

The Legal Construction of a Politics of Notables:

The Double Game of the Patricians of the Indian Bar in the Market of Civic Virtue

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Abstract

This article explores the structure of the legal field in India by examining the genesis of the field in the British colonial period, exploring an elite profession characterized by extraordinary material prosperity, prominent political positions, and close family ties. British-trained lawyers invested their capital in the movement for independence, then playing a double role during the 1950s and 1960s as politicians and defenders of large property owners threatened by the policies of their own party, the Congress Party. Contradictions in that double role helped bring the split of the Congress Party and the declaration of a state of emergency under Indira Gandhi, leading ultimately to a reinvestment of the elite in legal principles and a modification of the role in politics – while preserving the essential value of family capital in building an elite legal career.

Keywords: Legal profession, India, colonialism, lawyer-statesperson

The Indian legal field, strongly marked by its colonial history, well-illustrates the effects of a strict connection between law and politics. Lawyer-politicians were central to the formation of the Indian state, but one of them, Prime Minister Jawaharlal Nehru, accused many of that group of using great principles of constitutional law for their own narrow ends. Even worse, according to Nehru, the elite of the bar used their political power and command of legal procedures to stop agrarian reform and more generally to defend a privileged clientele whose interests and background they shared.

After a period of decline reflected in Nehru's criticism, the elite of the bar succeeded in rebuilding its public image by

defending civil liberties threatened by Indira Gandhi's declaration of a state of emergency. But the elite bar never fully regained its lost positions in the field of political power. The Supreme Court – closely linked to the elite bar – similarly took action to rebuild its image through a new judicial activism in favor of the disadvantaged, later turning that activism into a defense of the environment and an attack on corruption. These actions restored the Supreme Court – also compromised during the emergency – to its position as the legitimate arbiter of political conflicts. The ideal of the autonomy of law in India therefore returned but was accompanied by the weakening of the position of lawyers in the field of state power.

These events can best be understood by reviewing the colonial genesis of the 'legal compradors' who constructed the Indian state. In the early years of the Indian Republic, descendents from Indian lawyers trained in the English Inns of Court were rewarded politically and economically for their work in the struggles for independence. They formed the nucleus of the political field in the new Indian state. The exceptional success of these law-trained activists was also a result of the social and economic capital that they inherited. They invested that accumulated capital in professional notoriety and in politics. Paradoxically, investment by the legal aristocracy in the construction of the state came at the expense of the autonomy of the legal field. The best connected and most ambitious of the lawyers had a stake in a definition of professional excellence that permitted them to accumulate diversified positions at the crossroads of law, politics, and the economy. They invested relatively little in the autonomy of the law.

The situation is no longer the same. The leaders of the bar today still belong to a generation of grand notables able to draw equally on law and politics. But the double game has become much more difficult and risky, since the autonomy of the political field is now constructed around ideologies – including developmentalism on one side and Hinduism on the other – that are very different from, or even opposed to those of a law strongly imprinted with ambiguities and compromises going back to colonialism. The familial mode of production of the notables of the law, which protects their social homogeneity, also adapts poorly to the scholarly competition that go-

vern the market for state knowledge. Further, the aristocratic habitus of the legal elite is hardly conducive to political fights characterized by the strong presence of powerful populist and traditionalist movements.

~~The result is a paradoxical situation. In~~
 order to preserve positions that were increasingly threatened in the field of power, the political elites in the legal field had no other solution than to reinforce institutions – especially the Supreme Court – which rely on an affirmation of the autonomy of law and its distance from politics. They therefore increased their separation from professional politicians, which allowed their investment in law to place them in the position of neutral political arbiter; but it made it even more difficult to accumulate multiple roles and play the double game that once brought prosperity and prestige.

Our discussion of double games and political strategies does not mean that individual actors necessarily shared the same goals or explicitly adopted the strategies we attribute to them. Bourdieu's concept of strategy is meant to describe the ways that individual actors navigate a particular field, competing according to rules of the game that characterize the field and that can initially be traced to the field's genesis – and which change over time and in response to particular crises. The elite lawyers we examine pursue strategies that make sense in terms of the Indian legal field and that help the field to prosper, including, for example, paying attention to family connections, building stature through a commitment to high legal ideals, and excelling in high profile litigation.

The analysis of the relationship between law and politics found in the Indian legal field must therefore be built on a social historical line. The expertise of the bar is not automatically convertible into political capital – nor is the legal ideology. The results turn on sociological determinations that structure the legal field as well as the institutions and expertise of the state.¹ In order to understand the connection between these two sites of power, it is necessary to start with the strategies of elite reproduction that are played out in parallel or even complementary manners. The familial transmission of a capital of legal notoriety in India has long represented one of the privileged ways to gain access to the field of power as well as one of the most valuable resources in the market of civic virtue.

