

LAW, RELIGION AND POLITICS

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The whole progress of mankind has been from Ignorance and helplessness before natural and social forces to understanding of these forces and harnessing them.

The basis of religion is ignorance of the real nature of these forces, helplessness before them and fear of the unknown. Thus, for example, many of the vedic gods e.g. Agni, Surya, Indra etc. were personification of natural or social forces. These forces could either benefit man or harm him. Thus, timely rains could benefit agriculture, but failure or delay of rain could ruin the crops, and whether there would be timely rain or not was entirely beyond man's control. Hence rain was conceived of as a god, Indra, who had to be propitiated to save oneself from his wrath.

Even today religion plays a powerful role In our lives because we are still largely dependent on natural and social forces in view of the low development of science. Since man feels helpless before these forces, which can adversely affect his life, he needs religion as a psychological support.

Science is that knowledge by which we can understand the real nature of these forces, the law which govern them, and the method of harnessing them for our benefit. With every step taken forward by science religion recedes. We no longer believe that the sun is a god, and instead we regard it as a huge furnace in which nuclear reactions are converting hydrogen into helium by the fusion process, thus liberating radioactive energy. We no longer regard small pox as caused by a goddess (mata) but believe that it is due to a virus and it can be prevented by vaccination. Thus with every advance of science the need for religion will become less as we are gradually able to control our own destiny.

Until the coming of industrialization religion was inseparably connected with every aspect of human life. Thus the Dharmashastras contain religion, law, morality, etc. all inextricably interlinked with each other. In fact the very word 'dharma' has religious, legal as well as moral overtones.

The reason for this predominant Position of religion In life up to the feudal, age was the relatively low level of scientific knowledge, and the low level of development of the productive forces. Production as well consumption up to this stage was largely local. Human groupings were small and scattered, and science and technology was still at a primitive stage. People lived in small worlds of their own in small groups with little interaction with each other.

¹ Elevated to Hon'ble Supreme Court subsequent to publication of this Article

With the coming of industrialization human groupings became large. People from different places and belonging to different religions, castes, tribes, lingual groups, etc. had to come together in urban areas and work together in factories, establishments, offices, institutions, etc. This gave rise to the concern of secularism, for a factory recognizes no religion or caste, but only effacer production, and' it cannot function if its organization is compartmentalized on the basis of caste or religion. Thus, industrialization smashes caste, religious and lingual barriers.

The great American, French and Russian Revolutions ushered In a new chapter In the history of the human race. These Revolutions abolished many class distinctions, proclaimed the ideals of liberty, equality and fraternity, and of religious freedom. These ideals were not mere empty declarations. They were incorporated in the Constitutions of these countries and become legally enforceable rights.

Religion was not abolished by these Revolutions. In fact religion cannot be 'abolished' but will wither away gradually with the progress of science and social development and will disappear completely when man is no longer helpless before natural and social forces but is able to control them. What these revolutions, however, did was to relegate religion to a private affair unconnected with the State.

In Europe social development proceeded broadly along a straight line, that is, from tribal society to slave society to feudal society to capitalist society to socialist society (in Russia), in underdeveloped countries, on the other hand, the advent of imperialism considerably complicated the matters, The Imperialist policy was to keep the colony (or semi-colony) as a market and source of cheap raw materials, and with this object the imperialists arrested social development and blocked the natural course of industrialization, Moreover, to retain their hold over the colonies the imperialists pursued the divide and rule policy and deliberately created religious, caste-based and lingual friction and hatred. Thus while in their own countries the imperialists preached liberty, equality and fraternity, they denied these rights to the people of the underdeveloped countries.

It is a tribute to our Constitution makers that despite the fact that our economy and social conditions were still largely semi- feudal they adopted a modern Constitution on the model of Western nations. It is also a tribute to them that at a time when religious passions were inflamed-they refused to be swayed by these passions and upheld the modern ideal of secularism and incorporated it in Articles 25 to 30 of the Constitution. Thus Articles 25 states.' Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion'.

Articles 27 to 29 embody the principle of separation of state and religion. Article 27 states "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the

promotion or maintenance of any particular religion or religious denomination."

Similarly, Article 28 (1) states "No religious instruction shall be provided in any institution wholly maintained out of State funds".

Article 28(3) states "No person attending any educational institution recognized by the State or receiving aid out of State funds, shall be required to take part in any religious instruction that may be Imparted in such Institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto".

