

## *Special Comment*

### **LAWYERS AND THE BUILDING OF COMMUNITIES**

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*The intermingling of diverse cultures in India and the U.K. forms the backdrop of this special note, which deals with the relevance of culture to law. The recognition that culture plays a role in jurisprudence entails the recognition of differences, whereas in the present era of globalization, there is a movement towards homogenization. The note elaborates on how the role of the lawyer is also in a state of flux, in the midst of these changes. It deals with the way that the society views lawyers: as a lawyer as a technician serving individual clients, rather than a more esteemed role as a political actor serving society. In this context, the pivotal role of legal education in shaping lawyers is stressed upon in the note. The author opines that lawyers should aspire to be moral entrepreneurs who build communities, and underscores the importance of sociological ideas in building communities, since they help one understand one's moral responsibilities.*

When the editors of the *Student Bar Review* asked me to write a special comment for this issue, I was delighted to accept. However, very soon (I think it was on the plane flying back to London from Mumbai), the obvious, awful question struck me. What can an English professor who has visited India only once (for the “Enculturing Law” conference at National Law School of India University, Bangalore, in August 2005) say that could be relevant in an Indian context? There are important links between our countries and their laws – links that made it a huge, never to be forgotten pleasure for me to come to India. However, I was afraid of sounding like too many people in the West who, from a position of profound ignorance, try to tell others around the globe what to think or do.

The conference I participated in focused on law's roots in culture and the possibilities and responsibilities of legal education. The paper I wrote for it emphasised the increasing significance of comparative legal studies in the world today, and the difficulty – but necessity – of discussing culture as an idea in legal

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studies. Writing the paper beforehand, at home in London, I knew I would learn far more from visiting India than I could hope to contribute through my visit. That paper, like this comment, had to be concerned with communicating across cultural boundaries while focusing on themes that transcend those boundaries.

A key argument of my conference paper was that “culture” is complex and elusive (a mix of traditions, values or beliefs, economic activity and conditions, and emotional ties), but it is often unanalysed and taken for granted, as long as we stay in what we think of as our own culture. Yet, lawyers are increasingly forced to recognise the legal relevance of culture in some sense, as they experience an intermingling or confrontation of cultural traditions and values. In Britain this is now very obvious. London, today, is one of the world’s most culturally diverse cities. U.K. law is having to work out its stance on, for example, marriages contracted and ended in different ways in different cultures, diverse adoption practices and patterns of family life, the possibility of “cultural” defences to legal claims, and the protection of diverse religious practices and sensibilities.<sup>1</sup> Culture – however defined – must be addressed in legal studies, if lawyers are to be sensitive to major social changes, especially those brought about by population movements and the world-wide spread of ideas.

At the same time, globalisation has its impact. While cultural issues are often associated with a demand that *difference* be legally recognised (different religions, customs, languages, lifestyles, values, traditions or aspirations), globalisation is usually associated with *homogenisation* or *harmonisation* (in law, trade practice, etc). World-wide changes drive both globalisation and localisation – or “glocalisation”, as some have called it. In some ways, the pressure is to lessen differences between countries and legal systems (promoting, for example, the transnational operation of commercial, financial, intellectual property, information technology and human rights law). In other ways, it is towards recognising the value of a diversity of ways of using and thinking about law, and of the consequent responsibilities that attach to legislators and courts to make law a living, valued and respected institution in their particular countries and cultures.

Is the job of being a lawyer something that cuts across all these complexities? Despite all the changes occurring, is there something that stays constant in lawyers’

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<sup>1</sup> See, e.g., S. POULTER, *ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE* (1998); *ETHNIC MINORITIES, THEIR FAMILIES AND THE LAW* (J. Murphy ed., 2000); W. F. Menski, *Muslim Law in Britain*, 62 *J. ASIAN & AFR. STUD.* 127 (2001); A. Phillips, *When Culture Means Gender: Issues of Cultural Defence in English Courts*, 66 *MOD. L. REV.* 510 (2003).

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responsibilities? It would be nice to think so. However, law has been portrayed as a “destitute camp follower” of globalisation’s “itinerant armies”;<sup>2</sup> in other words, law and lawyers’ practice are seen as meekly adapting to serve a new transnational economic order. So, one might think that law now is merely *instrumental*, endlessly adaptable to whatever environment lawyers happen to find themselves in. We must be honest and admit that this is what law often is: just a technical means of achieving whatever ends are set for it: the lawyer’s job is to be a skilled and reliable *technician*.