The descriptions that follow seek to clarify the structure of the professional field through a social history of the field – seeking to identify the features and types of capital that produced what later became naturalized into more or less permanent definitions. This focus minimizes the effects of objectification inherent in analyses of legal institutions or the logics of the state.²

1 In order to be more complete, this analysis ought also to take into account competition with other state expertises, such as economics, and to explore more deeply the ties between the lawyers and the world of business (See, for example, Dezalay – Garth forthcoming; Dezalay – Garth 2002; Dezalay – Garth 1997. See also Charle 1989; Karady 1991).

2 On the symbolic violence of these state logics, see (Bourdieu 1994).

This approach in the case of India leads us to privilege three crucial episodes that help to explain the political dynamic of this structural history.

The first episode is by far the most important. The colonial genesis of the Indian led to a comprador elite organized through Legal professional a familial mode of reproduction. The elite and familial recruitment of the bar explains the double game that lawyer politician played after independence. Serving as advocates on behalf of large property owners, they helped to mobilize the Supreme Court and the Constitution in a political strategy against key policies of the ruling Congress Party. These contradictions culminated with the proclamation of the state of emergency in 1975 – the second episode. The double game returned with the reaction to the state of emergency as the politicians of law regrouped around the elite bar to denounce Indira Gandhi's *coup d'état* against constitutional liberties.

The defeat of Indira Gandhi in 1977 did not bring elite lawyers back to their original political strength. The failure of the attempt to restore the hegemony of lawyer politicians opened the way to a period characterized by a more complex division of labor in the legal field and the field of state power – the third episode we describe. The Supreme Court established itself as the neutral – above the fray – arbiter of the political game, and the notables of the bar also took some distance from domestic political struggles – while also and increasingly playing the card of internationalization.

From One Generation to Another: Two Models of Excellence

In order to illustrate more explicitly the hypotheses that will be examined in this article, it will be useful to compare two successive generations at the core of the family hierarchy of legal notables. The second generation lawyer was Mr. P., Chief Justice of the Supreme Court of India prior to being nominated to the International Court of Justice at the Hague.

We begin with a description of his father, a lawyer who finished his career as Vice President of India after having been one of the close advisors to Nehru and later a Minister of Justice under Indira Gandhi. Before embarking on his career in the state, the father moved through the ranks of a typical legal career. He lacked the advantage of family legal connections and therefore, despite a brilliant career as a student, capped by a master's degree at Cambridge, had to begin his career in the 1920s in the district courts at the bottom of the legal hierarchy. His growing reputation as an advocate in the district court allowed him to gain admittance to the high court and then – in 1945 – to be appointed as a high court judge. The judgeship crowned a prosperous career as practitioner defending the interests primarily of property owners. His career then became oriented toward politics. Nehru, whom he did not know personally but came from the same village, asked him to become part of the Indian delegation to the United Nations. In the following years, he became a diplomat – serving as special envoy and advisor to Nehru – and a politi-

cian – elected to the Senate, later serving as Minister of Justice, Governor of Karnataka, and finally as Chairman of the Upper House and Vice President of India (1969-74). Throughout the period he also continued to act as barrister of the Supreme Court. He refused to be nominated to the Supreme Court, however, even though he considered himself to be 'not a man of politics,' because he wanted to continue in public life. He felt that a judge was 'a bird in a gilded cage.'

In contrast, his son entered the field already steeped in the British tradition according to which, he emphasized, judges ought to be 'discreet' and avoid all publicity. His career was facilitated by the reputation of his father. After a quick pupillage with a reputed senior advocate in the high court, he moved toward practice in a new area – tax and company law – different from the subjects in which his father practiced. His office prospered so rapidly that at age 33 he employed seven juniors. Despite his material success, noblesse oblige led him to accept the offer of a judgeship at the precocious age of 36 – despite an 80 percent reduction in pay. He rapidly climbed the judicial hierarchy, joining the Supreme Court in 1978 and becoming, on the basis of seniority, Chief Justice in 1986. He contributed on the court by tempering the activism of his predecessor who, he felt, 'went too far too fast' and led to a 'loss of public confidence in the judicial system.' In a collection of essays in honor of a famous lawyer, constitutional scholar, and director of the Tata industrial group, he emphasized the dangers to the court of political activism. In 1989, at the request of the Prime Minister, he joined the Hague In-

ternational Court of Justice. At the conclusion of this triple career as financial lawyer, Chief Justice of the Supreme Court of India, and Justice of the International Court of Justice, he naturally became an international commercial arbitrator. Two of his sons became partners in international law firms as well, continuing the evolution of the Indian legal elite to a more international profile.

