Lawyers in Developing Societies, Especially India

The papers brought together in this issue reveal that substantial scholarship is being directed to the study of India's lawyers. This is entirely appropriate, given the potential role of the legal profession in shaping the development of India. To understand that role adequately, it would be helpful to compare the position of India's lawyers with that of lawyers in other developing societies. That turns out to be a difficult task.

For one thing, there are to my knowledge very few systematic studies of lawyers in other contemporary developing societies. Originally, Professor Galanter had hoped to conduct a conference on the legal profession in South Asia. He ended up adding the qualification, "with particular reference to India." His search for material on research in other Asian countries revealed one fine historical study by Ziadeh on Egypt, abstracted in this issue, and some fascinating work on Japan and China—but not much else.[1] More recently, a conference held in Ceylon by the Ministry of Justice of that country and the International Legal Center of New York brought together knowledgeable practitioners and academic lawyers from many parts of Asia, but again the ratio of empirically grounded answers to fascinating questions was very low.

The desire for information on this subject is well placed and should be followed up with solid research. There are good theoretical reasons for believing that the legal profession may be crucial in determining the rate and type of development. If social order is always problematic, this is particularly true in societies reaching and moving beyond the developmental take-off point. Many societies respond to developmental disequilibrium by tipping into totalitarianism, which frequently seems a more stable state. For those that retain a multicentric nontotalitarian order, however precariously, it is a matter of some urgency to know which groups in the society can provide equilibrating balance. One possible answer is that the professions, taken together, might be crucial in holding such societies together through periods of rapid social change.

1. Since the holding of the Conference Jay Murphy *et al.*, Legal Profession in Korea: The Judicial Scrivener and Others (Korea Law Study Series No. 2, 1967) has appeared.

Theoretically, the professions are extremely significant in maintaining social equilibrium in complex societies. In Weber's "ideal-typical" model the professions enjoy a grant of discretion from the society under which they certify and discipline their members. With the aid of such privileges, if not in return for them, they provide the society with a set of skilled services, otherwise unobtainable.

Although such an ideal pattern never quite works out in practice, the model should not be dismissed as purely Panglossian. It approximates reality closely enough to provide a policy target. When compared with its most likely alternative—the domination of society by a single elite—it acquires attractiveness through contrast.

This being the case, it is reasonable to ask how the professions can begin to approximate the ideal-type in developing societies. In a transitional situation, there may even be possibilities for the professions to function more effectively than in complex ones, because those that developed earlier—the skier that made the trail, in Sakharov's phrase—have provided a normative path to be followed more quickly and accurately. What was often ideological cant for us may become a realistic possibility for professions in the Third World.

With this in mind, what can be hoped for the legal profession in a developing society? First, that it will coalesce as a self-conscious organized group. Tocqueville pointed out that U.S. lawyers in the early 19th century acted as a new aristocracy, united despite diverse class origins, by common adherence to a rational discipline and set of principles infused with a concept of order through justice. To act as a synthetic aristocracy required intensive mutual association both informally and in professional associations.

Such coalescence among lawyers varies widely among the developing nations. In some, such as Ceylon, the bar is highly organized in subsegments (solicitors and advocates) that work together. In others, legal practitioners know each other only through contacts in the litigation situation and may have no opportunity for association at all because of the presence of multiple separate systems of adjudication. This is the case in Ethiopia, for example, where no bar association exists to unify advocates who practice before the several systems of tribal, religious, and secular courts. Coalescence of the profession may also be prevented by a state ban on bar associations, apparently out of concern lest the profession threaten governmental control. Prohibitions of this kind are found in many African and some Asian countries.

Where the profession does not coalesce, the prospect is dim if not nonexistent for any kind of system of professional ethics which would protect the client. In two developing nations, lawyers are generally referred to as swindlers (Ethiopia) and sharks (Indonesia). This is not to say that coalescence of the profession inevitably means an effective professional ethic. But if we avoid the temptation for fashionable cynicism, a serious comparison might well show greater actual protection of clientele by the profession in countries with, than without, comprehensive bar associations.

