

THE INDIAN CONSTITUTION AND JUDICIARY

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FORUM OF FREE ENTERPRISE

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THE INDIAN POSITION
AND JUDICIAL

"People must come to accept private enterprise not as a necessary evil, but as an affirmative good."

—EUGENE BLACK

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DR. P. B. MUKHARJI*

Law, justice and judges of India are today at the crossroads. The atmosphere in the country is filled up with the hubbub of debates and controversies, is clouded by confused thinking and ideologies and is marred by political attacks on the system and ideas by interested parties. This public controversy has produced many slogans. Some of them are "Committed judiciary", "Servile judges", "Politicians are the masters of judges", "the Executive alone is to determine the calibre of judges", "neither the Constitution nor the Courts can stand against the so-called voice of Parliament and the Executive, and judges must decide according to the so-called public opinion". There are many more similar slogans.

These battle cries indicate a misconception and misunderstanding of the whole problem. Misleading philo-

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sophies are used to support and contest these groups of contending thought. A new discovery is made about the social philosophy of the judges which has suddenly acquired a sinister meaning. Unless a man is of a particular social philosophy, he is not fit to become a judge or win the prizes of the judiciary. It disregards the signal fact that a social philosophy of a man or even a judge is not static but an evolving concept. Then there is looming large behind it, the question of class war and the classes from which judges are recruited. It is openly said with an aroma of modern logic that a judge from a particular class will always decide against some other class; a socialist judge, a communist judge, a capitalist judge, a traditional judge, an anti-tradition judge and so on.

I want you to view the entire scene with as much composure as possible in the circumstances.

At the dawn of history, justice was an individual notion. The problem then was an individual getting justice from another individual. The subject of this justice was crimes, personal laws of the family, marriage and children, private properties and of the prevailing morality and customs. Later on came further entrants into the fields—the tribes and the communities. Justice then became a question of tribal customs, tribal ownership, tribal wars and of tribal and communal rights and obligations. Then with the modern age came a further widening of the notion of justice. It began with the state regarded as an umpire and an arbitrator of the conflicts in society and the community, which developed on pluralistic lines of groups and interests. Gradually, the State became more involved as a direct participant in the

conduct, control and regulation of human behaviour in the totality of life including crimes, property, civil rights, personal rights, trading rights and taxation. In other words, modern State slowly emerged into a Welfare State. Social welfare is its main accent. It is no longer a mere police state or a taxing state.

As a result, we find today a vast body of laws, rules and regulations which touch a man's existence from life to death. On a proper administration of these laws, rules and regulations depends the happiness of millions of people. Economic prosperity, social expressions, happiness, cultural affluence and political and civic living—all depend upon the administration of law and justice. Justice has become a universal concept. Law and justice are today synonymous with life and living.

We have a Constitution. This Constitution is the common denomination of all laws, Acts and regulations in the country. They must obey the constitutional mandates, observe its prohibitions and follow its directions. Therefore, judges in India swear by the Constitution.

Ideally, a judge's first allegiance is to his own conscience. This conscience is shaped in a judge by his training, his education, his experience of the nature, of the working of human mind and behaviour in the affairs of life. This conscience is not a whim or idiosyncrasy of a judge. This is a trained and finished product which contains the element of evolving. This is basically rooted in reverence and respect of individual freedom which is the basis of all creative judgements. This conscience is the resultant of the complex forces which we call life.

His second allegiance is to the Constitution of India, which is the source of his appointment, which prescribes the oath of his office to uphold the Constitution and within the framework of which he has to fashion his legal and judicial concepts and cut his individual diamonds. Justice is a concept of a myriad-facet diamond. As no two individuals are the same, so different societies and cultures are not the same and therefore no two cases are similar. The Indian judges' commitment to the written Constitution is therefore absolute and yet elastic to suit the varying needs of changing individuals, society, time and environment.

The word "commitment" has acquired a sinister significance. Commitment to his conscience is understandable. Commitment to the Constitution is plain and explicit. The expression "Committed Judiciary" has come to mean that a Judiciary is committed to the policies and dictates of the Executive. The argument runs thus: The conscience of the judges is not free but is enslaved by the Constitution. The Constitution again is not transcendent and immutable. It is changeable by Parliament and the Cabinet and the ruling party depending on the exigencies of votes, elections and passions. So, ultimately it is the Parliament's and Executive's dictates which the judges should administer. In this view, judges are reduced to a bureaucracy and administrators.