Article 29(2) states "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on ground only of religion, race, caste, language or any of them."

Mention may also be made of Article 15(1) which states "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". Similarly 16(2) prohibits discrimination on the ground of religion in public employment.

Thus we see that our Constitution is modern and secular. However, the fact remains that while our Constitution is modern, our social order is still backward and semi-feudal, and this dichotomy gives rise to a host of problems. Since in feudal or semi-feudal society religion has a powerful hold on men's minds, the vested interests seek to exploit this situation by perpetuating and accentuating caste and communal divisions and by sowing the seeds of discord, among the people. This activity has been stepped up in recent times.

Religion and caste have divided our people. What is it that will unite us? In my opinion this uniting force will be science and industry. By science I mean not merely physics, chemistry or biology but the entire scientific outlook, the scientific analysis of our problems, and the scientific solution to those problems.

It may be mentioned that in our country we have a very old scientific tradition. Out of the six classical systems of Indian philosophy viz. Nyaya, Vaisheshik, Sankhya, Yoga, Purva Mimansa and Uttar Mimansa (or vedanta), the last one laid emphasis on adhyatma vidya (or spiritual knowledge) while the ; first (~yaya) represented the scientific outlook, laying emphasis on reason and ; experience. Thus, the Nyaya system (as well as its adjunct, the Valsheshlk, system) gave a philosophical basis and justification to science in ancient India f and was thus of immense help in the progress of science. It is well known that f in ancient India we made tremendous progress In Physics, Mathematics, Astronomy and Medicine. At a time when most people in Europe (except in Greece and Rome) were living in forests, our scientists like Aryabhatta, Brahmagupta, Bhaskar, Sushrut, Charak, etc. were making astonishing scientific discoveries e.g. decimal system in mathematics, plastic

surgery in medicine etc. (see Will Durant's 'The Story of Civilization: Our Oriental Heritage'). This perhaps may not have been possible if the Nyaya-Vaisheshik system had not given science the philosophical support it needed, particularly when it was faced with a mass of theological dogma.

The Nyaya system rejected the extreme viewpoints of Vedanta and the Sunyavadi and Madhyamik Buddhists who asserted that the world was either unreal or unknowable. It took a balanced, commonsensical and realistic approach and placed great emphasis on pratyoksha pramana or knowledge arising out of sense-object contact (see Gautam's Nyaya sutras). No doubt theological elements were subsequently introduced into the Nyaya system by Vatsyayana, Udayan etc. but as D.P Chattopadhyaya has pointed out in his 'What is living and what is dead in Indian Philosophy' this was only to escape from the inquisition'.

Thus we see that we have a strong scientific tradition in our country supported by a whole system of philosophy representing the scientific outlook. No doubt we have unscientific traditions, too, but the point I am emphasizing is that we are not a race of irrational, unscientific savages, as many Westerners have tried to paint us.

This is the age of science and technology. Unless we develop the scientific attitude we can never hope to catch up with the advanced industrialized nations and will remain condemned to poverty and backwardness. Therefore whatever promotes science is good for us and is to be encouraged and developed.

Today our country is facing gigantic problems, social economic and political and in my opinion the root cause of these problems is our backwardness. We are economically backward, we are socially backward, we are backward in every way. Therefore the solution to our problems is to modernize, and this is possible only by adopting the scientific outlook. While the main forces in the country's progress towards modernization will be political and social, the law, too, must give a helping hand.

There are broadly two conceptions of the law viz. the passive and the active. While according to the passive conception law is a reflection of the existing social relations, according to the active conception law is an instrument of change (see Friedman: Legal Theory).

The passive conception is often attributed to Savigny, the renowned German jurist who flourished in the 18th century. Austin, the father of positivism and Ehrlich, one of the founders of modern sociological jurisprudence, can also be said to belong to the passive school.

According to Savigny's historical school of jurisprudence, law is not consciously created phenomenon but is a gradual distillation of the 'volksgeist' (the spirit of the people). Thus, Savigny was a strong advocate of customary law, and was opposed to legislation. Most of the ancient codes e.g. Manu-

Smriti the code of Hammurabi, the Roman Twelve Tables, etc. were merely a reflection of the existing customs.

It would be a mistake, however, to equate the passive conception with customary law. Even positive law can be passive if it seeks not to bring about social change but to preserve the established order. Thus, the positivism of Austin aimed at reinforcing the existing social system in England rather than bringing about any change.

