

LAW AND JUDICIAL SYSTEM FOR NEXT SOCIETY



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I. VISION OF THE NEXT SOCIETY

A. Demography and Polity of the Future Society

India it is rightly said, lives concurrently in several centuries. The mindsets of some place them in the medieval period. Those who believe in the brave new world share the thoughts and stimulus of the current century in the western world. According to some, the mid-point in the developmental history in the last 2,000 years is not the end of the first millennium but 1900, that is, the development of the last 100 years of the second millennium far outweighs those of the earlier 1900 years. Similarly, it is said that the mid-point of the twentieth century is not the end of the first fifty years but the end of ninety years. That is, the development of the last ten years far outweighs the development of the first ninety years.

Today the world is disparate. The top one-fifth of the world's rich has 86% of the world's export markets. The bottom quintile has just 1% of both. Professor Jeffry Sachs in his article in the Economist titled New Map of the World says:

[T]oday's world is not divided by ideology but by technology. A small part of the globe, accounting for about 15% of the world's population, provides nearly all of the world's technology innovations. A second part, involving half of the world's population, is able to adopt these technologies in production and consumption. The remaining part, covering around a third of the world's population is technologically disconnected.

Today the largest single export from the United States of America is not aeroplanes or computers. They are entertainment material. The area of change is in the social impact of the technology and information revolution and emergence

of internet and e-commerce. Elimination of distance began with the rail road expansion in the nineteenth century. According to Prof. Drucker:

The first ones to see the importance were the Rothschild's, who built the first long distance line from Vienna to Prague. And when the Austrian Chancellor went to the Emperor, who hated Rothschild but had to give his consent to the plan, the Emperor just laughed and said 'Thank God, at last they're going to lose their shirt. We already have a stage coach that goes from Vienna to Prague three times a week, and it is always empty.' That railroad was sold out from day one.

World has come even closer with faster transport and communications. But the internet and e-commerce is revolutionary in its impact on the future course of industrial civilization. Professor Drucker observes:¹

It is something that practically no one foresaw or, indeed, even talked about ten or fifteen years ago: e-commerce-that is, the explosive emergence of the internet as a major, perhaps eventually the major, worldwide distribution channel for good, for services, and surprisingly, for managerial and professional jobs. This is profoundly changing economies, markets, and industry structure; products and services and their flow; consumer segmentation, consumer values and consumer behavior; jobs and labour markets. But the impact may be even greater on societies and politics and, above all on the way we see the world and ourselves in it.

B. Economy, Science and Technology

The Asian Edition of BUSINESS WEEK states that, "by some estimates, there are more Information Technologists in Bangalore (1,50,000) than the Silicon Valley (1,20,000)" and that "India's 'brain power' is already reshaping corporate America."² There is a virtual euphoria about the prospects of Indian economic growth in the coming two decades. The extrapolations suggest that while the present GDP of half a trillion will explode into fifteen trillion – that is –a surge of thirty times – in the next decade. It is also estimated that the exports of IT related services which are currently about three billion U.S. dollars will, in the next five years grow into 24 billion U.S. Dollars. The number of graduates with college degrees in engineering will rise from current 2,60,000 to 5,50,000 in just seven years.

It is said if India can turn into a fast-growth economy, "it will be the first developing nation that has used its brainpower, not natural resources or the raw muscle of factory labour, as the catalyst"- not a small compliment. In comparative terms, China has shown greater potential for growth. It started opening up its economy in 1979 whereas India did so only in the earlier nineties. China has seen

growth of an average of 8% over the past decade. India's has been around 6%. Infrastructure such as highways, energy etc. is superior in China. The foreign investment in China is about fifty billion U.S. dollars and in India it is about four billion U.S. dollars. China's export was about 266 Billion U.S. Dollars in 2002 and that was four times more than that of India's. But India has its own advantages. It's chaotic but robust democracy is one of them. The Indian population under twenty-five years of age is about 53%. One of the impressive plus points is the emergence of a culture of high profile technical and management education in India. There is an increased awareness of the need to absorb high standards that are needed to drive an internationally competitive economy.

