

***JURISPRUDENCE AND
JURISCONSCIENCE A LA GANDHI***

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FOREWORD

Conscientious search for truth and its pursuit through self-suffering may be said to be the very life-blood of *Satyagraha*. *Satyagraha* as a way of life, and as the law of self-suffering for one's own truth with ill-will towards none, and total sacrifice for it if need be, might be said to be as old as the birth of human conscience. Harischandra and Prahlad of Indian mythology, Socrates of the pre-Christian era and Jesus of the Christian era are clear and glaring examples of it. Historically speaking, it was mostly confined to individuals holding certain beliefs, religious and/or other and suffering for it when they were challenged by society or by authority. The history of the Inquisition, for instance, reveals that thousands of individuals at different times and places offered themselves to be burnt alive publicly at the stake. All this was for believing what they did. They would not retract, come what may, and thus paid the highest price with their lives, which perhaps is the very definition of martyrdom.

It is to the eternal credit of Gandhiji that he perceived in domestic life as well, this law of self-suffering operating. He discerned and discovered that this law of suffering for one's own truth need not be limited either to the narrow domestic life or to the religious and/or to the spiritual field; it should be as valid for the establishment of truth one holds dear in all human affairs. In fact, while quest for truth and truthful living, namely, the Law of Being and Becoming -- the dyad of *Satya* and *Rita* of the *Vedic Rishis* -- is the common passion of humanity, the only way to pursue it without physical force and coercion but with love and without bitterness, is to follow the law of nonviolent self-suffering for achieving truth in action.

It was for historical reasons that political overtones clouded the universal gospel of *Satyagraha* of Gandhiji, as both in South Africa and later in India, *Satyagraha* had to be resorted to by him in the political field most conspicuously. In fact, during his own life-time, Gandhi either himself adopt-

ed *Satyagraha*, or blessed others for adopting it, not less than fortysix times in different situations, as Nirmal Kumar Bose has pointed out. Many of them were non-political. Therefore, it is a misnomer to identify *Satyagraha* as the only, or even a pre-dominantly political remedy. To do so would be repugnant to its comprehensive nature and to delink it from the *Satyagraha* way of life, which is its basic and positive aspect. *Satyagraha* has to be looked upon as the most evolved and civilised way of truthful living, and of establishing one's own truth through selfless suffering and supreme sacrifice, if need be. Confrontation is neither the essence nor the objective of *Satyagraha*; its birth itself lay and its growth lies in the pursuit of truth as one perceives it and in the endeavour to establish it by self-suffering without ill-will, rather than by confrontation and force.

Having said this regarding *Satyagraha*, I would like to mention that jurisprudence and jurisconscience, though they refer here primarily to their existence in a country, and to the occasional correction and/or modification of jurisprudence by jurisconscience through voluntary self-suffering, there is already in existence what may be called international jurisprudence and even international jurisconscience in embryo. There is international law and international court as well. There is an international body for the last quarter of a century called the United Nations Organization, which in addition to its other functions as an international forum, acts sometimes as the international jurisconscience, when for instance, it calls upon nations to exercise sanctions like non-cooperation with nations which observe apartheid, or it evolves a charter of Human Rights and gives a call to all nations to adopt it.

At the present stage of evolution, man is increasingly becoming conscious of his own consciousness and is capable of being witness to what is going on in his own mind. He has also developed what is called 'conscience', a kind of discriminating judgment (*sadasadwiveka-buddhi*) seat which gives him a sense of values and points out what is good for his progress. Man may be said to have come of age and can be held responsible for his evolution which is on in nature. No

doubt, this conscience is at present aptly called 'the still small voice' since man has not yet developed the power of will to abide by the dictates of his own conscience. Even so, we do recognise the existence of a conscience in man in spite of the fact that confirmed materialists look upon it as an interloper since they have no use for moral values.

It was the great British philosopher C.E.M. Joad who called Gandhi, the conscience of humanity, meaning thereby that Gandhi spoke for humanity and belonged to humanity and not merely to India. Long long ago, Rev. Holmes introduced Gandhi to America as a second Christ. Louis Fischer, the popular biographer of Gandhi wrote that to look for the like of Gandhi one would have to swing back two thousand years. Einstein said, "Generations to come will scarce believe that such a one as this ever in flesh and blood walked upon this earth".

And yet, however great Gandhi might have been, he had to resort to the law of self-suffering to establish the truth as he saw it, whether it was in the domestic field of his home or Ashram, or in the area of social evils and economic injustice or in the matter of Jallianwala massacre and 'Punjab wrongs' and political liberation of India.

Here Sri Justice V.R. Krishna Iyer of the Supreme Court of India has dealt with one important aspect of Gandhi, namely, the limited subject of "Jurisprudence and Jurisconscience *a la* Gandhi". I need not say that this subject is of international importance and of great juristic significance. At the same time, it is of universal human interest as it calls upon each individual to be aware of his own conscience and its place in one's own progress and that of humanity. He is eminently qualified to deal with the subject in a balanced and scholarly way by placing before the people the pros and cons of the principles involved and the methodology of Gandhi. While stating that jurisconscience has often played an important role in being a corrective to established law and jurisprudence, he has rightly pointed out the dangers also of a wrong use of Gandhian methods without his indivisible dual discipline of *Satya-Ahimsa*, Truth-Nonviolence. In fact, in his early experiments in India in the

1919 Satyagraha against the Rowlatt Acts, Gandhi himself with great humility acknowledged that his mistake was of 'Himalayan magnitude'. To the great disappointment of his close followers, he withdrew the promised total Bardoli Civil Disobedience in 1922 when he had the full reports of the dastardly and cruel violence against eight policemen by Congress volunteers in distant Chauri-Chaura in the then United Provinces. But it has to be remembered that Gandhi could not and did not abandon his principles and his methods in which he had abundant faith; since he saw that while caution was necessary, his abandoning the field would mean free field for violence and all possible unethical methods with disastrous results. That would be violation of his great and fundamental belief in 'right means only for right ends'.

One of the main objectives of the Gandhi Peace Foundation is to try to educate people in Gandhian ways and values. While the quest for Truth is common, what was uncommon and extraordinary with Gandhi was his ceaseless effort to establish the truth he perceived through love, through persuasion, through self-suffering without ill-will, and through even supreme sacrifice, if need be. The Foundation has instituted an annual lecture appropriately on the Martyrs' Day, the 30th of January. This talk was the second of the series. We are sure the highly juridical and yet very popular treatment of an important Gandhian theme in a telling phrase by Sri Justice Krishna Iyer would be welcome to all.

R.R. DIWAKAR

Bangalore
February 1976

When Sri R.R. Diwakar made a generous gesture on behalf of the Gandhi Peace Foundation by inviting me to deliver this year's Gandhi Peace Foundation Lecture, I initially shrank from a gladsome acceptance. Two reasons weighed upon my mind. Gandhi, if anything, is the large flame of the human spirit that burns forever, inspiring coming generations and I, if anything, am a flimsy faggot once feebly afire but now mostly extinguished by tragic personal circumstances. Secondly, any theme associated with Mahatmaji is too sublime for me, a humble, but distant, doubting, viewer of this world-stage personage. The subject of my talk may well be abbreviated as Gandhian Jurisprudence, defiant and dynamic, scientific and constructive, and I, a Judge by profession may, perhaps, by way of anti-climax, look at it from the limited light of legalistics. Even so, fools should not rush in where angels fear to tread, and this sense of diffidence, inadequacy and irreverence forbade my ready compliance with the request to speak. However, persuaded by the gentleness of Sri Diwakar, I have yielded and shall endeavour to unfold, within my ken, those finer facets of Law and Conscience which have been lit up by modern history's benignly maverick jurispudent and mystical law-breaker who has not merely affected the lives and laws of our times but will shape for long the rule of law in a changing society by charging it with changeless spiritual values and direction. Before proceeding further, permit me to thank the organisers of the Lecture for overlooking my poor credentials and inviting me for this lofty occasion.

Frankly, I have not been a Gandhi-cultist, nor master of *Gandhiana*, although, from far-away glimpses, my heart has heaved when remembering him in the great words of Nehru: "Where he walked was hallowed ground, where he

sat was shrine'." Still, why do I, an ossified lawyer, reverence his creative jurisconscience, his experiments with truth, his shining theory and practice of *unlaw*? My answer is this lecture.

The Thesis

Gandhi was India — of course, he mentioned, 'For me patriotism is the same as humanity' — and personified the finest values of its culture, including its legal culture or *Dharma*. Law and Justice, often distant neighbours, are dichotomous Western concepts and Jurisprudence has been 'a chaos of approaches, to a chaos of topics, chaotically delimited' (Stone). Many schools of law have emerged and several theories have been propounded by pundits covering a whole spectrum of legal thought. When we examine them comes the juridical discovery of *Bharatiya Vidya* with its *Vedic* synthesis and higher emphasis on truth in action, right conduct and just administration — *Ritam, Satyam, Dharmam*. And, as we study, a neglected facet of that multi-dimensional Mahatma comes to the fore, the founding faith of all great justice doctrine — the integral *yoga* of law and conscience, of secular norms and spiritual ethos. When Law is viewed as a social science and cultural process, the dualism of *lex* and *jus* will not loom large as happens in formal, uni-disciplinary understanding of jurisprudence. And then rises the challenging role of *Satyagraha* and of its morality-legality synthesis in shaking and shaping the formal rule of law. From Socrates and Jesus to Gandhi and Martin Luther King, through pre-history and history, the law of soul-force has been unbending before the crypto-violent law of the State. Soul force is the strength of the human spirit; coercive violence is the sanction of the State. This unexplored territory of moral resistance to temporal authority when there is an awesome *asuric* hiatus between the command of the law and the conscience of the citizen, this confrontation between *ahimsa* and *himsa*, has been a seminal branch of super-jurisprudence, a spiritual-secular compound of human dignity and democratic legality. Such is the backdrop to the Gandhian

school of jurisprudence or theory of radical humanism — and of Gandhi, in forensics and politics.