Rather than multiply such examples, it will suffice to mention briefly another of these family stories. This story is less exceptional, but also quite representative of the major business law firms in Bombay. Son of a well-to-do merchant, the first of this line sought a career in politics. He went to Oxford to study law and history. Upon his return to India, he had to postpone his political ambitions because his father had just died and he needed to apply himself as a young lawyer. After a brilliant career at the bar, which included his choice by his peers to be the head of the Bombay bar, he became Chief Justice, then Indian Ambassador to the United States. His son followed his father's footsteps by studying law and history at Cambridge, practicing law, and then gaining re-election three times as President of the prestigious Bombay Bar Association – a group of advocates specialized in large commercial matters in the Bombay High Court. Contrary to his father, however, he never sought to move into specifically political positions. His intervention in the political field was limited to weighing in on the politics of law.

In both cases, the careers of the second generation are marked by a refocus on law. One explanation is certainly that there has been a great growth and diversification

over time in India in the market of state elites. The relative dearth of cosmopolitan professionals in the first years of independence represented an exceptional opportunity to move to a second career in politics or diplomacy. The professionalization of political careers in the state today also makes entry more difficult to non-specialists – hindering the translation today of the social capital of the great notables of law into politics.

The competition from new state expertise and specialized politicians is not the full explanation, however. The multi-positioned elites lost their preeminence in the field of politics also because they failed to diversify their strategies and alliances. In the colonial era, the notables of law spent much of their legal talent in defending the financial interests of the major landowners and merchant-compradors. This position led them to oppose the politics of development and social justice that came with the new Indian state. Before examining this turn in the political history of the Indian bar, it is essential to revisit the colonial genesis of the strategies of a double game.

From Apprenticeship in Colonial Law to the Construction of the State: The Trajectory of a Comprador Elite

As Bourdieu showed, one cannot analyze the internal contests through which a professional field is constructed if one relies on the institutional definitions produced by the field. The definitions serve to hide the very contests that produced them. An examination of the genesis of the field makes it possible to avoid being misled by seemingly objective representations, such as 'the bar,' which tend to mask the extraordinary stratification of the professional milieu as well as the importance of family capital. The analyses that follow do not therefore examine the bar as a formal entity. Indeed, the formal characterization fails even to account for the hierarchy between solicitors and barristers instituted by the British – which lives on quite strongly despite its formal abolishment.³

3 The stratification continues on a de facto basis, despite being formally abolished by the Advocates Act of 1961, which instituted an All India Bar while tolerating provisionally the survival of the distinction between barristers and solicitors in the bars of Bombay and Calcutta – where there also existed a differentiation de facto between high and low justice. The largest matters, mainly commercial, could go directly to the High Court, which served as a court of appeal for more routine matters. The provisional categories have remained. The two bars today are side-by-side without mixing. Their professional organiza-

The relevant groups for our analysis include the Supreme Court advocates⁴ at the highest level and the advocates in the most prestigious and well-established high courts from the colonial period – Bombay, Madras, Calcutta. These groups account for the reproduction of the personnel of the elite justice system.⁵ As with respect to the model in Britain, where the high court judges are recruited from among the elite of the Queens' Counsel, the nomination to the judiciary represents the crowning of the professional trajectory of a successful practitioner. The relatively clear symbolic division of labor today between the figure of

tions and meetings are distinct. According to one respondent, the bar meets at a British club with leather arm chairs, while the solicitors are on wooden benches.

- 4 The Supreme Court Bar includes a few less than 4,000 members in comparison to a total of some 600,000 lawyers in India estimated by the Law Minister in an interview. Even if one adds the elite of the leading bars, notably Bombay, the small group that speaks in the name of the bar represents no more than one percent of practitioners.
- 5 The relatively broad and open-ended definition of elite justice differs from the definitions usually employed in history or sociology. Our definition conforms to the notion of a field with a durable nucleus and boundaries that are porous and changeable. One heuristic advantage of this definition is that it focuses attention on the stakes of contests at the margin of the professional field. At the margins one can observe the mobility of persons and the circulation of social and financial resources between the legal field and the fields of political and economic power. Institutional definitions tend to obscure or hide such exchanges.

the high court judge and that of the notable lawyer-politician is a relatively recent phenomenon, with the judge's distance, reserve, and neutrality now serving as a contrast to practicing lawyers seen to be instrumentally serving their clients and the world from which their clients come.