The twenty-first century will be the most stunning century in human history. By 2040, the life expectancy of a human being will rise to a full 100 years. If I may recall it was just twenty years for an Indian in 1910; in 2000, it became eighty years for the urban female in Kerala. Several breakthrough in science and technology will bring about changes which will border on the fantastic. The thrust areas in the next decade are in Health care, Medical electronics, Oceanography, Nano-technology, Genetically modified food, Micro-robotics, Bio-technology, Energy, Education and Space research. Similarly, spectacular breakthrough in the fields of renewable energy such as fuel cells and plasma energy will revolutionize the energy scenario.

C. Knowledge Economy and its Implications

Through out human history spectacular changes in the lifecycle of civilizations have followed in the wake of advent of new energy sources. Each such cross-over point has witnessed tremendous economic and social volatility. Employment patterns have changed, life-styles, mind set etc. We have seen this happen with the advent of steam power, with electricity, with information technology and currently with the knowledge economy.

II. JUDICIARY IN THE NEXT SOCIETY

Confucius said that it is a "curse to live in interesting times." Times ahead are not going to be merely interesting but surely exciting. Economic Development must go hand in hand with social opportunity. Health, Education Human Dignity, Human Rights, Human Security are not the rewards of development. They are crucial to the very process of development. Amartya Sen said that these public goods are not the social outcome of economic reform but really economic outcomes of social reforms. The economic development without social opportunity will merely lead to ruthless growth which is rootless, futureless, voiceless and jobless.

Crucial to the convergence of social and economic development is the role of the legal system and the judiciary. If we fail to manage this crucial department of public institutions, we will certainly prove Confucius right.

I shall refer to four areas which need urgent attention in the judicial system. The first of course is the reformation of the criminal justice system with an emphasis on case-flow management. Second is the expeditious resolution of commercial disputes. Third in the challenges of the new Biology which will raise frontier issues in law and morality, law and ethics, law and environment. The fourth is the area of constitutional adjudication and Judicial Review.

A. Criminal Justice System

For paucity of space, I shall not refer to the substantive and procedural aspects of criminal law. I will confine my comments on the available alternative models of case-flow management by the use of “customer focussed models” and identify opportunities for a more streamlined system by the application of “Virtual Organisation” Philosophy, described as the process of application of principles of ‘Supply-Chain Management’ to this problem; equating the stake holders involved in the delivery of the service with the suppliers in a commercial organization. The innovators of this system identify the ‘key suppliers’ in the criminal justice system supply chain – the police, the prosecutors, witnesses, defense lawyers. I had the opportunity recently to hear Michael M. Kaye and Marilyn Dyason who actually carried out the work in the Courts in U.K.³ The system with requisite changes appropriate to Indian conditions is a model which deserves consideration.

It is needless to emphasise that criminal justice system is not only the back bone of law and order but has a civilizational value and status. It is not insignificant that in several advanced countries even the impressive view of the appearance and architecture of buildings housing the criminal courts is an informed choice. They make a statement as to how important the community considers dispensation of criminal justice to orderly living. The criminal justice system is crucial to the survival of all other economic and social institutions. That area today is in a state of bad repair.

There is an increasing feeling that numerical proliferation of courts is the solution to the problems of arrears in courts. That in India judge-strength is just 10.29 per million population has become some sort of a negative slogan around which judicial reforms are built. We might have to pause here to think. Is the number of judges per – say a million population the appropriate yardstick? or should the number of judges be proportionate to the number of cases? A wag rattled his tongue uncharitably to comment that the first proposition is similar to the idea of responding to the break-out of an epidemic by opening up new grave yards. Contrary to the popular myth of excessive litigiousness in India, - use of courts in India by its people its people is comparatively lower. For instance, the annual rate of filing in India is just about 10% of that of Germany.

Many lawyers have argued that the judge strength should bear a proportion to the number of cases and not to the population. Some even say that in terms of the latter equation, India is more favourably positioned than some of the advanced countries. But the only thing that is lacking, they point out, is a proper system of case flow management and lack of appropriate auxiliary adjudicative systems and services.