The Gandhian religion of law or the rhetoric and romanticism of this Jesus Jurisprudence have roots in the jural postulate of truth as the law of life and justice as its beautiful expression. The cacophony of juridical theories which are current coin cannot claim the moral majesty of this legal philosophy. Violence is the inarticulate major premise of all State-enforced law. Obedience springs from fear of social sanctions or governmental coercion. Order of sorts is the goal and force is the locomotive of law. Thus we get a plurality of schools of legal thought, all together making a loosely woven fabric of working order in society secured through fear of corporal punishment or corporeal deprivation. Spiritual touch is alien to this art and readiness to suffer to uphold right is crime in this pragmatic programme. Justice beyond the pale of law, truth in variation of legal evidence, challenge of evil by self-courted suffering and open encounter between righteous nonviolence of man and wrongful mandates of enthroned Power — these are the credal rainbow of Gandhian doctrine in the field of new jurisprudence. Conscience, backed by truth, pitted against cowardice masked as conformity, is the ethical kernel of the God *versus* Caesar predicament. This crescendo of divinisation of human law is personified in Socrates, as tough steel of truth, taking poison as the martyr of right despising death. Jesus' divine indifference to Pilate's verdict, holding fast to Truth even if crucifixion be the lethal follow-up, is the tragic triumph of moral power over vulgar violent injustice. And a modern epic of the inner voice ignoring the external command, of the body giving so little purchase over the soul, where breaking *satanic* law becomes the religion of sedition — this is the Gandhi who harboured a seed of celestial jurisprudence. Its glory is that order is secured through justice and nonviolence, that law is legitimised by conscience and that soul-force is superior to prison power — all this is not a distant ideal or vaporous theory but burning conviction and programme of action here and now. Project Law through Conscience is a cosmic principle with

revolutionary portent in our age of satanic sceptre speaking with the arrogance of power to a demoralised demos. State action, in the Gandhian school of jurisprudence, becomes law with a soul — *Ritam* and *Dharma*. Social scientists must, in the right spirit, research into the vast potentiality of this gift of hope to the sublime rule of law. The presiding idea is that law shall be socially just or suffer civil disobedience.

Gandhi the Bizarre Jurist

A soul of strength caged in a frail flesh-frame is Mohandas Gandhi whom the Indians called Mahatma, to the tumult of Ki-jais, and the world regarded as the carnate expression of spiritual discipline and law-abidingness and the symbol of the higher law of the human spirit conquering, by suffering, the lawless law of the repressive ruler and legitimating law-reform by giving it the sanction of social conscience. Many pragmatic political theorists and imperative school jurisprudents have philosophised that Might is Right — and indeed, ought to be. But a little man in a colonial country bared his bosom to the leonine violence of an Empire and, in whispered eloquence, declared Right *has* Might and thus puissantly elevated legal culture. The Moral Order of the Cosmos is more potent than the muscular mandate of the sovereign. Conscience *versus* Law is the continuous confrontation between divine discontent of the weaker multitude kindled by the sensitive individual — God's good man — and the inhuman code ordained as law and bulldozed as order, the apparatus of the State being operated oppressively. This is the *dharmakshetra* where the duel between good and evil is dramatised in society. Gandhi spearheaded this militant resistance of the deprived and the depressed, and inspired an insurgency for human justice, and in life as in death, became the beacon light of protest against brutal mis-rule and mis-guided mass frenzy. It is a strange phenomenon of modern times that a practising lawyer, Gandhi in South Africa and India, reacted to iniquity that came to his cognizance in his professional life and laid the doctrinal foundation for the science and inno-

vated the activist art of jurisprudence which injected a revolutionary spirituality into mindless legality. The moral imperative of the *Mahatma* is that the rule of law shall not, without peril to its own life, rob its consumer, the common man, of his right of inalienable liberties, values of veritas and conditions of survival which make man manly.

Gandhi was a master-jurisprudence architect and a supra juridical iconoclast. So were Lenin and Lincoln, their own way. He drew inspiration from Tolstoy, Thoreau and Ruskin, apart from that oceanic reservoir of Indian culture and world heritage. He was preceded by a marvellous galaxy of martyrs of jurisconscience. Explaining the science of *Satyagraha*, which is an alias for jurisconscience, Gandhiji wrote:

"In the application of *Satyagraha*, I discovered in the earliest stages that pursuit of Truth did not admit of violence being inflicted on one's opponent, but that he must be weaned from error by patience and sympathy. For, what appears to be Truth to the one may appear to be error to the other. And patience means self-suffering. So, the doctrine came to mean vindication of Truth, not by infliction of suffering on the opponent, but one's own self.

"When Daniel disregarded the laws of the Medes and Persians, which offended his conscience, and meekly suffered the punishment for his disobedience, he offered *Satyagraha* in its purest form. Socrates would not refrain from preaching what he knew to be the truth to the Athenian youth, and bravely suffered the punishment of death. He was in this case, a *Satyagrahi*. Prahlad disregarded the orders of his father because he considered them to be repugnant to his conscience. He uncomplainingly and cheerfully bore the tortures to which he was subjected at the instance of his father. Mirabai, who is said to have offended her husband by following her own conscience, was content to live in separation from him and bore with quiet dignity and resignation all the injuries that are said to have been done to her in order to bend her to her husband's will.

Both Prahlad and Mirabai practised *Satyagraha*. It must be remembered, that neither Daniel nor Socrates, neither Prahlad nor Mirabai, had any ill-will towards their persecutors. Daniel and Socrates are regarded as having been model citizens of the States to which they belonged, Prahlad a model son, Mirabai a model wife.

"This doctrine of *Satyagraha* is not new; it is merely an extension of the rule of domestic life to the political. Family disputes and differences are generally settled according to the law of Love. The injured member has so much regard for the others that he suffers injury for the sake of his principles without retaliation and without being angry with those who differ from him. And as repression of anger, self-suffering are difficult processes, he does not dignify trifles into principles, but, in all non-essentials, readily agrees with the rest of the family and thus contrives to gain the maximum of peace for himself without disturbing that of the others. Thus his action, whether he resists or resigns, is always calculated to promote the common welfare of the family. It is this Law of Love which, silently but surely, governs the family for the most part throughout the civilised world.

"I feel that nations cannot be one in reality, nor can their activities be conducive to the common good of the whole humanity, unless there is this definition and acceptance to the law of the family in national and international affairs, in other words, on the political platform. Nations can be called civilized, only to the extent that they obey this law."

On June 16, 1920, Gandhi wrote in *Young India* on the Law of Suffering:

"No country has ever risen without being purified through the fire of suffering. The mother suffers so that her child may live. The condition of wheat-growing is that the seed-grain would perish. Life comes out of death. Will India rise out of her slavery without fulfilling this eternal law of purification through suffering?"

"If my advisers are right, evidently India will realize

her destiny without travail. For their chief concern is that the events of April 1919 should not be repeated. They fear non-cooperation because it would involve the sufferings of many. If Hampden had argued thus he would not have withheld payment of ship-money, nor would Wat Tyler have raised the standard of revolt. English and French histories are replete with instances of men continuing their pursuit of the right irrespective of the amount of suffering involved. The actors did not stop to think whether ignorant people would have not involuntarily to suffer. Why should we expect to write our history differently? It is possible if we would, for us to learn from the mistakes of our predecessors to do better, but it is impossible to do away with the law of suffering, which is the one indispensable condition of our being. The way to do better is to avoid, if we can, violence from our side and thus quicken the rate of progress and to introduce greater purity in the methods of suffering. We can, if we will, refrain, in our impatience, from bending the wrongdoer to our will by physical force as Sinn Feiners are doing today or from coercing our neighbours to follow our methods as was done last year by some of us in bringing out *hartal*. Progress is to be measured by the amount of suffering undergone by the sufferer. The purer the suffering, the greater the progress. Hence did the sacrifice of Jesus suffice to free a sorrowing world. In this onward march he did not count the cost of suffering entailed upon his neighbours whether it was undergone by them voluntarily or otherwise. Thus did the sufferings of a Harishchandra suffice to re-establish the kingdom of truth. He must have known that his subjects would suffer involuntarily by his abdication. He did not mind because he could not do otherwise than follow truth."

* * *

"What then is the meaning of non-cooperation in terms of the law of suffering? We must voluntarily put up with the losses and inconveniences that arise

from having to withdraw our support from a Government that is ruling against our will. 'Possession of power and riches is a crime under an unjust government, poverty in that case is a virtue,' says Thoreau. It may be that in that transition state we may make mistakes; there may be avoidable suffering. These things are preferable to national emasculation."

"We must refuse to wait for the wrong to be righted till the wrongdoer has been roused to a sense of his iniquity. We must not for fear for ourselves or others having to suffer remain participators in it. But we must combat the wrong by ceasing to assist the wrongdoer directly or indirectly.

"If a father does an injustice, it is the duty of his children to leave the parental roof. If the headmaster of a school conducts his institution on an immoral basis, the pupils must leave the school. If the chairman of a corporation is corrupt, the members thereof must wash their hands clean of his corruption by withdrawing from it; even so if a government does a grave injustice the subject must withdraw co-operation wholly or partially, sufficiently to wean the ruler from his wickedness. In each case conceived by me there is an element of suffering whether mental or physical. Without such suffering it is not possible to attain freedom."

On a later occasion he breathed fire and brimstone:

"I can no longer retain affection for a Government so evilly manned as it is nowadays. And for me, it is humiliating to retain my freedom and be witness to the continuing wrong. Mr. Montagu, however, is certainly right in threatening me with deprivation of my liberty if I persist in endangering the existence of the Government. For that must be the result if my activity bears fruit."

* * *

"But the greatest thing in this campaign, of non-cooperation is to evolve order, discipline, cooperation among the people, co-ordination among the workers. Effective non-cooperation depends upon complete or-

ganization. Thousands of men who have filled meetings throughout the Punjab have convinced me that the people want to withdraw cooperation from the Government but they must know how. Most people do not understand the complicated machinery of the Government. They do not realize that every citizen silently but none the less certainly sustains the government of the day in ways of which he has no knowledge. Every citizen, therefore, renders himself responsible for every act of his government. And it is quite proper to support it so long as the actions of the government are bearable. But when they hurt him and his nation, it becomes his duty to withdraw his support.

"But, as I have said, every citizen does not know how to do so in an orderly manner. Disorderliness comes from anger, orderliness out of intelligent resistance. The first condition, therefore, of real success is to ensure absence of violence. Violence done to persons representing the Government or to persons who don't join our rank, that is, the supporters of the Government, means in every case retrogression, in our case, cessation of non-cooperation and useless waste of innocent lives. Those, therefore, who wish to make non-cooperation a success in the quickest possible time will consider it their first duty to see that in their neighbourhood complete order is kept."

In *Hind Swaraj* Gandhi explained with cold clarity the law of passive resistance, the precursor to the positive theory of *Satyagraha*. Excerpts illumine, and I quote:

"Passive resistance is a method of securing rights by personal suffering; it is the reverse of resistance by arms. When I refuse to do a thing that is repugnant to my conscience I use soul-force. For instance, the Government of the day has passed a law which is applicable to me. I do not like it. If by using violence I force the Government to repeal the law, I am employing what may be termed body-force. If I do not obey the law and accept the penalty for its breach, I use soul-force. It involves sacrifice of self.

"The real meaning of the statement that we are a law-abiding nation is that we are passive resisters. When we do not like certain laws, we do not break the heads of law-givers but we suffer and do not submit to the laws. That we should obey laws whether good or bad is a new-fangled notion. There was no such thing in former days. The people disregarded those laws they did not like and suffered the penalties for their breach. It is contrary to our manhood if we obey laws repugnant to our conscience. Such teaching is opposed to religion and means slavery. If the Government were to ask us to go about without any clothing, should we do so? If I were a passive resister, I would say to them that I would have nothing to do with their law. But we have so forgotten ourselves and become so compliant that we do not mind any degrading law.