The active conception of the law can be said to originate in modern times from the thinkers of the Enlightenment (Helvetius, Holbach, Diderot, etc.) who regarded law as an instrument for the radical reconstruction of society. Bentham's conception of law as an instrument for bringing about 'the greatest good for the greatest number' can also be classified as an activist theory, though it can hardly be called radical.

In modern times sociological jurisprudence permits an activist approach by the judiciary. Since our country is facing tremendous social and economic problems it is only the activist approach which is acceptable today. It must be remembered that ultimately all organs of the State, legislature, executive and judiciary, are servants of the people. Hence if they do not serve the people the people have the right to show them the door.

In my opinion in the coming days the judiciary will have to play a crucial role in the people's march to progress. This is because the higher judiciary is objectively so placed in our Constitutional scheme that it is in a position to give correct guidance to the people. Due to their independent Constitutional status the Judges can take a more panoramic and long-term view than other authorities. They do not have to face the next election, or worry about their vote banks or the next law and order problem. Hence they are in a position to fearlessly put forward modern progressive ideas which will be of great help to the people in their struggle for social and economic uplift.

I do not mean to say that the Judges by themselves can bring about great social changes. It is the people alone who can do that. But the people need guidance and encouragement from intellectuals and in the prevailing situation the intellectuals whose voice carries greatest weight in our society are the members of the higher judiciary, not because they are more intelligent than others but because of their status. Hence a heavy responsibility lies on the shoulders of the higher judiciary to show the people the way out of their problems.

It may be objected that the task of the judiciary is merely to decide cases so and not to act as statesmen. In my opinion this is an outdated view belonging to the 19th century positivist jurisprudence of Bentham and Austin. Modern sociological jurisprudence permits judicial activism and calls on the Judges to shoulder the responsibility of giving guidance to the nation.

As a matter of fact our Supreme Court has been responsibly discharging its obligation to the nation by playing an activist role, and by

squarely addressing itself to the social problems of the people. The vast expansion of the scope of Articles 14, 19 and 21, particularly after Maneka Gandhi's case (AIR 1978 S. C.597) is clear proof of this. In a poor country like ours the judiciary, too, must make a contribution in solving the country's problems, otherwise it will be living in an ivory tower unconnected with reality.

In my opinion the judiciary must encourage scientific thinking and oppose unscientific and reactionary trends. In a vast country like ours with people of different faiths, castes, etc. the judiciary must oppose attempts to divide our people on the basis of religion, caste, language, etc and must uphold -secularism. Communalism and casteism weaken our nation and divert the attention of the people from the real problems, which are basically economic.

In my opinion the judiciary should take the following steps:-

- 1) In the light of the reasonability test in Maneka Gandhi's case it should declare reactionary, backward undemocratic and unscientific laws as unconstitutional on the ground that they are unreasonable.
- 2) In view of the fact that sociological jurisprudence permits a certain amount of legislative activity by the judiciary (see In this connection the recent Constitution Bench decision of the Supreme Court in Sarojini Ramaswamy Vs. Union of India, 1992, 5 J.T.I. In which in para 93 the observation of Lord Reid that the view that Judges do not make law is a fairy tale is quoted with approval), the Judiciary should make modern progressive laws within the permissible limits.
- 3) Where such progressive legislation by the judiciary is not possible, the judiciary should make recommendations to the Legislature for enacting modern, progressive laws. Even if these recommendations are not accepted they will be widely publicized, and thus give encouragement and guidance to the people.

Today the situation in our country is that almost everything is unscientific. There is no scientific planning and management of the economy, no scientific education policy, no scientific agriculture, no scientific utilization of our resources (both natural and human). The result is that our country, despite having abundant natural wealth and skilled personnel, is abysmally poor.

Hence to progress we must bring about a situation where everything is scientifically planned and managed, and there is massive application of science and technology, both in urban areas and in the countryside.

The capacity to guide its own development is a unique feature of scientific society. Once we have a scientific society we will no longer be subject to the vagaries and uncertainties of natural and social forces, but will be masters of our own destiny.

The law of a scientific society will have a high democratic and moral content. The higher the forces of production develop, and correspondingly the higher men's intellectual and cultural level, the greater is felt the need for independence and creative initiative. As Jawitsch says "Man's social essence manifests itself particularly in his striving to effect creative activity which is inconceivable without freedom of personal choice of variants of conduct within the limits of social interest and objective possibilities". (Jawitsch : The General Theory of Law).

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