B. Efficient Management of Commercial Causes

Equally indispensable is the speedy resolution of commercial causes. The present scenario of long delays deters economic and commercial activity and leads to institutional conflicts as to jurisdiction. With the Growth of the economy, the adequacy of present systems to deal with arbitration, intellectual property disputes, patent actions, enforcement of commercial contracts, securitization and corporate insolvency, investor protection disputes needs to be re-assessed.

In a Festschrift brought out in honour of Professor A.C. Guest in 1997, the contributors explained the concept of commercial causes and discussed the adequacy of institutional machinery for dispute resolution. This is an area which needs urgent attention to prevent the increasingly undetectable instances of forum shopping and clutching at jurisdictions.

C. Challenges of New Biology: Ethical Issues and Dilemmas in Biomedical Research and Experimentation

With the tremendous advances in medical science and technology, all branches of medicine and surgery have made tremendous progress. Indeed, some of the results of genetic re-engineering and Assisted Reproductive Techniques [hereinafter ART] border on the fantastic. The excitement started with the case of Louise Brown – the girl who became famous even before she was born – and excitement has not abated. The frontier-line researches in ART have led to breathtaking breakthrough into nature's hitherto safely guarded secrets. Genome mapping, Genetic recombinant engineering, ART, stem-cell research, DNA Finger Printing, human cloning etc, have opened up hitherto unimagined vistas in the practical application of the benefits of biomedical technologies for the benefit of mankind. Human fetal tissue is used for a wide range of purposes. This idea of using fetal cells for transplants started with treatment of patients with loss of nerve cells in the brain and spinal chord. Since damaged nerve cells do not regenerate, attempts to trick neurons cells to re-establish damaged neural circuits. But the immunological complications that result, whenever any foreign tissue is transplanted into a human proved a barrier. Other potential uses of fetal tissue are the improvements in the treatment of diabetes, genetic optic nerve defects, spinal injury, Alzheimer's, acute leukemia and liver failure. Xeno-transplantation is yet another area of interesting research.

The area of special interest to gynecology is Assisted Reproduction, which is defined as “manipulating the gametes outside the body and transfer of embryos into the body.” It is estimated that there are sixty to eighty million infertile couples worldwide (almost 10% of all the couples). Advent of ART has enhanced the possibility of child bearing and has made conception possible in cases where it was considered impossible earlier. ART requires enormous technological expertise and expensive equipments. They carry less than 30% success rate and tax the couples’ endurance physically, economically and emotionally.

The ART presents many ethical issues and medical dilemmas. There have been legal issues – one such being the IVF mix-up, when black twins were born to a white couple after an apparent blunder at an IVF clinic. Then again if the embryo is placed in the wrong womb, the question arises “who are the real parents of the twins.” It is said that IVF is used in about 27,000 cases in Britain annually. The fact is that even certain basic concepts such as ‘motherhood,’ ‘legitimacy,’ ‘parentage’ etc. need to be re-defined.

There are also, what some uncharitably call “court aided disasters.” One such was from Oliver Wendell Homes, the “magnificent Yankee” from Boston – ‘a great judge who wrote 2,000 opinions in his long and illustrious career but signed on to the eugenics movement so enthusiastically’ to uphold law of the State of Virginia, which took power to sterilize mentally defective persons. The court’s decision triggered a wide sterilization move. Nearly 8,000 men and women in Virginia alone and more than 60,000 nationwide were sterilized under this move. So much so that the Virginia legislature recently passed a resolution of apology for the incalculable damage done. A woman, Carrie Buck had challenged the Virginia Law before the U.S. Supreme Court for violation of the Fourteenth Amendment. The judge’s description of the petitioner itself foretold the fate of the challenge. Justice Holmes called Carrie Buck, the petitioner, “as a feeble minded white woman who was committed to the State colony in due form. She is the daughter of a feeble minded mother in the same institution and mother of an illegitimate feeble minded child” and declared “three generations of imbeciles are enough.” The principle that sustains compulsory vaccination, according to the judge was broad enough to cover cutting the fallopian tubes.