"Kings will always use their kingly weapons. To use force is bred in them. They want to command, but those who have to obey commands do not want guns; and these are in a majority throughout the world. They have to learn either body-force or soul-force. Where they learn the former, both the rulers and the ruled become like so many mad men; but where they learn soul-force, the commands of the rulers do not go beyond the point of their swords, for true men disregard unjust commands. Peasants have never been subdued by the sword, and never will be. They do not know the use of the sword, and they are not frightened by the use of it by others. That nation is great which rests its head upon death as its pillow. Those who defy death are free from all fear. For those who are labouring under the delusive charms of brute-force, this picture is not overdrawn. The fact is that, in India, the nation at large has generally used passive resistance in all departments of life. We cease to cooperate with our rulers when they displease us. This is passive resistance."

Law and Conscience, Law and Humanism, Law and Religion, cross-fertilised each other for him and vibrated on the same wave-length. 'Sedition is my religion', Gandhi

firmly asserted before a British Indian Magistrate administering a *satanic* law. 'I ACCUSE'—Fidel Castro argued in defence at a treason trial launched by tyrant Batista. Both meant that uncompromising resistance to barbarity was the law of one's being when the unlaw of an Empire, despot or racist regime strutted as the law of the realm. To Lord Reading, Gandhiji retorted once:

"Bred in the atmosphere of law-courts, Lord Reading finds it difficult to appreciate the peaceful resistance to authority. His Excellency will learn by the time the conflict is over that there is a higher court than courts of justice, and that is the court of conscience. It supercedes all other courts."

The Law of conscience, in its penetrating power and pervasive manifestations, with its severe code and application to extraordinary oppression on the one hand, and its spurious misapplication to sweeping and superficial situations of anarchic explosiveness on the other, is too sensitive and inflammable a subject to be handled without great care.

The fundamental principles upon which this magnificent philosophy of law is founded are best stated in Gandhian maxims. From these rhythmic notes arise the symphony of his jurisconscience. 'My notion of democracy is that under it the weakest should have the same opportunity as the strongest'. 'No society can possibly be built on a denial of individual freedom'. 'Any tradition', he argued, 'if inconsistent with morality, is fit to be banished from the land'. 'A non-violent fight is as sharp as the edge of a sword'. 'The only tyrant I accept is the still small voice within'. In his ethical code, 'Power rightly exercised must sit light as a flower; no one should feel the weight of it'.

'All reforms owe their origin to the initiation of minorities in opposition to majorities', he claimed. Does not the democratic validity of law lie in this concern for the minority? Again, what a fresh breath of confidence in man, when in Jesus' tongue, he speaks: 'Love is the strongest force the world possesses and yet the humblest!' Paradoxically he indoctrinates that 'suffering is the law of human beings, war

is the law of the jungle'. The great sanction behind valid law is Truth and Nonviolence and the courage to withstand physical torture or infliction of other sort, to stand by principle. This *caveat* is needed because the brazen and diverse broods of *pseudo-satyagrahis* are untrue to themselves, violent at heart and unready for the supreme price. He was no anarchist but a strict disciplinarian whose creed was that 'the highest form of freedom carried with it the greatest measure of discipline and humility'. *Siddhi* flows from *Sadhana*. The core of this construct of a new, yet ancient, jurisprudence is that 'non-violence is infinitely superior to violence — forgiveness more manly than punishment'. And 'nonviolence does not mean meek submission to the will of the evil-doer, but the putting of one's whole soul against the will of the tyrant. Working under this law of our being, it is possible for a single individual to defy the whole might of an unjust Empire and lay the foundation for that Empire's fall or its regeneration'. Gandhi's *Ahimsa* was positive, power-packed: 'Insist upon truth by loving argument, by the testimony of your own life. Once you are assured of the truth, refuse to recant, even to death'. Organised brute force, the State — bends before organised soul force — *the Satyagrahi*; moral force is stronger than machine guns.

A word about 'direct action' rounds off the doctrine. When Howard Thurman, a black American, asked Gandhi: "Is nonviolence a form of direct action?", "It is not one form, it is the only form", he replied. He explained further, "I do not confine the words 'direct action' to their technical meaning..... Without a direct action expression of it, non-violence..... is meaningless One cannot be passively nonviolent. In fact, 'nonviolence', is a term I had to coin in order to bring out the root-meaning of *Ahimsa*..... One person who can express *Ahimsa* in life exercises a force superior to all the forces of brutality..... It is the only true force of life....."

Jesus defied the Roman Empire with the jurisconscience of love as a weapon of transformation of social *mores*. Did he not denounce the formalistic lawyers who built sepulchres over the teachings of the prophets and buried the living law

of love in life? 'Woe unto you, Lawyers! for you have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in, ye hindered'. He said, 'I am come to send fire on the earth!'. His Sermon on the Mount, like the Ten Commandments of Moses, was the law of conscience. And when charged for sedition before Pontius Pilate – Gandhi too was so arraigned – Christ pleaded God's Truth. 'What is truth?' said jesting Pilate; and would not stay for an answer! Here was jurisconscience *versus* jurisprudence recorded in the macabre mists of biblical history. Gandhi developed this Jesus' jurisprudence into a whole philosophy and technology of social change through the jural power of *Ahimsa* – not as an intellectual odyssey nor emotional appeal but a potent weapon for societal change. The subject of moral man and immoral state is not ethics nor politics but law, higher, universal law. The tension between justice and injustice is transcendently synthesised or dissolved by nonviolence, societal and individual – incidentally this measures the methodological distance between Marx and Gandhi. Non-cooperation with evil and cooperation with good, a willingness to fill the jail for principled social change, peaceful direct action against intolerable tyranny, are but applications of jurisconscience. The State's sanction to compel obedience to evil fails, for in the words of Gandhi:

"We will match your capacity to inflict suffering with our capacity to endure suffering. We will meet your physical force with soul-force. We will not hate you, but we cannot, in all good conscience, obey your unjust laws. Do to us what you will and we will still love you. Bomb our homes and threaten our children; send your hooded perpetrators of violence into our communities and drag us out of some way side road, beating us and leaving us half-dead, and we will still love you. But we will soon wear you down by our capacity to suffer. And in winning our freedom we will so appeal to your heart and conscience that we will win you in the process."

Truth and opposition to evil expressed with nonviolent readiness to suffer the sentence of the State sum up his thesis.

In the Ahmedabad trial his words of inner power showed fire:

"I have no desire whatsoever to conceal from this Court the fact that to preach disaffection towards the existing system of Government has become almost a passion with me.

"I wanted to avoid violence. Nonviolence is the first article of my faith. It is also the last article of my creed. But I had to make my choice. I had either to submit to a system which I considered had done an irreparable harm to my country, or incur the risk of the mad fury of my people bursting forth when they understood the truth from my lips."

When challenged by the elemental power of *Satyagraha* conventional law looks like a vast web of illusions without even a veneer of ethics.

Martin Luther King, Jr., says:

"Nonviolence can touch men where the law cannot reach them. When the law regulates behavior it plays an indirect part in molding public sentiment. The enforcement of the law is itself a form of peaceful persuasion. But the law needs help. The courts can order desegregation of the public schools. But what can be done to mitigate the fears, to disperse the hatred, violence, and irrationality gathered around school integration, to take the initiative out of the hands of racial demagogues, to release respect for the law? In the end, for laws to be obeyed, men must believe they are right.

"Here nonviolence comes in as the ultimate form of persuasion. It is the method which seeks to implement the just law by appealing to the conscience of the great decent majority who through blindness, fear, pride, or irrationality have allowed their consciences to sleep.

"The nonviolent resisters can summarise their message in the following simple terms: We will take direct action against injustice without waiting for other agencies to act. We will not obey unjust laws or submit to unjust practices. We will do this peacefully, openly, cheerfully because our aim is to persuade. We adopt the means

of nonviolence because our end is a community at peace with itself. We will try to persuade with our words, but if our words fail, we will try to persuade with our acts. We will always be willing to talk and seek fair compromise, but we are ready to suffer when necessary and even risk our lives to become witnesses to the truth as we see it.”¹

Remember, this is no easy rule for observance. To give blows is easier and more cowardly than to receive blows cheerfully. To do violence to brother is vulgar, to suffer it with courage is manly. To sum up, blood and iron is the hidden force of law to secure conformance. A bleeding soul which unbends before iron is the spinning wheel of social harmony, the locomotive of jurisconscience. When Gandhi fell, mourned Nehru: “The light has gone out of our lives.” No, the sheen of jurisconscience is glorious with Gandhian hues! For, mankind everywhere has now an instrument of activist justice, an anti-law jurisprudence which jettisons wrong and steers the State towards right through nonviolent disobedience and soulful suffering.

The silent effect of this science of being and art of living directed towards a new concord, moral and material and of hateless inter-personal relationship, is to inaugurate an age of enlightenment. The Western schools of jurisprudence are thereby transmuted in their methodology to a moral level and their capabilities lifted to an awareness of imperishable values which govern the purpose and guide the march of cosmic life. If the rule of law must run close to the rule of life — the functional and sociological jurists hold this view — the source book for law is society, even as the beneficiary of change in legal norms is the human being, singly and collectively. Once we grasp that mankind moves towards a higher progression — from darkness to light — the function of law, human law, becomes the practice of the know-how of making the better man, of evolving and stabilising the better society through such means as affect inner life and outer conduct. Law is not value-neutral, it is teleological. And the Gandhian hope of the great society and the good man, without resort to the barrel of a gun, is to use *Ahimsa* as

the sanction of suffering and to evolve an anthology of normative commandments from the finer being within. A strange vocabulary indeed, a mystical programme perhaps, but a demonstrated project from the days of the *Rig Veda*, the Buddha, Maha Vira, Socrates, Krishna, Jesus, Muhammad, Martin Luther, Gandhi and Martin Luther King. The kernel of this law is that love is stronger than hate, that suffering is more potent than its infliction and that the Church of State will collapse before the gospel and the cross. Juris-conscience is the historical, yet scientific, organisation of this higher law. In contrast, vogue jurisprudence is the art of velveted brutality which totteringly holds unstable truce in society by penal procedures flavoured by the beast-instinct of *homo sapiens*. The dark age of draconic law as its voice and whip must yield place to the *sattvic* impulse of human justice charged with superior sensibilities. Here is the confluence of juridical theory and social conscience resulting in creative ethics in action.

The fire of conviction in this great law burns through that historic appeal to America Gandhi made in 1931 at the climactic pitch of our national struggle. Here he speaks:

"In my opinion, the Indian struggle (for freedom) bears in its consequences not only upon India (and England) but upon the whole world.

"The means adopted are not violence, not bloodshed but they are purely and simply truth and non-violence'.....

"We in India feel that the law that governs brute creation is not the law that should guide the human race. That law is inconsistent with human dignity.

