impeachment. It was then realized how difficult it is to rid of High Court Appointee. We encountered these when the members of Chennai Bar started lobbying with political parties to launch the impeachment proceeding against him. Rejection of couple of names sent to the President for elevations were over ruled quite summarily. The accusations made against Mr. Anand by Sundaram or against Sabherwal the recently retired Chief Justice all tell us that if at the appointment stage it cannot be checked they become the hunter (VETHAL) riding on the backs of the people.

All the methods of reforming the judiciary have been till now non-starters. From the Method evolved in the Second Advocates on Records case to M N Venkata Chaliah's Constitution Review Committee's suggestions for reforming the judiciary have entrusted the power of appointment to an exclusive oligarchy and these small committees with secretive decision-making process will always turn into oligarchies exercising arbitrary powers. Even Mr.

Justice H R Khanna when asked by Morarji for his suggestions recommended yet another oligarchy. I think, lawyers who represent the litigant population of the country are best suited to select the Constitutional appointees as judges of the High Courts and further elevation. We are finding the difficulties of the people and the government for managing the errant judges. A bad judge once appointed is not amenable to any disciplinary jurisdiction. The only way found is to deport him to the neighbouring State. Is it politically ethical to transfer 'a not very good judge' and saddle him upon on unsuspecting litigant population on some other state? What evidence is there to verify whether his brokers are not brisk in the state to which he is transferred? This problem cannot be solved unless you devise a method by which principles of democracy and transparency inform these institutions.

In fact, Harold J Laski has examined in detail the matter of judicial appointments from the perspective of integrity and independence in the chapter on Judicial process in his *Grammar of Politics* from various angles but not from the angle in which we are looking at now. He found that judges in England and US were hardly independent. We have in the brief period of six decades found the Court to be very conservative, very casteist and anti-labour and have been championing the rights of the propertied classes. We are now examining it from the population of lawyers. When he wrote about it, population of lawyers would not have been as large as it is now and the scope of judicial review would not have covered so large a field as it is covering now. Judges' power rises along with the expanding areas of judicial review.

The burgeoning lawyer population which is an integral part of the judiciary—one of the wings of the State—is a factor that has to be reckoned with primarily on account of its numerical strength; secondly, because it is highly literate and has quality of strengthening the judiciary; thirdly, it provides judges of all categories; fourthly and more importantly, entrustment of this responsibility will

lead to its discipline and that will lead to rejecting all litigation which is destructive of Constitutional values. Fifthly, the profession and its members will not look at the Constitution as an adversarial document! Sixthly, I do believe that it will come to realize that Constitution was evolved by consensus, by a social understanding and the dogfight we witness in courts whenever reservations are made in favour of the backward classes or minorities will come to an end. Most of them may work for an all pervading equality etched out by the Constitution.

It is possible by debates at various levels to evolve method of consultation of this large constituency which has undoubted interest in a competent judiciary which may help the country in the realization of the

Constitutional objectives. It also will help harnessing these highly literate people to work for a cultural and social transformation as mandated by the constitution.

By restructuring the existing Bar Council Act by amending suitably converting it into a deliberating body in the matter of appointment of judges or give the All India Bar Association a statutory status and constitute a council from out of this body who will have a consultative status in the appointment of judges. The Bar associations may debate about the structure and the necessary framework for a statute. To ignore the claim of this population in the matter of structuring or staffing the judiciary would be a very undemocratic attitude.

Second Peoples Education Congress

Peoples Council of Education in association with the Homi Bhabha Centre For Science Education, Tata Institute of Fundamental Research will hold the **Second Peoples Education Congress on Science Education from October 2 to 5, 2008 at Mumbai** to critically appraise the state of science education in our schools, colleges and universities, and deliberate on the ways and methods of making it more universal, democratic, creative and people - orientated. The Peoples Council of Education has constituted a Core Group and a National Academic Advisory Committee for the purpose. Prior to the Congress, the Core Group will hold a series of regional and state wise workshops in association with universities, research institutes, and NCSTC – Networks and State Councils of Science. The details will be put up on the website <http://www.peoplescouncilofeducation.info>; <http://www.pecindia.info> and URL: www.hbcse.tifr.res.in from time to time.

Researchers, teachers, science communicators/popularizers and all others concerned with the theme of the Congress are hereby most cordially invited to participate in the Congress. Young scholars, teachers and grassroots workers are especially welcome to it. Request for participation in the Second Peoples Education Congress may be sent by post or email to the undersigned; with the following particulars as name, age, sex, place of work, residential and mailing address, telephone number and email, if any and title of the paper. Please also include a brief description of the nature of work in which you are involved.

Those interested in presentation of a paper/poster at the conference should submit the abstract of the same by May 15, 2008. The full text of the paper/poster should be submitted by June 30, 2008. All papers will be printed well in advance of the Congress. All abstracts/papers/posters must be submitted with three hard copies along with a CD.

Length of the abstract should be about 500 words and that of the full paper within 7000 words or 20 A-4 pages typed in 10 fonts. Papers can be either in Hindi or in English. The paper can be written either in Hindi or in English.

Abstracts of all accepted papers will be put on website by August 15, 2008

All participants will be required to pay the stipulated registration fee by June 30, 2008. All the registered participants will be provided free boarding and lodging, and the literature of the Second Peoples Education Congress. Since arranging accommodation in Mumbai is quite difficult, interested scholars are advised to register as early as possible.

Please write to the Local Secretary Dr. K.K. Mishra, Homi Bhabha Centre for Science Education, Tata Institute of Fundamental Research, V.N. Purav Marg, Mankhurd, Mumbai 400088 (Tel:)(O) 091-22-25555242, 25567711, (R) 022-22783204; e-mail: kkm@hbcse.tifr.res.in; Fax: 091-22-25566803; M: 9867210755 for accommodation well in advance.

We are happy to cordially invite you and your colleagues to the Second Peoples Education Congress. We shall be grateful to you for giving it wider publicity in all the departments of your university/college/institute and making this event known to your colleagues and friends. Let us try to ensure the participation of every creative thinker from your university/college/institute/ organization. (Contd. See page 237)

N. P. Chaubey, General Secretary, Peoples Council of Education, C/o ISSA, Iswar Saran Ashram Campus, Allahabad 211 004

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