In another case, a lady sued her doctor for a failed tubectomy resulting in an unwanted child birth. An English judge was of the view that it was opposed to public policy to hold a legitimate child-birth actionable, for, the birth of a child was always a matter of joy and that at least a child should never know that his or her birth had been declared by a court to be the result of a mistake.

Another area of concern is “embryo ethics:” the question whether excess human embryos – “the frozen orphans” – should be adopted. In the process of assisting

conception, doctors end up creating many embryos and what should be done to the ones which are not implanted. It is estimated that a large number of reduction procedure is carried out in the U.S. each year. The number, it is said is more than twice the number of Korean children adopted by U.S. citizens. In the famous American case of *Roe v. Wade*,⁴ very far reaching ethical issues were raised in the context of the right of abortion as part of the right to privacy claimed by a woman. The larger issues were 'when does life commence? At or after conception? Is the fetus a 'person' in law? Etc. Court did not accept the Christian belief that life commences at the very conception.

Other questions involved are "could there be damage to the embryos due to freezing? "Ethically is it acceptable to ask people to adopt embryos when the adoptive parents cannot be told about the future health of these children? Will there be a new group of trial lawyers suing for "wrongful embryo adoption"? Who will be the target of such suits? Surrogacy arrangements have also produced emotional and legal hassles. Another area of concern is pre-natal sex detection tests, which have contributed to the number of "missing women," upsetting the male: female ratio. Female infanticide is a particular scourge in India.

All these issues conceal a more fundamental debate. Is creation the handiwork of an all knowing Almighty? Is the world a moral order? Is the evolutionary process informed by a transcendental purpose? Is it ethical and safe to tamper with some of the fundamental framework of nature which is God's creation? On the other hand, the protagonists of the brave new world argue that there are only two limits on the scope of interference with Nature – Knowledge and Ability – the former in the form of Science and the latter in the form of Technology. Given these two there are, they argue, no limits on scientific experiments. This ethic neutrality will assume justiciable proportions though their adjudicative dispositions raise difficult problems.

The ultimate question is whether the judiciary is able to take on and handle with efficiency the issues that characterize the next society? What structural and functional changes that it must adopt and undergo?

D. Judicial Review

In a sense the power to nullify laws passed by the elected representatives of the people by an unelected, non-representative set of judges has its own anti-majoritarian implication. This plausible anti-majoritarian nature of judicial review is counter-balanced by judicial restraint whose chief proponent was Professor James Bradley Thayer. This philosophy of judicial restraint which was the hallmark of judges like Holmes, Cardozo, Frankfurter, Brandeis and Black was echoed in the early decisions and famous dissents of the Supreme Court.

But a more expansive statement of judicial review was expressed by Chief Justice Bhagwati:⁵

Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is.

Justice Holmes said something different, "I do not think the United States would come to an end if we lost our power to declare an act of the Congress void."⁶

American Due Process

In district periods of American judicial history, the expression 'due process' acquired distinct connotations. The judges of Lochner era were all born before the industrial revolution. They had their own mindset. It almost tended to make the Supreme Court of United States that third house of legislature.

The turning point was indeed the effect of the appalling human conditions of the Great Depression. A learned author gives a graphic picture of those conditions:⁷

In November 1929 the bubble burst. The collapse of stock market prices measured the collapse of the entire economic structure. In the summer of 1929 the Dow Jones average for industrial stocks had been 381.17. In the summer of 1932 it was 41.22. Ninety percent of the value disappeared.

The plight of the farmers was worse. Corn was sold for seven cents a bushel, sugar for three cents per pound. Twenty-five percent of the land in Mississippi was sold at auction on the foreclosure of mortgages.

The plight of industry was not better. In the three-year period of December 31, 1930 to December 31, 1933, the gross national product fell from 194.4 to 56. Bankruptcy liquidation and reorganization were a chief business in legal profession. The average wage of the factory workers was forty cents per hour. Factory payrolls were cut in half. One of every four men available for work was unemployed. There were no labour unions, no unemployment compensation, and no social security.