"The world is seeking a way out, and I flatter myself with the belief that perhaps it will be the privilege of the ancient land of India to show the way to the hungering world.

"I have, therefore, no hesitation whatsoever in inviting all the great nations of the earth to give their hearty cooperation to India in her mighty struggle. It must be a sight worth contemplating and treasuring, that of millions of people giving themselves to suffering without

retaliation in order that they might vindicate the dignity and honour of the nation."

The Sources of Gandhi

The *Vedic* fountain of legal philosophy has had an exalting influence on the moral bedrock of Gandhiji's teaching. The cultural heritage of India contains the idea of *Ritam*, like the *lex aeterna* of the Romans. The moral order, according to *Rig Veda*, is the synthesis of the inside and outside of *Atman*. This cosmic law is supplemented by the ground rule of *Dharma*. *Satya* goes with *Dharma*, truth with right norms. Says² Prof. K.R.R. Sastry (Sadhu Ramananda Bharati):

"One need only advert to Sri Krishna's note in the *Karna Parva*:

"The word *Dharma* comes from the root 'DHRU' to hold, uphold and human beings are held together by *Dharma*. That by which the holding together (of all human beings) takes place is *Dharma*."

In the *Upanishads*, according to Prof. Sastry, the *Santi-Pata* starts with:

"I will speak of the *Ritam*. The order in the IX *Anuvaka*, *Taittiriya Upanishad* is from *Ritam* to *Satya* to Austerity, to self-control and to Tranquility. This is how the most-important duties are evolved and catalogued."

Gandhi welded out of these components of a world order, as envisioned by the ancients, his doctrine of *Satyagraha* — holding on to Truth through suffering *plus* defiance of evil without *himsa* to the evil-doer. But, even then, Dr. Besant and Rt. Hon'ble V.S. Srinivasa Sastry had cautioned that *Satyagraha* and *Duragraha* are apt to be confused by the crowd as 'thin partition do their bounds divide'. Prof. K.R.R. Sastry's scepticism is worth mentioning in retrospect and is of contemporary relevance:

"That a method of defying law by peaceful and non-violent means could degenerate into violence and arson was seen in Chauri-Chaura, which later was rightly condemned by Mahatmaji as a 'Himalayan Blunder'.

"The cult of courting *mass imprisonment* had left be-

hind a wave of *calculated disrespect for law and order*. The unobtrusive humility of a non-cooperationist could not be had in the many. How many can stand *wholly outside evil* 'on the firm, solid ground of unadulterated good?'".

Ruskin, Thoreau and Tolstoy moulded Gandhi into a *Mahatma* and some thoughts of each have fused into his *Satyagraha*.

John Ruskin — An Advocate of Human Dignity

A non-legal man, John Ruskin, criticised³ the economists of his day for confusing between legal and just: 'For it is possible among certain nations, or under certain rulers, or by help of certain advocates, that proceedings may be legal which are by no means just'. In a footnote⁴ the author writes:

"I hear that several of our lawyers have been greatly amused by the statement in the first of these papers that a lawyer's function was to do justice. I did not intend it for a jest; nevertheless it will be seen that in the above passage neither the determination nor doing of justice are contemplated as functions wholly peculiar to the lawyer. Possibly, the more our standing armies, whether of soldiers, pastors, or legislators (the generic term 'pastor' including all teachers, and the generic term 'lawyer' including makers as well as interpreters of law), can be superseded by the force of national heroism, wisdom, and honesty, the better it may be for the nation."

Ruskin, who influenced Gandhi, condemned the power of wealth, the injustice of exploitation of labour and the delinquency of political economy which constructs a system denying the humane laws of life and upholding the anarchic laws of death. He pleaded 'that our economy' — which is the matrix of law — 'will no longer depend merely on prudence, but on jurisprudence — and that of divine, not human law'.

Thoreau, The Modern Model Dissenter

It is basic to jurisprudence to understand the moving message of its modern progenitor Henry David Thoreau. His view was that a man must follow his conscience regard-

less of cost. His point was that he could not support a Government that endorsed slavery and waged a merciless war against Mexico. Put differently, "There is a higher law than the civil one and the higher law must be followed even if a penalty ensues". Under a government which imprisons any unjustly, the true place for a just man is a prison. It is fascinating to note the little anecdote⁵ connected with the imprisonment of Thoreau when he condemned slavery. Emerson, visiting him, enquired: "Henry, why are you here?". Regarding his friend critically, Thoreau replied: "Waldo, why are you *not* here?". Later, in his essay "Civil Disobedience", Thoreau wrote:

"If the law is of such a nature that it requires you to be an agent of injustice to another, then I say, break the law. Let your life be a counter friction to stop the machine".

In a sense, the Gandhian doctrine was developed from Thoreau's advocacy of the essentially revolutionary principle of action based on one's conscience. Radical social reforms like the abolition of slavery could not be effected by petitions to government or by other indirect democratic means but only when each right-minded individual takes direct action on his own part. This would consist in withdrawing his allegiance in person and property from the government that supports or promotes the abuse in question. Thoreau put into practice this form of peaceful revolution by refusing to pay taxes. Gandhiji raised the status of this doctrine on a cosmic scale and added multi-dimensional application.

Count Tolstoy – The Sage of Yasnaya Polyana

The spiritual genesis of the Gandhian idea is found in Count Tolstoy too. He wrote to young Gandhi:

"Do not resist evil, but also yourselves participate not in evil, in the violent deeds of the administration of the law courts, the collection of taxes and, what is more important, of the soldiers, and no one in the world will enslave you."⁶

Gandhi comments:

"He does not mean by this that those who suffer must

seek no redress. He believes rather that we invite suffering on ourselves through our own fault. An oppressor's efforts will be in vain if we refuse to submit to his tyranny. Generally, no one will kick me for the mere fun of it. There must be some deeper reason for his doing so. He will kick me to bend me to his will if I have been opposing him. If, in spite of the kicks, I refuse to carry out his orders, he will stop kicking me. It would make no difference to me whether he did so or not. What matters to me is the fact that his order is unjust. Slavery consists in submitting to an unjust order, not in suffering ourselves to be kicked."

Archibald Cox, now well-known after Watergate as the prosecutor briefed by a nation's conscience, who dared to accuse his nation's highest single executive of high crime, has presented, a decade ago in polite lawyer's diction, the case for the Gandhian principle of nonviolent protest against the law's evil. I quote:

"When I speak of the rule of law, I mean not a static set of rules but a process. Law is a civilizing and liberating influence only so long as it arises out of the conditions of contemporary society and serves the current needs of men. The capacity for change and growth is as essential an element of the rule of law as reason and voluntary compliance. Indeed, voluntary compliance cannot be severed from the other side of the coin — to win consent of the governed the law must deserve acceptance. When the pace of social change or the growth of social conscience is revolutionary, so must be the changes in the law.

"Social protest and even civil disobedience serve the law's need for growth. Ideally, reform would come according to reason and justice without self-help and disturbing, almost violent, forms of protest. Resort to such pressures is hardly consistent with the ideals of reason and civility. Those who use direct action eschew reason in favour of a form of force, whether it be economic power or simply the power to upset the community by interfering with its normal life. No little cause will justify

their action. Still, candor compels one here again to acknowledge the gap between the ideal and the reality. Short of the millennium, sharp changes in the law depend partly upon the stimulus of protest.”⁸

The deep philosophical under-pinnings and practical implications of soul-force against State-violence in the context of the modern world are so considerable that I fear to tread on this perilous territory and invite statesmen, godmen, jurists, judges, lawyers and the reflective core of the world community to ponder the jural problems, prospects and perspectives projected by this constructive articulation of the creed of conscience not as anarchical adventurism but as built-in divinity in the human system which shall not be stilled until a new justice is delivered by a chastened legality. My thesis in this Lecture is a humble tribute to Gandhi, the super-lawyer, who, by practising the law of Caesar, learnt the law of God and perfected a high-minded discipline, a technique of self-suffering and thus evolved an instrument and theory to enter with catalytic effect an inadequately explored, visionary area of social or human legitimation of State-dictated law of man-made *Dharma*. Great things are always topical; so is Gandhi’s soul-jurisprudence.

Historical Flash-Back

Great movements are not just born full-fledged but germinate and grow, stumbling zig-zag but looking forward. The study of jurisconscience is similar.

Let us examine historically the halting journey of jurisconscience. *Jura Naturalia* of Justinian is an echo of this concept from the caves of legal history. *Jus Divinium* sounds similarly. *Vedic* Indians too spoke of *Rita*, the eternal sense of Right, akin to *lex aeterna* of Roman thought. St. Thomas Aquinas, in the Middle Ages, sought to reconcile divine law and human law and Grotius explained Natural Law thus:⁹

“A dictate of right reason, which points out that an act according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity.”

Hobbes switched Law to absolutist ends as explained in his Leviathan. Locke disagreed: "The end of Law was not to abolish or to restrain but to preserve, or enlarge freedom." Rousseau struck a mean between the individual and the community, but God re-asserted himself through Blackstone, the English jurist, whose regard for parliamentary supremacy was conditioned by homage to divine law:

"This law of nature being coeval with mankind and dictated by God himself is, of course, superior in obligation to any other. It is binding over all the globe, in all countries and at all times; no human laws are of any validity, if contrary to this."¹⁰

Montesquieu and Hume started the sceptical age and Kant and Hegel saw in man his ancestor, the animal. Bentham, the utilitarian realist, thought natural law as a simple fiction. Then came the historical school of Savigny and Maine followed by the Analytical Positivism of Austin which sounded a revolt against Natural Law, a juristic irrelevance. Law was to him but 'a rule laid down for the guidance of an intelligent being by an intelligent being *having power over him.*' This imperative theory of command and coercive enforcement was modified by the sociological school whose champion was Roscoe Pound. Friedmann too argued for the theory of social justice and viewed law as social engineering, and end being justice. Durkheim tried to devise a secular morality:¹¹

"Morality is not a system of abstract rules which man finds inscribed in his conscience, or which the moralist deduces in the midst of his den. It is a social function, or rather a system of functions which developed and became consolidated little by little under the pressure of collective needs."

"..... Morality begins only where effort, struggle, sacrifice, disinterest begin, to live morally is not simply to follow our physical nature..... but..... to add to it, with our own hands, a higher nature which alone is really characteristic of humanity, a wholly spiritual

nature. . . . whose laborious construction would not even be attempted because of the effort it would cost if we did not feel morally and socially obliged to do so."