This revisiting of colonial history to explore the genesis of the legal field also helps to provide clarity about the relationship between law and politics in India. The progressive opening of high courts in India to participation by Indian advocates in the 19th century was both a project of professional promotion and a political project for the construction of an aristocracy of compradors. There were several ways to gain access to this role as high court advocate. The route open to a few individuals was through the internal promotion of a small number of practitioners before indigenous jurisdictions (vakils and Indian pleaders). The vast number of advocates, however, gained their credentials at the English Inns of Court – where essentially only the children of the well-to-do landowning class could attend. Schmitthener notes that, 'Few Indians could afford the long expensive training program for barristers that could be had only in England. The earliest candidates were primarily the sons of rich Parsi merchants.' (Schmitthener 1968, p. 365).⁶

This detour through the metropolis was more about prestige than about scholarly necessities. The exam that permitted access

to the Inns of Court was reportedly less difficult than those of the Indian law colleges – not to mention the extremely difficult Indian Civil Service exam. In this manner, the descendants of the well-to-do classes in India were 'called to the bar' and returned to India transformed into 'English gentlemen'. (Schmitthener 1968, p. 369) These lawyers elected also to transplant to India the British tradition of apprenticeship with a senior advocate, which in practice serves as another barrier to limit access to the market.

The education of the producers of law in India has always been a family affair. To quote Schmitthener again:

'Traditions of the profession were absorbed in the home. The friends and guests who frequented the home were lawyers, judges, and leading men of the community... Without the help of a practicing family member or relative many a well-trained talented young lawyer had little chance to show what he could do to succeed at the bar.' (Schmitthener 1968, p. 375)

The role of family helps explain the extraordinary continuity in the recruitment of this professional elite.⁷ The importance of family continues today. The great majority of our respondents – and especially those who occupied positions of power in the bar and in the high courts – are descendants able to discuss in some detail

6 It was a long trip, since it typically required four or five years of study in England before admission to the Inns of Court.

7 In the 1960s, Schmitthener was surprised by his own observations among the lawyers in Madras who confirmed, 'If one does not come from a family of lawyers, it is impossible to make a career in the law.' (Schmitthener 1968, p. 375).

the legal careers of their predecessors and relatives. As one senior advocate noted,

'It is very difficult actually in India for a young lawyer who does not have lawyers in his family to break into the profession because, unfortunately, there aren't many professional law firms which properly employ young lawyers ... it's still a very futile profession, in many ways...'

An engineer stated that he was told that 'unless your parents are lawyers, you don't become a lawyer.'

Family support is particularly decisive when securing an apprenticeship in the chambers of a reputable senior. As one senior Indian advocate observed, 'you need good chambers' in order to succeed. When a colleague asks 'take my son in your chambers,' you 'can't refuse.' This apprenticeship stage remains unpaid in the first few years – which adds further, as Abel has noted, to a social selection where family resources count much more than knowledge or personal talent (Cf. Abel 1988; See also Gandhi 1988, p. 376).

The subsequent career only magnifies the importance of the initial difference between the descendants of legal families and the new arrivals. Those from the legal families that demonstrate talent are quickly recognized within the elite of the bar, among the high court judges, and also among the solicitors able to refer to them large business matters – which in turn allow them to further build their reputations in the bar. This process is cumulative and quick: the reputation acquired in the courtroom attracts not only clients through lucrative referrals, but also the attention of senior advocates and judges who control

access to the prestigious Supreme Court Bar.

The President of the Supreme Court Bar, elected in 1996 to the International Union of Advocates after fifteen years of practice, thus noted that nomination to be a senior advocate of the Supreme Court 'depends on your reputation in the bar.' He pointed out also that while publication may help, for example, colleagues will 'brief you as senior' according to a reputation based 'mostly what you do in court.' This advocate also noted that his father, educated at Lincoln's Inn, gained fame in the 1950s for his constitutional defense of an imprisoned Communist leader. Prominent cases and constitutional stands help to build the notoriety necessary for an elite career, but it takes family capital to gain access to those opportunities.