In one group of labourers were found clergymen, engineers, a school principal and a bank president. For factory workers the depression meant unemployment, bread lines, and soup kitchens. Municipal bankruptcies were common. The young hit the road. One young hobo was Eric Severeid, a banker's son, whose face and voice would become familiar to millions of CBS News programmes. The estimates of the number of youths who lives as tramps ran up to two million.

The judicial attitudes to the New Deal Legislations changed under circumstances which had their own dramatic overtones. That needed some one like President Roosevelt who gave a new promise of hope to the nation. He declared that “the only thing we have to fear it fear itself.” The nation rallied behind him. These economic events had their own influence on judicial attitudes. Some writers even called it the demise of the “Due Process.” In 1963, the U.S. Supreme Court had occasion to acknowledge these changes in judicial attitudes towards legislation:

The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for judgment of legislative bodies, who are elected to pass laws. As this court stated in a unanimous opinion in 1941, we are not concerned ...with wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to subject the State to an intolerable supervision hostile to the basic principles of our Government had beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

Those who blame the constitution for our ills seem to argue that our dismal political performance is by some constitutional compulsion. Again, Sir Alladi, set the right note. He said: ...

it need hardly be pointed out that the proper functioning of the Constitution will to a large extent depend upon:

1. ancillary organic laws passed to implement the Constitution.
2. the utilization of the principles of what I may style as the common law of India which has grown up under the British regime by the adoption in part of the principles of English Common Law as a matter of justice, equity and good conscience.
3. the acceptance of conventions in the working of our Constitution similar to those obtaining in other Constitutions,
4. Judicial decisions interpreting the Constitution, the Supreme Court being constituted the final arbiter of the Constitution. Above all, it is the law-abiding spirit of the average citizen in India that I regard as the greatest asset in the proper working of the Constitution.

The constitutional adjudications therefore, have the urgent task of defining

or redefining basic constitutional concepts in a changing and disparate world. Success is far more difficult to handle than failures. To ensure the most basic of all systems viz, parities of the electoral process, it is necessary judicially to define the minimal essential components of the constitutional concept of democracy and its essential concomitants, namely the electoral processes and prescribe the minimal requirements of an acceptable process. These tasks have to be accomplished, of course, with the assistance of Constitutional bodies such as the Election Commission of India. The efficacy of the ancillary laws and their plenitude to transform constitutional vision and promise to reality is justiciable within the judicial purview on the touchstone of how effective the ancillary laws are in realizing the constitutional goals and transforming constitutional phrase into reality.

Out of the developed countries, about nineteen of them have a population of less than one crore and each of them has its own Parliament, Executive and Supreme Court. There is, therefore, adequate access for the citizens to these institutions. Some of the challenges of the next society to the judicial system will be new ones – some others the old questions reappearing with renewed vigour.

Judicial policy is directed to the management of certain apparent contradictions in society. For instance: the exercise of individual freedom might, conflict with the interest of the society. This is one of the themes of the Preamble to the Constitution: the dignity of the individual on the one hand and the unity and integrity of the country on the other. Similarly, exercise of democratic power on the one hand and legal control of government on the other, pose seemingly irreconcilable problems. That is why it is said that ‘judicial review has no support outside public confidence.’

When Sir Edward Coke remarked that all “causes” (should be) measured by the golden and straight met wand of the law, and not to the uncertain and crooked cord of discretion, he was referring to ‘private opinion’ masquerading as discretion. Unless the public law issues and judicial pronouncements are widely and carefully discussed law will not develop to serve the cause of justice.

(Footnotes)

¹ See Managing in the Next Society 3.

² Business Week, Oct. 8, 2003.

³ Applying Six Sigma in Public Sector, 27(1) Quality World 33-35.

⁴ 410 US 113 (1973).

⁵ S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124-30.

⁶ O.W. Holmes, Collected Legal Papers 295-96.

⁷ Archibold Cox, Court and the Constitution 144.