The rule of law also underwent, since Dicey, a sea change. Today it wears a holy mantle and subserves the happiness of the masses. The 'is' of the positive law is pushed aside if it obstructs the 'ought' of the living law. Moral-social principles have become human rights sanctified by the United Nations Charter and many Constitutions of nations. Moral values, fundamental freedoms and social justice as part of the *suprema lex* and natural justice is familiar in lawyer's mouths. The divine ascent of man's jurisprudence has revived since Coke. Gandhi has supplied sublime and living proof of its validity and added a new dimension to the doctrine and its amplitude. Gajendragadkar J. (as he then was) touched its fringe when, in *Workers of Gold Mines*,¹² he stated:

"Social and economic justice have been given a place of pride in our Constitution and one of the Directive Principles of State policy enshrined in Article 38 requires that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social economic and political—shall inform all the institutions of national life. Besides, Article 43 enunciates another Directive Principle by providing that the State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of a Welfare State."

In the legal history of the English-speaking world the fortunes of *jus naturale* have been fluctuating. May I quote from B.N. Banerjee's fine little book¹³ to make my point with precision?

"The Flood Tide of Respect for Natural Law"

A.D. 1470(1) (Year Book 8 Edward IV, 21):

"We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law; then they resort to the law of nature which is the ground of all laws, and according to what they consider to be most beneficial to the common weal they do, and so also we shall do". (per Yelverton, C.J.)

A.D. 1608(2) 7 Cokes Reports 1, *Calvin's Case*:

"Now followeth the Second Part, De Legibus wherein these parts were considered: first, that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England; thirdly, that the law of nature was before any judicial or municipal law, fourthly that the law of nature is immutable. The law of nature is that which God at the time of the creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature."

A.D. 1614(3) Day vs. Savadge (1614) Hobart 85 (87):

"Even an Act of Parliament made against nature, equity, as to make a man judge in his own cause, is void in itself."

A.D. 1694(4) Blankard vs. Galdy (1694) 2 Salk. 411:

"..... that in the case of an infidel country, their laws by conquest do not entirely cease but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity" (per Holt, C.J.).

A.D. 1701(5) City of London vs. Wood (1701) 12 Mod. 669 (687):

"If an Act of Parliament should ordain that the same person should be party and Judge, or which is the same thing, Judge in his own cause, it would be a void Act of Parliament" (per Holt, C.J.).

A.D. 1723(6) R. vs. Chancellor of Cambridge (1723)
1 Strange 557:

"Besides, the objection for want of notice can never be got over: The laws of God and man both give the party an opportunity to make his defence, if he has any" (per Fortescue, J.).

A.D. 1824(7) Forbes vs. Cochrane (1824) 2 B&C 448
(469)(471):

"That if any human law should allow or injoin us to committ an offence against the divine law we are bound to transgress that human law Now if it can be shown that slavery is against the law of nature and the law of God it cannot be recognized in our courts."

* * *

"The proceedings in our courts are founded upon the law of England and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these the English municipal courts cannot recognize it" (per Best, J.).

A.D. 1882(11) Gibbs vs. Guild (1882) 9 Q.B.D. 59 (74):

"Acts of Parliament are omnipotent, and are not to be got rid of by declarations of courts of law or equiry" (per Holker, L.J.).

A.D. 1912(12) Baylis vs. Bishop of London (1913) 1 Ch. 127(140):

"Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'" (per Hamilton, L.J.).

A.D. 1913(13) Rohinson vs. Fenner (1913) 3 K.B. 835 (842):

"In so far as the term 'natural justice' means that a result or process should be just, it is a harmless, though it may be a high sounding, expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as

it is resorted to for other purposes it is vacuous" (per Lord Shaw).

In his lecture before the Sverdlov University, delivered on July 11, 1919, Lenin said:¹⁴

"We shall cast away all the old prejudices as to the state being universal equality; that is false there cannot be equality so long as there is exploitation, the squire and the worker, the hungry men and he who has enough to eat, cannot be equals.....we shall smash exploitation of every kind..... There will then be neither State nor exploitation. There you have the viewpoint of our Communist Party."

Later on, P. Yudin, in his article on Socialism and Law, observed:¹⁵

"Our Soviet State and Soviet Law — defending in the field of distribution of the socialist principles 'each according to his labour' is making ready the transition to the effectuation of the Communist principles to 'each according to his need.'"

And Vyshinski, in his book 'The Law of the Soviet State', described the Soviet theory of law as based on:¹⁶

"..... the principle of a socialist economic and social system resting on social property, annihilation of exploitation and social inequality, distribution in proportion to labour, a guarantee to each member of society of the complete and manifold development of all his (spiritual and physical) creative forces and true human freedom and personal independence."

No one can deny that Natural Law exists not because courts and prisons enforce them but because it is written by the finger of nature on the hearts of all men. And, in the long run, men, not the Government Gazette, make and validate law. Ethical jurisprudence deals with the law *vis a vis* its justice content. It is the meeting point of moral and legal philosophy. A dehumanised law is sure to be broken since men go by reason and defy brute force. Modern legal philosophy dare not alienate law from conscience, jurisprudence from justice, lest protestant movements overpower the legal system. Law and Disorder will otherwise go together

as happens, for instance, under Imperialism. The simple conclusion is that the fabric of civilised law and humanist order shall have the golden strands of good conscience. Equity jurisdiction is an assertion of this truth.

Salmond who saw the blended felicity of law and justice wrote:¹⁷

"If rules of law are from one point of view, commands issued by the state to its subjects, from another standpoint they appear as the principles of right and wrong so far as recognised and enforced by the state in the exercise of its essential function of administering justice. *Law is not right alone, or might alone, but the perfect union of the two. It is justice speaking to men by the voice of the state.* The established law, indeed, may be far from corresponding accurately with the true rule or right; nor is its legal validity in any way affected by any such imperfection. Nevertheless in *idea* law and justice are co-incident. It is for the expression and realisation of justice that the law has been created, and, like every other work of men's hands, it must be defined by reference to its end and purpose. A purely imperative theory therefore, is as one-sided as a purely ethical or non-imperative theory would be. It mistakes a part of the connotation of the term defined for the whole of it." (Emphasis, added.)

That law and justice are, by birth, Siamese twins is borne out by the language of law in many countries. *Dharma*, right, *jus*, *droit*, *recht* have all a double meaning, ethical and juridical. Therefore, if law is not on speaking terms with justice, if legislation suppresses conscience, if statutory unrighteousness is forced down the throat of society, martyrdom, lawlessness and rebellion ensue. So it is that the Gandhian remedy of conscientious objection in the shape of nonviolent non-cooperation and cheerfully suffering punishment when all other proper methods fail and the injustice is *asuric* in the extreme, comes into play.

Lofty Realism

There may be many hard-headed realists and pragmatic

jurists who reject all this stuff of moralism and conscience as alien to work-a-day jurisprudence and at best on Sunday pulpit or Ashram indoctrination. Here we must remember that law is a social science, that societal legitimation and individual consciousness are basic to effective legality. In this sense, an extra-legal component makes law what it is. Law is functionally good only if it is realisable in fact. Civil power is the potency of Government to execute laws. So it is that even constitutional law follows hard upon the heels of constitutional fact. Most colonial communities have had their constitutional law illegally by rebellion. "By what legal authority was the Bill of Rights passed, and by what legal title did William III assume the Crown? Yet, the Bill of Rights is now good law, and the successors of King William have held the Crown by valid titles." The *Magna Carta* and the meadows of Runnymede are a re-affirmation of popular conscience being a source of great law.

We must therefore spread the canvas wide beyond the statute book, the court halls and prison gates if we are to get a hang of *judicare* by which expression I mean the acceptance, observance and protection of the community by legal system. *Judicare* is the sense of justice in action; judicature is legal justice enforced through courts. The first prevails in the long run, the second in the short run and is moulded by the first.

Legal sociology — call it a social science, if you like — is the 'knowledge regarding the foundations of a legal order, the pattern of legal changes, and the contribution of law to the fulfilment of social needs and aspirations'. Law affects and is affected by the social milieu that surrounds it. Neither legal sociology nor jurisprudence is autonomous; they interact. Any student of political-legal history will admit that pluralism in law holds the view that law is located in society — in "We, the People"—and, in reality, the great law-makers are those who, by the power of their purity and vision, shape the minds of the masses of men. Thus the instrumentalities of law go beyond judges and policemen and the authority of law lies in the people's habitual urge for observance and, when necessary, for change of the social and

economic order. The institutions of law are, of course, set up by the law itself. The image of law suffers when its efficacy in the community is little and the cultural forces oppose it. Law lives not by force alone nor by books alone. Its majesty and its roots are in the conscience of the great prophets of disciplined dissent whose lonely voice becomes the organised value system of the community resources, both legal and social. "In a developed legal order", says the Encyclopaedia of Social Sciences,¹⁸

"authority transcends coercion, accepts the restraints of reason, and contributes to a public consensus regarding the foundations of civic obligation. To the extent that law is 'the enterprise of subjecting human conduct to the governance of rules' (Fuller, 1964 p. 106) it can be said that law aims at a moral achievement; the name of that achievement is *legality* or 'the rule of law'. Its distinctive contribution is a progressive reduction of the arbitrary element in positive law and its administration."

Again, legality requires, beyond the legal system, society's legitimation since legitimacy, as understood by the conscience of the community, is the strength of the legal order. Once we grasp the social foundations of the rule of law, rationality, conscience and revolt against injustice become forces of social change and of the *corpus juris*. Thus law is not the authority of the mace or even of the sceptre but of the elemental powers incarnating in great men like Gandhi who ignite the latent might of morality in human society. Once we agree that law is a social institution, the legal system, the legal process, legal changes — all these tend to acquire humanitarian credentials, Gandhian validation. The rule of law, in the words of Nehru, will then run close to the rule of life — the reflection of the refined moral fibre of the good man. As Salmond put it, "In every progressive community the law undergoes a continuous process of growth and change". The seeds of change lie in the soul of a free community. We may beautifully epitomise the thesis by stating that the halcyon days for Law will emerge when, and only when, Conscience, the inner voice, is heard res-

ponsively by the legal system.

The great question then arises: Can a man of conscience defy the law because he thinks it is not good? Can he non-cooperate with the legal system because he regards it as vicious? Can each good man become a nuclear unit triggering off an explosive break-the-law on a conscience *alibi*?

If Law is the foundation of the social order, deserving of respect and allegiance, anyone, on his own, setting up the cult of revolt, is the harbinger of chaos. Therefore, a society of consensus must move and evolve on the lines of shared beliefs and values. A broad ideological basis must bind the community through legality instead of breaking it up into a clash between black law and white soul. The law follows society and as society changes, the law shall reflect these changes or be bent or broken by society. May be, even the American Constitution, as Learned Hand thought, spoke the vocabulary of 'natural law'.

Great principles of justice form the quintessence of the constitutions of civilized societies. There the rule of law will broadly answer the moral aspirations of the good people. Moreover, the periodical assent at the polls is a necessity of democracy and legislative policy will bear the general stamp of community consent. Even so, honest dissent is a way of democratic life if animated by perfect probity and manifested as civil disobedience, guided by the urge of conscience and willingness to suffer the penalty for breach of an utterly unjust law. Thoreau practised it and was put in prison and Gandhi followed his theory and expanded it into a solemn legal-political philosophy of global dimensions and diversity.