A more ambitious role might be that of the lawyer as a *political actor*. The role is still instrumental – to get things done – but here it is in the service of goals or values that lawyers may choose for themselves: for example, to help prevent an environmentally catastrophic dam being built; to get compensation for the victims of a man-made disaster; to campaign for better conditions for the poor by asserting rights on their behalf; to get prisoners out of Guantanamo Bay, or off death row; or to use law to help undermine caste, class, race, religious, sexual-orientation or gender discrimination.

I would like to go beyond these expressions of lawyers’ roles and responsibilities, very important though they are. I think the lawyer’s central role is to contribute to the building and strengthening of communities. This may seem a strange idea because the dominant view is that lawyers primarily serve *individual* clients (including corporations). Lawyers get bad press because of the instability of their focus on individual clients: they serve clients by serving the legal system, but they try to make the legal system serve the client. There is a potential contradiction here. Where, as in the U.S. legal system, the client-focus is often very strong, the image of the lawyer can be that of a “hired gun.” The hired gun role is basically the technician’s role, but added to the neutral idea of technicality is an aggressive, confrontational, sociopathic, gunfighter image. No one who cares about law as a profession can fail to note that something has gone badly wrong when lawyers are thought of in this way.

If, on the other hand, we think of the lawyer’s role as being to serve the community, it is possible to stabilise the difficult balance of responsibility to the individual client and responsibility to the legal system. What is a legal system? Surely it is nothing if not the regulatory structure of a community of some kind – the rules needed to guarantee a minimum of stability and order in communal life and to define social relations of the community. The lawyer’s responsibility to

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<sup>2</sup> B. R. Barber, *Global Democracy or Global Law: Which Comes First?* (1993) 1 *IND. J. GLOBAL LEGAL STUD.* 119, 119 (“Law has always been the destitute camp follower of the itinerant armies of transnationalism”).

individual clients is to protect their place in the structures of community (but also to inform them of their legal responsibilities to the community and to help them fulfil those responsibilities).

What links us (you, if you are a law student, and me, a law professor) is, most directly, legal education. I have taught law for more than thirty years; you are (or perhaps were) a consumer of legal education. We are, I hope, jointly interested in asking: what kind of lawyers does legal education produce and what sort should it produce? In a book store in Kerala last August, I found Gandhi's writings about lawyers.<sup>3</sup> I confess that I had not read them before. He wrote passionately about the importance of a lawyer's role in ending disputes – if possible, by negotiating settlements, bringing the parties together and showing them an honourable way out of their conflict. According to this view, litigation and the need for a court decision may often be, for the lawyer, an admission of social failure.

A few years ago, before encountering Gandhi's thoughts on lawyers, I wrote an article about the primacy of the lawyer's role in what I called the "routine structuring" of relationships, transactions, institutions and organisations.<sup>4</sup> Lawyers get bad press because many members of the public (certainly in Britain) associate them mainly with litigation and with criminal prosecution and defence; in other words, with things going wrong in society, rather than going right. Lawyers are widely seen as parasitic on social pathology. Yet empirical socio-legal research highlights the pervasive role of lawyers in setting up deals and negotiating understandings (contracts, corporate structures, etc.), defining lines of authority (constitutions, regulations, etc.), making provision for future contingencies (wills, trusts, contracts, etc.), limiting risks, facilitating projects, encouraging trust, and so on. In other words, it shows them helping to build networks of community and co-operation. What lawyers do in this way is often what Gandhi thought they should do. Often it involves great technical skill, bluff, tact, foresight, psychological insight, hard-headed practicality, and the carefully calculated use of legal pressures to make the parties see a way to peace.

Routine structuring is not just another aspect of lawyers' instrumental role (getting things done, making the wheels turn). It also has a moral aspect. Lawyers should be *moral entrepreneurs*, and this is what I really mean by building community. In our contemporary multicultural societies, different religions somehow have to co-exist. So must different customs and traditions, allegiances

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<sup>3</sup> M. K. Gandhi, *THE LAW AND THE LAWYERS* (1962).

<sup>4</sup> R. Cotterrell, *Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies*, 29 *J. OF LAW & SOCIETY* 632 (2002).