Along with coalescence, it is important that the professions provide services of value to diverse segments of the society. In this way it can achieve independence, as a profession, from any given interest group while increasing its general social utility. In Western Europe, as Weber so clearly pointed out, lawyers played a crucial role in developing a set of laws and decisions that helped create a predictable environment in which rational decision-making became more feasible for entrepreneurs. In India, as in many of the developing nations, indigenous lawyers have not assumed the role in commercial transactions and corporate development familiar in the West.[2] This may have resulted in part from a concentration of corporate control—and associated law work—in the hands of imperial personnel. During this period, the model of the lawyer as litigator may have assumed a primacy that made the shift difficult. Whatever the explanation for this phenomenon, it perhaps left the Indian legal profession free to avoid an over-identification with the privileged classes.

The nature of legal services most needed by the society depends on the institutional areas in which new normative arrangements are most badly needed. In the West during the past two centuries, that area may have been in the development of the juridical bases of the corporation. But for the developing societies, already beneficiaries of these innovations and wary lest corporate rights loom too large, the area of greatest need for legal service may well lie in the protection of the rights of the underprivileged.

Indian lawyers do in fact spend a great deal of time representing the grievances of the underprivileged. Through the system of "touts," mentioned in several of these papers, they find grievances and even promote them, pushing forward litigation in institutional areas such as

2. For a fuller discussion see my *Reflections on the Status and Functions of the Indian Lawyer*, 1 KERALA L.R. 14 (1968).

land, inheritance, and family problems. This demand for lawyer's services reflects a widespread rights consciousness in the Indian population. Unfortunately, however, it does not seem that Indian lawyers are as helpful in giving needed services as they might be. Aside from the questions of ethical regulation and fee control, there is the important issue of whether the work of the lawyers, taken as a whole, produces real changes in the life conditions of the underprivileged segments of Indian society. It is notable, for example, that Myrdal in his recent *Asian Drama* finds multiple examples in which the legal process makes it possible for laws intended to help the poor to work out in the opposite way. Thus, land reform laws produce court backlogs and lawyers' bills, but no new land for the landless. Cooperatives aimed at avoiding debt slavery use government funds to strengthen the creditor. Such outcomes may be understood simply in terms of the greater economic and social resources of the rich which permit them to turn every policy to their advantage in part by coopting the best legal resources. I believe, however, that the matter is more complex. In representing the interests of the poor, the capacity of lawyers (in the U.S. as well as India) to bring about significant legal change has been limited by the individual case method. Just as the corporate form provided a means of massing the strength of capital, as a class the poor need a way of gaining representation in the courts. The first segment of the underprivileged to use the law systematically in this way in the United States were the labor unions, although the great changes in that area were effectuated through administrative regulation that bypassed the courts. It is interesting that labor relations in India was also the first area in which class interests of the underprivileged have received effective assistance under the law. In fact in India the process has been even more a legal-judicial one, involving a special system of courts and drawing increasingly on lawyers. The original Indian Industrial Disputes Act of 1947 made it very difficult for lawyers to represent the litigants, but increasing use is now being made of lawyers by both sides. The effort to exclude lawyers seems to have been based on a fear that lawyers would provide an unfair advantage to management with its greater resources. What has emerged, instead, is a pattern of quality legal representation for the unions as well, made possible by using the combined financial resources available to unions. What is needed is not enormous wealth, but an institutional arrangement that permits an able lawyer to build a career through representing the legal interests of the underprivileged.

How the Indian legal profession can provide this kind of service in spheres other than labor is not clear. There has been some talk about legal aid clinics, but it is to be hoped that they will not develop in India (as they tended to in the U.S.) into tokenism which makes no real difference in the life conditions of the poor. Better U.S. models might come from some of the newer programs spawned under OEO for community legal services, representation of tenant unions and neighborhood organizations. Also the work of civil rights groups in the courts might be worth studying as a model. But my guess is that the lawyers of developing countries, such as India, working with underprivileged clients, may be best able to create new forms of organization, social and legal, that could provide the most adequate representation for the underprivileged.

If they do not succeed, law is likely to be seen as another way in which rich men oppress the poor. With the Shakespearean character who was plotting a revolution, this may lead the Indian masses also to cry, "The first thing we do, let's kill all the lawyers!" But lawyers have not always been on the side of privilege in the United States or in India. Indian lawyers gained great esteem during the struggle for independence. Are they now ready to recapture this position by joining and leading the struggle for social justice?

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