Magnificent, morally uplifting, powerful beyond pragmatic imagination, the soul-force of civil disobedience, when conscience fights codified evil draped in law, is a demonstrated fact. Gandhiji, in the midst of mad communal fury, proved its strength as superior to military might and Mountbatten described him, when massive savagery was bleeding India, as 'a one-man boundary force'. Law with wig, mace and baton and with *tamasic* potency, pales before

the Himalayan resistance of luminous conscience whose non-violent strength displayed through fasts, jail-going, receiving blows and suffering physical torture, is operational anywhere on the human planet. But the might of the moral fibre shows up only where the science of soul-force is mastered and the principles of its application strictly applied. So savage must be the situation of injustice, so extraordinary the adherence to Truth and Nonviolence, so determined the will to suffer, perchance to die, for the cherished cause — that one might well suggest that rare are the occasions, and rarer the men, for the jural drama of the transcendental *versus* para-violent to be enacted. Indiscriminate and vulgar promiscuity in indulging in *Satyagraha* contradicts Thoreau's anti-slavery struggle, Dr Martin Luther King's anti-black discrimination and Gandhi's anti-imperialist battles. Potti Sreeramulu's fast unto death and death produced terrific effect and linguistic States came about. It is a doubtful example. Kelappan's Vaikom Satyagraha and Guruvayoor Satyagraha are great instances of rousing social conscience against social resistance. Divine archery is intended against *asuric* systems. Drastic drugs are dangerous except in terminal diseases.

Administrators, lawyers and judges, statesmen and peace-loving men will rightly turn the focus on the spectrum of illegal, albeit peaceful, transgression of rules of law on principle. The conscience factor if sanctified as holy doctrine might breed civil disorder and chaos unless contained within narrow, sacred, confines beyond ordinary mortals. Another necessary caution is to define, as far as the concepts admit, the different subjects like 'direct action', 'civil disobedience', 'nonviolent non-cooperation' and 'satyagraha'. For, allowing the rule of civil disobedience to run amok is the undoing of all civilised rule of law unless the practitioners are masters of *Ahimsa* — a consummation devoutely to be wished.

India's Gandhi in the Champaran case, cleared the confusion and underscored the imperatives:

"As a law-abiding citizen my first instinct would be, as it was, to obey the order served upon me. But I could not do so without doing violence to my sense of duty

to those for whom I have come. I am fully conscious of the fact that a person, holding, in the public life of India, a position such as I do, has to be most careful in setting an example. It is my firm belief that in the complex constitution under which we are living, the only safe and honourable course for a self-respecting man is, in the circumstances such as face me, to do what I have decided to do, that is, to submit without protest to the penalty of disobedience. I venture to make this statement not in any way in extenuation of the penalty to be awarded against me, but to show that I have disregarded the order served upon me not for want of respect for lawful authority, but in obedience to the higher law of our being, the voice of conscience."

India, since the Mahatma, has misused this spiritual instrument resulting in vulgar devaluation of the method and its potency through rashes of *Satyagraha* for worthless causes. A moral nuclear weapon has lost its seriousness and explosiveness and become a mass *tamasha*, self-defeating and profane. O, the pity of it!

In America the Civil Rights Movement, the Women's Liberation Movement, the Youth Dissents and Anti-Draft Protests against Vietnam have highlighted the uses and misuses of the law of conscience, even as in our own land *Satyagraha* has sometimes appeared as an infectious disease of puerile lawlessness. The danger of reckless and disguised free-for-all civil disobedience of constituted authority is the break-up of ordered society.

Jesus and Gandhi are rare guides. Indeed, was there only one Christian in all the world and He died on the Cross — and was there only one Gandhi in our time and he slumped to death to some Godse gun? No, emphatically no. But the greatness of this law and its practitioner is beyond the comprehension of common men, however well-meaning and high-minded. Even the apostles do not understand the master and it was Renan who once said that when Fate could not destroy a great man it sent him disciples in revenge. That apart, the people in the mass may easily miss the nonviolent drill of the Gandhian law — the austere

Anusasan. In despair Gandhi wrote in 1946 in the *Harijan*:

“Is independence to be bought at the price of a bloody revolution, as was, say, the French, or the Soviet, or even the English?”

Then, comments Prof. Hiren Mukherjee, frank and honest work has yet to begin — work that he, at any rate, would never undertake. He was warning the country of ‘the danger from within which ‘corrodes the soul’, while ‘the danger from without ... polishes’. To an American professor some time later, he said that communal conflict had nearly taken on the dimensions of a civil war because *Satyagraha* had not sunk deep in people’s minds. “Indians harboured ill-will and anger against their erstwhile rulers, while they pretended to resist them nonviolently. Their resistance, therefore, was inspired by violence, and not by regard for the man in the British, whom they should convert through *Satyagraha*. Now that the British were voluntarily quitting India, the apparent nonviolence went to pieces in a moment.” (Hiren Mukherjee on “Gandhi”, p. 171.)

It is profitable to study the uses and misuses, the import and portent of conscience *versus* law in common life situations removed from the tense and tragic moral climaxes which have established the validity of this supra-legal jurisprudence. Law management being assaulted by little men armed with civil disobedience kits creates a new crisis of lawlessness — a *caveat* which social scientists have stressed.

Obedience and its Perils

In a recent series of experiments Prof. Stanley Milgram, a professor of Psychology, tested the role of obedience mechanism in the psyche in humans and examined its legal and philosophic aspects. Strange were the methods — electric shocks — and stranger the findings, viz. obedience is an ingrained behaviour tendency and any average man may act like Adolf Eichmann — any uninspired bureaucrat who simply sat at his desk and did his job! Conscience and compassion are to be cultivated both because each man has a wild beast within him and because wrongs are done out

of an impression of his duties as a subject. Gandhi's great relevance emerges from this *bizarre* study.

A Social Scientist's Perspective

Prof. Milgram rightly regards obedience as a basic element in the structure of social life:

"Some system of authority is a requirement of all communal living, and it is only the person dwelling in isolation who is not forced to respond, with defiance or submission, to the commands of others."

* * *

"The dilemma inherent in submission to authority is ancient, as old as the Biblical story of Abraham, who is commanded by God to sacrifice his son as a test of his faith. And the question of whether one should obey when commands conflict with conscience has been argued by Plato, dramatized in Sophocles' *Antigone*, and treated to philosophic analysis in almost every historical epoch. Conservative philosophers argue that the very fabric of society is threatened by disobedience, while humanists stress the primacy of the individual conscience."¹⁹

The essence of obedience is that the person does not take responsibility for his actions but merely responds to the authority directing him. And, there's the rub. For mere morality becomes subordinate to authority and unconscionable things are done uninhibited by the qualms of conscience. Law-abiding people who commit heinous acts get away with it by merely condoning themselves that they have done their duty by the law. A free citizen must feel responsibility for his action and democracy finds its finest hour only when there is responsible allegiance to the law. The problem of obedience is partly psychological and partly social. We cannot have society without some structure of authority. We have to learn obedience in the family situation, at school, at the work place and in the larger circles of society. Otherwise, instability will be writ large and anarchy will be inevitable.

The philosophical issue of order in society thus assumes deeper significance in the context of conscience and authority, of inner conviction and directed action. Professor Milgram poses the problem of difficult democratic implications when he comments:

"Is there any way we can avoid this frightening potential, this easy acceptance of authority even when it is misguided or evil? It may be that we are puppets — puppets controlled by the strings of society. But at least we are puppets with perception, with awareness. And perhaps our awareness is the first step toward our liberation. The fact that obedience is often a necessity in human society does not diminish our responsibility as citizens. Rather, it confers on us a special obligation to place in positions of authority those most likely to use it humanely. And people are inventive. The variety of political forms we have seen in history are only several of many possible political arrangements. Perhaps the next step is to invest and to explore political forms that will give conscience a better chance to resist errant authority".²⁰

Conscience *versus* law has other direct implications for social scientists. There is a tendency for people to justify unethical behaviour by pleading the sanction of authority. We know that the Vietnam bombardiers suffered little conflict of conscience when they dropped devastating death, for they felt they were obeying authority. At the same time, the other horn of the dilemma cannot be missed. If each individual claims conscience and autonomy as an alternative to authority and obedience, anarchy will be the outcome and history teaches us that the surest way to tyranny is chaos. Richard Herrnstein takes a correctly critical look at the Milgram thesis:

"Though he recognizes the alternatives, Milgram's sympathies are libertarian. He wants a more defiant citizenry, a higher percentage of disobeyers to authority. I have no doubt that it would be easy to make people more likely to say no to authority, simply by reducing the penalties for doing so. But the evidence does not

suggest that people use only benevolence or moral sensitivity as the criteria for rejecting authority. Think of some real examples. Would it be greed or a higher virtue that would be the main reason for defaulting on taxes if the penalties were reduced? What deserter from the army would fail to claim it was conscience, not cowardice, once conscientious desertion became permissible?"²¹

Another deleterious offshoot of setting the law of conscience against the law of the State is to activate the roots of violence. Ethnologists have pointed out that man is inherently aggressive and given some excuse violence will erupt masked as civil disobedience. The words of the distinguished historian Richard Hofstadter have much meaning in the contemporary world.

"Throughout American history, violence has been a facet of life, just as it has been in most other countries. Americans are...full-fledged members in the fellowship of human frailty".

Looking at the violence all round and the reckless idealism of youth-culture, there is need for increased insistence of law and order by repetition of the philosophy that dissent is healthy so long as it does not transgress the rights of others and accomplishes changes through broad consensus *within the system*. The conscience factor must therefore be kept under leash if the moral legacy of Gandhiji's law of *Satyagraha* were to be more productive than now. The new frontiers of juris-conscience cannot consent to validating wanton outlawing lest both law and authority get soaked in blood to suppress disloyalty. Unequivocally we must reject violence by groups and individuals as a means of correcting injustice or venting dissent. The loftier alternative is the Gandhian path of non-violence at all costs plus non-cooperation with evil at all costs.

A word about Gandhi the lawyer is apposite. His devotion to truth and peace was extraordinarily reflected in his professional career. Untruth in the brief was so promptly rejected by him that every judge could make an initial, almost irrebuttable, presumption on facts in favour of Gandhi's case.

He was fair to a fault and encouraged preventive practice viz., settlement of disputes as far as possible. In Law as in Life Gandhi was veracity in vigorous action.