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and affections, aspirations and projects. And all these have to confront often rapid economic **change**. Law has to serve many **different** networks of community including **commercial and financial networks and enterprises**; ethnic, kinship, religious or linguistic groups; urban and rural **populations**; cities, towns and villages. The nation is made up of all of these, and the nation itself is sometimes seen as a network of community, though often with a fluctuating, unstable basis – as an economic commonwealth, a focus of emotional patriotism, the haven of certain values or beliefs, or just a territory given identity by geography or the shared historical experience of its population.

All networks of community ultimately depend on interpersonal trust among their members for their survival, and trust can be of different kinds for different types of communal bonds. Business communities no doubt need honesty, fair dealing and good faith to some degree among their members to be secure; local communities thrive on the courtesy and mutual consideration of neighbours; religious communities rely on their members' integrity, sincerity of belief and mutual identification. Families and friendship groups flourish where there is empathy, and mutual care and concern. The law of the state, of course, plays a variable and sometimes only very limited role in supporting these and other moral bases of community. It does so, often in a negative way, by fixing limits of conduct **beyond which** individuals must not go; **limits which** are needed to prevent the most blatant contraventions of community morality. Lawyers' efforts towards routine structuring, properly understood, are, however, a *contribution* in this direction. At least, they should be, if lawyers are to be true to the moral responsibilities of their social status.

When I studied law a long time ago as an undergraduate, no ideas such as the above figured anywhere in my legal education. Law was just a matter of rules, to be learned in positivist fashion – as given data from law reports, legislation or statutory instruments. I quickly felt dissatisfied. It took me a long time to see that if the moral elements of law were to be understood in a realistic way – not as a kind of natural law, valid for all times and places (which I did not believe could be discovered), but as a set of legal values appropriate to the time and place – legal studies needed social science. Often, empirical socio-legal studies, on the one hand, and philosophical studies of law's relation to morality, on the other hand, are regarded as two entirely unconnected fields. However, they should be intimately connected.

Sociological ideas, for example, about the nature of communities in contemporary societies, are essential for understanding what kinds of moral responsibilities law (and lawyers) can properly be expected to fulfil in any particular society. My favourite sociologist, Emile Durkheim, taught that societies require not just individual economic activity to make **them** stable and strong, but

also solidarity – a commitment of citizens to their society.<sup>5</sup> He thought solidarity was a simple idea. However, in fact, societies like India or the U.K. are far too complex to have any single key to solidarity. Their innumerable, complex networks of community require solidarity of many different kinds. Law is needed to support and encourage this solidarity, even if it cannot create it. However, social science is required to reveal to lawyers and lawmakers the nature of the networks of community, and therefore, the kinds of solidarity (or moral bonds) possible in them and the conditions for encouraging these.

Perhaps all this sounds too abstract. While travelling in auto-rickshaws around Bangalore, I often mentally compared this with driving in London traffic. Maybe in both cities you sometimes feel you are taking your life in your hands sitting in the back of a taxi. You can marvel at the way the drivers negotiate seemingly impossible hazards, as traffic swarms around their vehicle (with you in the back of it). There are rules, of course, different in the two cities, and probably hard for a newcomer to understand – for example, whether and how to use your horn, when to give way, when and where to pass, how to calculate a fare. Some of the rules are informal, others official (legal). We could call them all “law” in a sense, legal frameworks of the community. We could also call them aspects of culture. To me, auto-rickshaws are part of the exotic, fascinating culture of Bangalore, which I have only recently encountered. Red double-decker buses and black taxis are widely regarded as part of London’s culture.

What point am I making? We should not draw any absolute line between law and culture, or between law and community. Law is a continuum of regulation that reaches deep into culture. It is also the regulatory framework of many different kinds of community life. As lawyers, we have a responsibility to be aware of these roots of law and draw on social science to explain their character.

I look back on my narrow, old-fashioned undergraduate legal education as dry and rather barren. Law comes alive when we recognise what Durkheim thought of as its moral “soul” – its nature as a regulation of community life. It comes alive also, when we focus on law in action as much as “law in the books.” I first sensed that when I studied legal realism in the final LL.B year. Legal education today has a responsibility to show how law can come alive through its moral meaning and its effects in building the community. Lawyers, I think, have the primary responsibility to make law come alive in that way – whether in India or in Britain, and irrespective of cultural differences, however they are understood. It is through accepting this shared responsibility that we can best communicate with each other, recognising and transcending cultural diversity.

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<sup>5</sup> E. DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (W. D. Halls trans., 1984).