The experience of the world throughout the centuries and the mature political philosophy, political science and sociology therefore evolved a division of power in a state to keep the sources of law and justice and their administration pure and unsullied. Separation of powers is the very cornerstone of this safeguard. The three main divi-

sions of state power are the Legislative, the Executive and the Judiciary. The Constitution separates and clearly demarcates their diverse spheres. No one is allowed to encroach upon the other. Parliament is regarded as supreme so far as the making of laws are concerned. Parliament is naturally jealous of this power. The Executive, in turn, carries out the mandates of the law, as passed by Parliament and acts largely as the handmaid of the government. The Judiciary deals with the impact of the laws and the impact of the Executive on the public and the people in general. The Judiciary has to see whether the laws of Parliament mean a certain thing or a certain course of action and whether the Executive, in their application of these laws is acting in accordance with them. Naturally, the Judiciary interprets the laws of Parliament and the orders of the Executive in the light of these considerations. The Constitution is the supreme law of the land. In a sense, it is above Parliament and the Executive. The interpretation of the Constitution belongs to the Judiciary. It is an inevitable fact and inexorable logic. It has been said that the Constitution is what the judges interpret it to be and that judgement must be supreme in a society of many conflicting interests. It is true that Parliament can change the Constitution and that it can override the decisions of the Courts by legislation. But neither the amendment of the Constitution nor the overriding of the decisions of the Courts is to be resorted to at every turn when the Government of the day feels the pinch of the judicial verdict. Constitution should not be amended as ordinary Legislative Acts, and specially a written Constitution. The sanctity of the Constitution must be observed and it should not be treated as a mere Legislative Act.

That does not mean that the judges have to be blind to what goes round them in the sociological and economic environment. Judges, apart from individual instances,

few and far between, have never been blind to these considerations. Law and justice have always been regarded as a sociological phenomena. Isolated living for a man is no longer possible in the world today. A few illustrations will help to clear the idea which I have in view. A handful of men cannot in the present circumstances own the entire land-wealth of the country and control its ownership and its use in the present age. It is no longer possible to accept the principle of absolute ownership of all lands and natural resources. So ceiling of some sort is enjoined in view of circumstances and by the turn of events. Then again privileges of the few cannot stand the scrutiny against the background of the unprivileged many. Poverty in India has been stark and naked. Most people are condemned to a life of sheer drudgery and small pittance. Eradication of this massive poverty is an urgent need in any society claiming to build a just social order. The problem is the same in education, health, food, necessities and housing. In spite of criticisms which are made of Bentham, this principle of the greatest good for the greatest number even today remains a vital principle for any system of justice.

Justice and system of justice, laws and their patterns would be meaningless in the midst of this appalling poverty and destitution in India which leads to widespread frustration and degradation of human beings. This means that all the resources of the country have to be harnessed with that one end in view. That means again that some of our basic concepts of law and justice require to be replaced by justice oriented by social principles. Control of enterprises, directions of human agency and building up organisation suitable for that purpose are the prime needs of the hour.

The legal system, the system of justice, the Courts and the laws generally have been under severe strain in the last twentyfive years. The costs of the law courts are prohibitive for the common man. The mounting arrears and dockets in the courts are a glaring fact today. Many proposals are afoot today to deal with this problem— increase number of judges, reduce their holidays and make the legal profession open to all and sundry, to make the laws simple and to make the courts' processes much quicker. Remember this is an atomic age, an age of computers and electronics, of space travels and interplanetary explorations, of mutation and biological changes and of most dynamic alterations in the physical, environmental and mental atmospheres. Air pollution, river pollution and land pollution have reached an alarming proportion and we have to find out certain methods to control, restrict and minimise these evils, if mankind is to survive. Controlling pollution is but one aspect of the more general problem of conservation of the environment and of the natural resources. Is it any wonder that our laws and system of judges is breaking under the strain of modern changes? I hope this will yield place to something new and effective.

This need for economic and social planning is presenting a problem to the world of law and justice.

Law and justice are primarily a possible, but not a necessary quality of a social order, regulating the mutual relationships of men. Only secondarily it is a virtue of men, since a man is just, if his behaviour conforms to the norms of a social order supposed to be just. But what is the meaning of the expression that a social order is Just? A social order is never a static except, but a living and

dynamic aspect. Justice is a multifocal adjustment of manifold differences, stress and strains of society. Justice is social happiness and the law and its administration must reflect it. Social ideals and system of justice and law are organically united.

It is to this commitment of the judges for which I plead.

The views expressed in this booklet are not necessarily the views of the Forum of Free Enterprise.

**"Free Enterprise was born with man
and shall survive as long as man
survives."**

**-A. D. SHROFF
(1899-1965)
Founder-President,
Forum of Free Enterprise.**

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