The Omens

The World Legal Order as also the National Legal Order must combine stability with change if they are to survive. The movement started by heroic souls asserting elemental human rights, usually without violence and always in direct challenge to the entrenched *status quo*, is broadly described as Civil Disobedience. The Civil Rights Revolution in America is a fruit of such civil disobedience because reform in favour of the coloured would not have moved so fast had there not been the peaceful demonstrations and the stirring marches. "There might be no Voting Rights Act of 1965 without Selma". Inspired Indian instances are legion to prove that nonviolent lashes by the conscience of the multitude have shaken the Establishment into surrender, reluctant law reform or law-making. Then arises the core question: What are the authentic limitations, what the driving force and what the touch-stone and testimony of the jurisprudence of conscience? If direct action, disobedience of authority and like anti-legal procedures are morally and factually justified and rewarding, could we resort to these dramatic, yet traumatic, processes for securing long overdue law reforms and undoing of chronic social evils? If there is force in this submission that nonviolent disobedience to unjust laws is morally correct and may, eventually, be constitutionally right, are we to widen the doctrinal basis of this theory to instigate violation of vogue legality to produce a radicalised legality? If we are sensitive to group wrongs — and they are many in almost every society — why not use the same techniques of anti-law to shock the conscience of the people and their elected representatives into an awareness of the inhumanity that hold sway even under systems of government described generally as 'by the people and for the people'? Disintegration may be the end product; disastrous forest fires!

This line of thought has an anarchical seed and must induce grave misgivings if massive disobedience as a techni-

que of law-reform were to receive juristic blessings. Mr. Justice Black, in his opinion in *Cox vs. Louisiana*, 379 U.S. 559, emphatically asserted:

"Experience demonstrates that it is not a far step from what to me seems the earnest, honest, patriotic, kind-spirited multitude of today to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble causes today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends".

The same point of view was stressed by Burk Marshall, formerly Assistant Attorney General in the Department of Justice, when he wrote:

"I frankly do not know how our society can support or at least as far as law enforcement is concerned, even tolerate a movement which relies on genuine disobedience to law as its source of energy, and on the threat of violence alone to induce social change".

In *Nawakhan*²² the Supreme Court of India considered this issue from a constitutional angle tinged with moral overtones. The rival views are lit up by beams of thought in the quotes contained in the judgement which may well be excerpted. "Said Justice Frankfurter:

"If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny".

The California Supreme Court walked up a different legal street when it held:

"An escape is classed as a crime against public justice, and the law, in declaring it to be an offence, proceeds upon the theory that the citizen should yield obedience to the law; that when one has been, by its authority or command, confined in a prison, that it is his duty to submit to such confinement until delivered by due course of law. But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offence does not exist. In such a case the right to liberty is absolute, and he who regains it is not guilty of the technical offence of escape."

The impeachment of Andrew Jackson elicited heated argument of great moment.

"I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizen or public officers."

For the working of the law in sisterhood with ethics, these contradictory lines of juridical thought may have to be reconciled by some understandable formula. Another dimension of the same issue is as to whether it is open to individuals or groups, convinced that a great right has been conferred on them by the paramount law or the natural law but is denied to them by a legislation, to flout the local statute by self-determining that it violates the constitution or defies the natural law. *Nawabkhan* faced this question and suggested a vaguely viable solution:

"Beyond doubt, an order which infringes a fundamental freedom passed in violation of the *audi alteram partem* rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e., the impugned act or order was never valid. The French jurists call it *L'inexistence* or outlawed order."

If the State's first duty is to keep the peace by enforcing the law regardless of its morality, the Gandhian dilemma will project itself.

Archibald Cox conscientiously queries about a violator of the law on grounds of conscience.²³

"Has such a man any better moral claim? Is there ever a social or moral right to disobey a plainly valid law? Can failing to register under the Selective Service Act or obstructing the shipment of munitions ever be socially or morally justified as a citizen's form of protest even though it is legally wrong? Can one distinguish between these cases and those of the sit-in demonstrations and others who engage in demonstrations for a just cause,

knowing that they violate well-established laws, but uncertain whether those laws are constitutional? We sometimes have to leave the legal question to decision after the event, but surely the moral question must be faced in advance of action.

"In answering the question we may put aside for the present the problems raised by men like Thoreau who reject society and go off by themselves into the wilderness eschewing demands upon other men which might yield a reciprocal social obligation. We are speaking now of those whose concern is to influence society through effective promotion of reform.

"The examples of Socrates, Gandhi, and our more violent revolutionary forefathers are also distinguishable. Their challenge was to regimes which gave them neither the means of effectuating guarantees of liberty nor the political processes essential to effective self-government. Both the liberty and processes are available within our constitutional system. Were it not for the power of the Federal government to which he could turn for justice and equality within a framework of constitutionalism, the Negro might have offered a justification similar to Gandhi's, at least in the South where he was effectively disenfranchised and treated as an outcast."

Being a jurist, he comments critically on this potentially anarchical moral doctrine.²⁴

"One cost we pay for all civil disobedience is the heavy damage it does to the principle of government by consent of the governed — a principle which is the surest guaranty of individual liberty devised by man and also the source of the widest opportunities men have ever enjoyed to remake society without repeated violence in contests for physical or economic power. Repeated widespread disobedience to the law's commands therefore puts at hazard individual liberty, freedom of speech and association, and opportunities for peaceful change through a government responsive to the people."

In an active democracy, the normative commands of law, in their dynamic form, respond to the moral demands of

change — or perish. Any judge or lawyer worth the name will agree with Cox:²⁵

“The simple fact is that our constitutional system works and our society is free because officials, individuals, and the community realize that in the end the rule of law depends upon voluntary compliance. Such is the true meaning of government by consent of the governed. Voluntary compliance is essential to the rule of law.

“I am not blind to the need for the coercive power of the State. The policeman’s billy will be an indispensable part of every legal system until we reach the millennium. That swift enforcement can and must follow disobedience, even by a State against constitutional judgments, is evidenced by our early constitutional history as well as the more recent events in Mississippi and Alabama. In cases affecting individuals, whether civil or criminal, the sheriff stands behind the court’s decree. Nonetheless, even in the case of individuals, force can be invoked only in exceptional cases. It supports but cannot take the place of free assent, for in the final analysis force and the rule of law are anti-thetical. The core of the evil in true civil disobedience, is that it weakens the bonds of law and compels the State to resort to power.

“You may object that this is a lawyer’s view and that if a law is truly unjust, there is no reason to preserve it. My answer is that we are concerned with the basic idea of law — with a force binding all men — and that you cannot pick and choose among good laws and bad laws according to each individual’s conscience without destroying the whole concept of the rule of law. Nor do I attach value to the rule of law just because it is law. Law is a human instrument, constructed by men to meet men’s needs; it must justify itself by what it does for men in meeting their needs, including their ethical judgements and moral aspirations.”

This great academician touches the moral-legal chords of higher jurisprudence when he loftily observes:²⁶

“It is the capacity to command free assent that makes law a substitute for power. The force of legitimacy —

and conversely the habit of voluntary compliance — is the foundation of the law's civilizing and liberalizing influence. Indeed, I am prepared to insist that law in this sense is the very fabric of a free society. There is no alternative short of the millennium."

* * *

"When I speak of the rule of law, I mean not a static set of rules but a process. Law is a civilizing and liberating influence only so long as it arises out of the conditions of contemporary society and serves the current needs of men. The capacity for change and growth is as essential an element of the rule of law as reason and voluntary compliance. Indeed, voluntary compliance cannot be severed from the other sides of the coin — to win consent of the governed the law must deserve acceptance. When the pace of social change or the growth of social conscience is revolutionary, so must be the changes in the law.

Social protest and even civil disobedience serve the law's need for growth. Ideally, reform would come according to reason and justice without self-help and disturbing, almost violent, forms of protest. Resort to such pressures is hardly consistent with the ideals of reason and civility. Those who use direct action eschew reason in favour of a form of force, whether it be economic power or simply the power to upset the community by interfering with its normal life. No little cause will justify their action. Still, candor compels one here again to acknowledge the gap between the ideal and the reality. Short of the millennium, sharp changes in the law depend partly upon the stimulus of protest."

May I add my footnote? Indiscriminate misuse of Gandhian jurat may produce the syndrome of suicide of law — too critical a social pathology to promote. On the contrary, abject obedience to every grinding mandate with a veneer of law, but too vicious for a man of conscience to conform, is an argument of cowardice. The fine but real demarcation was made by Gandhiji in his stern frown upon *Satyagraha*

by anyone but himself! Men of clay may blur the distinction and blunt the weapon. That is a big *caveat*. Gandhi is an atomic implosion for strictly peaceful ends according to that conscience-physician's prescription! 'Above all', says Yehudi Menuhin, 'what marks a great man is the spiritual climate he creates in his own soul'.

Law Reform and Protests of Conscience

Conscience of individuals and groups can be a catalyst for law reform to fulfil the finer values of life. An unjust social practice can be extirpated not by legislation alone but by the mobilisation of conscience force of the community. Gender injustice from *Sati* to *Purdah*, from economic discrimination to inheritance inequality, other grievous wrongs on segments like untouchables and a host of terrible social evils eating into the vitals of society may be extradited not by law alone but the 'grace of pressure' conscience can summon. The *Bhoodan* movement was an invasion by the Vinoba ideology on the law of real property considerably facilitating land reform legislation. In these areas, conscience and law are companions in a common cause. Allied Power beating back Reaction — Social, Economic and other.

It is a rewarding, promise-laden study to explore the methodology of producing socio-economic justice through the conscience process backed by the legal process. If Truth is on the side of this new social order, sure, *Satyagraha*, devoid of violence and acceptance of suffering, may be a science and art to achieve the end. Thus law reform, on a rainbow of topics, may be successfully promoted — not by the threat of political power nor by pontifical judicial power — but by the *Satyagraha* technique sincerely executed. The commanding heights of social change and subjugation of monstrosity belong to jurisconscience.

The rule of law comes unto its own when society legitimates it. Supportive social factors depend on the new values mirrored by the legal system. So it is that, whether the broad consensus be for a socialistic pattern or for specific step-by-step changes as are envisaged in the 20-point programme and re-orientation of the economic policy, law should

not go it alone as a uni-disciplinary instrumentality. It must be vitalised by the jural sense or jurisconscience of the people. Indian experience makes it redundant to expand on this great potential of the militant conscience courting suffering to set right social injustice.

Archibald Cox chimes in.²⁷ With lovely wisdom lining law, he writes:

"History affords abundant examples. The extension of the rule of law to millions of workers in industrial establishments is one of the great creative accomplishments of law in the present century, but the stimulus came from strikes, boycotts, and picketing that, under the older precedents, were quite plainly illegal. Similarly, while we may take some measure of reassurance from the demonstrated capacity of our statutory, judge-made, and constitutional law to grow in response to demands for racial justice, that satisfaction must be tempered by the admission that for decades the law was blind to the wrongs and its eyes were opened only by picketing, boycotts, sit-ins, marches, and other demonstrations creating the specter of violence. The legality of the sit-ins and some of the marches was far from certain.

"If what I have said thus far be true, even one with a conscience sensitive to the rule of law faces a dilemma. If he disobeys the existing rule established by statute or embodied in judicial decisions, he violates the precept of voluntary compliance, but if he obeys, he forgoes for himself and thereby deprives all of us of the chance that the law will change, and that, under the impact of his action, it will be decided that what he did was actually legal, despite the contrary precedents, either because it did not violate the relevant statutes or rules of decision or else because it involved the exercise of a constitutional right.