The 'Nabobs' of Business Law

A double selection according to money and family background conforms to the logic of high court justice in India, which is strictly connected to the world of business. The honorariums paid to advocates in the Indian high courts have long been recognized as exorbitant. In the 19th century, it was estimated that they were seven times greater than those in Great Britain (Schmitthener 1968, p. 346). Barristers who served in India as expatriates quickly amassed fortunes, but in the colonial context they also tended to spend their fortunes to maintain

the proper appearances. Gentlemen lawyers maintained life styles comparable to their rich clients.⁸

The colonial justice system staffed by expatriates provided merchants with a justice well-suited to their needs and with practitioners that were both competent and attentive. The system did not change with the slow arrival of young Indian advocates predisposed to become gentlemen lawyers. Following the example of their senior expatriates, they learned to celebrate British traditions of justice. They were also able to profit from their relative monopoly. At some point, indeed, their acquisition of wealth earned them the title of 'Nabobs of law'. Thus, in the 1880s, while still in his thirties, Motilal Nehru, the father of Jawarharlal Nehru, 'lived like a prince, had the first cars in Allahabad, and a palatial house.' (Schmittener 1968, p. 370) One reason for the extraordinarily prosperity of the Indian legal market was that the number of cases was huge – 2.2 million in 1901. The caseload, more particularly, included numerous disputes relating to the system of large properties (zamindari), and the cases lasted indefinitely – often more than a generation.

A Moderate Strategy of Indianization Profitable to an Anglicized Elite

It may be true that, as Weber noted, the adoption of the British model for the production of justice conformed to a certain market logic, but the Indianization of the model responded also to specific political preoccupations connected to colonial relations. Legal institutions were at the heart of imperial governance, playing a central role in the transmission of colonial power and in the maintenance of both the rules of the market and of social hierarchies. The stability of legal institutions provided a key to an historical pattern of change managed within a story of overall continuity. Continuity is easy to see. The elite Indian lawyers were the principle beneficiaries of a transfer of power which they had programmed and for which they themselves had been programmed.

Apprenticeship through law, from the beginning, was a political project – the construction of a national elite and a source of future leaders. As Schmittener stated, 'Legal training was regarded as the best possible preparation for a political career.' (Schmittener 1968, p. 378) Political ambitions were encouraged, even incited among the leaders of social groups such as the Parsi, which represented an emerging elite among the merchant class.⁹ As the

8 The clientele included a good number of rich merchants. 'The prestige of a lawyer depended on his manners, hospitality, and friends...' (Schmittener 1968, p. 348).

9 'For most Englishmen, having established the "rule of law" on the Indian subcontinent was probably the proudest achievement of the British raj.' (Rudolph – Rudolph 1965, p. 24).

profession that drew the elite of the country into its ranks, the legal profession "dominated all public life." Lawyers "organized and managed philanthropic and educational institutions and charitable societies." (Schmitthener 1968, p. 372 (citing Kotin et al. 12)) This long-term political strategy produced significant effects, permitting the bar and its reformist elite to prosper while defending the interests of clients dealing with the colonial bureaucracy.

In fact, educated at the colonial schools, these Indian gentlemen were perfectly situated to use the contradictions and ambiguities of the legal system against the colonists. At the same time, that system was perceived to be independent and credible among the Indian population because of the so-called 'Vakil Raj,' a term the British used to denounce the too easy access of Indians to courts and the lawyers who flourished in them. That easy access was in fact conceived precisely to make colonial domination more legitimate.

The Indian National Congress, founded in 1885, was the principal base for the constitutional and reformist strategy of the Anglicized legal elite.¹⁰ According to

Schmitthener, 'The leaders with their Western educations and legal training understood parliamentary procedure and constitutional methods. They had confidence in the British system of justice.' (Schmitthener 1968, p. 378) The biographer of Motilal Nehru, for example, noted that the senior Nehru, then a political moderate with little patience for extremists, 'believed that "able advocacy was as sure to succeed at the bar of British opinion as at the bar of the Allahabad High Court."' (Schmitthener 1968, p. 378)

This strategy of political moderation, however, was not sufficient to prevent major conflicts with the British. The intensification of the struggles led a certain number of the Nabobs of the law, including Motilal Nehru, to give up their privileges and follow Gandhi in his strategy of boycotting colonial legal and political institutions. The demands of politics had become such that the comprador elite could no longer accommodate the multiple roles that had facilitated a double game. This 'sacrifice' in fact revealed the priority of political ambitions over the pursuit of a career that, in any event, had brought them the financial resources needed to invest in politics and changed their image from Anglicized Nabobs to that of ascetics in the service of the Indian collectivity.

10 'Congress began as an organization of anglicized regional elites whose common language, interests, and lifestyle distinguished them from most of the Indians they purported to represent.' (Rudolph – Rudolph 1987, p. 127) Adams and Whitehead suggest that one of the main objectives of the founders of the Congress Party was to gain recognition for the merits of a new class of professionals by an aristocratic empire that ignored them by focusing more on direct re-

lations with Indian royal families (Adams – Whitehead 1997, p. 25).