"Under such circumstances one can hardly lump together all conduct potentially involving civil disobedience and then brand it, in terms of conscience, as altogether right or altogether wrong. On the contrary, one can say with considerable assurance that the test is not always

whether the action taken is consistent with the rights of others under existing rules and finds sanction in existing precedents. Surely there is a difference between (1) those who resort to self-help and other nonviolent action in disobedience to civil authority conscientiously believing that what they are doing involves the exercise of a legal right as the courts will declare it and (2) those who violate a plainly valid law knowing that their conduct is illegal.

"The first group would seem to do moral wrong merely because their conduct turns out, to be illegal. The law, as made by judges, grows and changes in response to what is done by those strong enough to assert new rights in the face of existing precedents. A good example is the march from Selma to Montgomery."

* * *

"Under the pressure of events Judge Frank Johnson laid down the novel but sound principle that '(the) extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against.' Judge Johnson found the wrongs to be 'enormous', and the extent of the right to demonstrate was determined accordingly.

"The civil disobedience of the sit-in demonstrators also belongs in this category, although perhaps their action was illegal. Judged by then existing law, they were trespassing against the settled rights of the operators of restaurants and lunch counters, and their constitutional challenge went far beyond the precedents. Their grievance, however, was greater than any other in the community, reason and civility had yielded no response, and their legal argument that the Fourteenth Amendment gave them a direct constitutional right to equal service at restaurants and lunch counters was not without an honest and substantial hope of success. The legality of their conduct has never been finally adjudicated, but I

would not question its morality on the ground that it might have turned out to be illegal.

"Society would disintegrate if demonstrations and direct action widely replaced reason and civility as methods of resolving questions of public policy. Repeated resort to such tactics is also likely to lessen their usefulness when truly needed. Nevertheless, when the cause is just, when there is urgency, and when other channels are closed, we should defend the social and moral right to disobey a law that one sincerely believes will be held unconstitutional, even though he turns out to be wrong. Whatever harm is done to the principle of consent is balanced by the need to conform the law to the demands of conscience."

With serious reservations and large areas of agreement, I demur to the generality of the proposition. In the march of legal civilization moral man may hopefully change the course of law and its justice-content. "In the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. If the time and energy expended on polemics were devoted to that work, jurisprudence would be more nearly abreast of its task." (Paton, *National Jurisprudence*; p. 7.)

I conclude this thesis with an interrogation and tentative answer. A valid poser which cannot be evaded may be put by any jurist confronted by the disruptive theory of a conscientious dissent. Can law-breaking, at all, be a process of law-making or revolt, a technique of reform? How can martyrdom have mutative potential when its method is infliction of mayhem on the Establishment? The answer is straightforward, though abstruse-sounding. Every democracy which legislates with the backing of the majority is bound to recognize the voice of the minority, the still small voice, maybe. Therefore, in the technology of power politics and democratic processes, dynamic dissent by a group — even a one-man minority — has a seminal role. But the rules of the game implied in the rule of law must be adhered to. In short, dissent and protest must be strictly disciplined and nonviolent, democratically designed to rouse the majority's conscience,

and the violater must act solely on spiritual conviction and be sweetly ready to greet the penalty of the law both to prove its impotence on his person and to rouse the better sense of the law-maker. Within this framework, jurisconscience, as a built-in mechanism, has a futuristic impact on the law of tomorrow.

Before parting with the subject it may be fair to quote a famous Gandhian dictum and follow it up with an American academician's treatment of the subject.

Gandhiji said:

"I have found that it is our first duty to render voluntary obedience to law, but whilst doing that duty, I have also seen that when law fosters untruth it becomes a duty to disobey it."

Inspired by Thoreau, theories of justice in America have been evolved by jurists giving a place to civil disobedience and conscientious refusal within the democratic order. Even in practice, the protest movements against black discrimination and the Vietnam draft have made this theory go into action. Professor John Rawls in his "A Theory of Justice"²⁸ has dealt at some length with the definition, discipline and operational area of civil disobedience within the constitutional framework. I leave him to speak for himself, through relevant excerpts, although I reserve to myself comments of approbation or disapprobation about the views so expressed. As Judge, I cannot contemplate civil disobedience which is illegal. As humanist jurist, I have to allow it play in the very restricted area rigorously delimited by Gandhiji. In any case, those who advocate civil disobedience must do so with great sense of responsibility as they must bear full moral blameworthiness for violent deviances and improper evasions which are bound to occur. I quote:

"I shall begin by defining civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among

free and equal men are not being respected.

"It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. The persistent and deliberate violation of the basic principles of this conception over any extended period of time, especially the infringement of the fundamental equal liberties, invites either submission or resistance. By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.... A further point is that civil disobedience is a public act. Not only is it addressed to public principles, it is done in public. It is engaged in openly with fair notice; it is not covert or secretive."

"Civil disobedience is nonviolent for another reason. It expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct."

"To be completely open and nonviolent is to give bond of one's sincerity, for it is not easy to convince another that one's acts are conscientious, or even to be sure of this before oneself. No doubt it is possible to imagine a legal system in which conscientious belief that the law is unjust is accepted as a defense for non-compliance. Men of great honesty with full confidence in one another might make such a system work. But as things are, such a scheme would presumably be unstable even in a state of near justice. We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.... Civil disobedience has been defined so that it falls between legal protest and the raising of test cases on the one side, and conscientious refusal and the various forms of resistance on the

other. In this range of possibilities it stands for that form of dissent at the boundary of fidelity to law. Civil disobedience, so understood, is clearly distinct from militant action and obstruction; it is far removed from organized forcible resistance."

"There is a temptation to say that the law must always respect the dictates of conscience, but this cannot be right. . . . A theory of justice must work out from its own point of view how to treat those who dissent from it. The aim of a well-ordered society, or one in a state of near justice, is to preserve and strengthen the institutions of justice."

"I shall consider the circumstances under which civil disobedience is justified. . . I shall begin by setting out what seem to be reasonable conditions for engaging in civil disobedience, and then later connect these conditions more systematically with the place of civil disobedience in a state of near justice. Of course, the conditions enumerated should be taken as presumptions; no doubt there will be situations when they do not hold, and other arguments could be given for civil disobedience."

"The first point concerns the kinds of wrongs that are appropriate objects of civil disobedience. Now if one views such disobedience as a political act addressed to the sense of justice of the community, then it seems reasonable, other things equal, to limit it to instances of substantial and clear injustice, and preferably to those which block in the way to removing other injustices. For this reason there is a presumption in favour of restricting civil disobedience to serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity".

"A further condition for civil disobedience is the following. We may suppose that the normal appeals to the political majority have already been made in good faith and that they have failed. The legal means of redress have proved to no avail. Thus, for example, the existing political parties have shown themselves indifferent to

the claims of the minority or have proved unwilling to accommodate them. Attempts to have the laws repealed have been ignored and legal protests and demonstrations have had no success. Since civil disobedience is a last resort, we should be sure that it is necessary. Note that it has not been said, however, that legal means have been exhausted. At any rate, further normal appeals can be repeated; free speech is always possible."

"The third aim of a theory of civil disobedience is to explain its role within a constitutional system and to account for its connection with a democratic polity. As always, I assume that the society in question is one that is nearly just; and this implies that it has some form of democratic government, although serious injustices may nevertheless exist. In such a society I assume that the principles of justice are for the most part publicly recognized as the fundamental terms of willing cooperation among free and equal persons. By engaging in civil disobedience one intends, then, to address the sense of justice of the majority and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated. We are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us."

"There are, to be sure, definite risks in the resort to civil disobedience. One reason for constitutional forms and their judicial interpretation is to establish a public reading of the political conception of justice and an explanation of the application of its principles to social questions. Up to a certain point it is better that the law and its interpretation be settled than that it be settled rightly. Therefore it may be protested that the preceding account does not determine who is to say when circumstances are such as to justify civil disobedience. It invites anarchy by encouraging everyone to decide for himself, and to abandon the public rendering of political principles. The reply to this is that each person must indeed make his own decision. Even though men normally seek

advice and counsel, and accept the injunctions of those in authority when these seem reasonable to them, they are always accountable for their deeds. We cannot divest ourselves of our responsibility and transfer the burden of blame to others. This is true on any theory of political duty and obligation that is compatible with the principles of a democratic constitution. The citizen is autonomous yet he is held responsible for what he does. If we ordinarily think that we should comply with the law, this is because our political principles normally lead to this conclusion. Certainly in a state of near justice there is a presumption in favor of compliance in the absence of strong reasons to the contrary."

"The final court of appeal is not the court, nor the executive, nor the legislature, but the electorate as a whole. The civilly disobedient appeal is a special way to this body. There is no danger of anarchy so long as there is a sufficient working agreement in citizens' conceptions of justice and the conditions for resorting to civil disobedience are respected. That men can achieve such an understanding and honor these limits when the basic political liberties are maintained is an assumption implicit in a democratic polity. There is no way to avoid entirely the danger of divisive strife, any more than one can rule out the possibility of profound scientific controversy. Yet if justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist."

Jurists may venture theories of justice but pragmatic dispensers of justice and administrators of law and order must not lend countenance to disruptive practices which have a high break-up potential.

A Festschrift

Great dissent is ethics in democracy and posthumous glory

of prophets and judges, if played over the flame of conscience, wisdom and discipline. Writing on the judicial dissenters of American history in "Prophets with Honor",²⁹ Alan Barth quotes Charles Evans Hughes to say: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day". Perhaps, a conscientious nonviolent law-breaking also is a plea to posterity or to the final court of appeal viz. the whole people. The dissent of today may become the law of tomorrow. The seminal role of stirring the sensibilities and prodding the conscience of the country belongs to judges who foresee the future and to jurisconsults who fashion its fabric. Gandhiji was a god-possessed dissenter, a prophet with honour, a law-abiding law-breaker and disciplined democrat. I salute him as the cosmic exponent of the doctrine of 'Discretion to Disobey' and as this century's "Prometheus Unbound" for whom love and nonviolence are a powerful social force against injustice and inertness and a potent instrument for collective transformation. Our tryst with Gandhi demands an 'unbending front of nonviolence', and an ability to turn the other cheek. The fighting faith of jurisconsults is:

"Things of fundamental importance to people are not secured by reason alone, but have to be purchased with their suffering".

And the province and function of human law is human justice in action. The journey is long, but it is to the stars! The navigation is hazardous, but the direction is to a happier world! Ages hence, the pharmacopoeia of law will find Gandhi as the most potent, broad-spectrum, long-acting remedy for society's malady. To vary the metaphor, a voice of celestial law is hushed by death, but generations ahead will hear its echoes and capture its overtones. Gandhis are the whispering galleries of history. Gandhi had a mission and jurists have a commission. Together they form a beautiful totality.

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