Law and Social Transformation in India through the lens of Legal Positivism

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Abstract

Law can be used a powerful instrument to bring change in the society. It is an effective weapon to criminalize anti-social activities in the society. Law can be agent of injecting direct change in the society. It needs realization on the part of law makers that the society needs to move in a particular direction in order to maintain social order peace and harmony. The process of social transformation in India has been conceived through transition of various aspects of society – structure, culture, institution, ideology etc. The objectives of social transformation in India as envisaged ideologically could be characterized as 'revolutionary' in content and 'evolutionary' in strategy. The leaders of Indian freedom movement envisaged how social structure, history and tradition which form the initial condition of society, set a limit to the strategies, goals and methods of social transformation. The Indian society has transformed over the period of time from a society governed by Shruti, Smrithi and other customary law, and to western conceptions of law. Further with the rights-based Constitution of India and progressive law-making which include the codification of religious laws and affirmative action during the post-colonial period, the Indian society has undergone transition. It lays down the normative principles which are the overriding elements in the entire strategy for social change. Post-colonial period witnessed significant amount of law-making that affected much of social transformation in India. For example: Hindu Widow's Remarriage Act, Hindu Women's Right to Property Act, Indian Penal Code, Child Marriage Restraint Act, Abolition of Zamindars System etc.

Article

The aim of the paper is to study the relationship between law and social change, as a determinant of social transformation. The history of mankind reveals that human wisdom has devised different methods and means to meet the structural changes in the social

system which take place with the advancement of knowledge, culture and civilization. Law has always been considered as one of the important instruments of affecting social change. In the modern era, there has been widespread concern of law as a tool for bringing about homogeneity in the heterogeneous population having socio-cultural diversities. Though there are several devices to bring about a change and reformation in society, but reformation through law is perhaps one of the most effective and safest methods to achieve this end.[1] Law has long been thought worth studying for its intrinsic philosophical or social interest and importance which relates to but extends beyond its immediate instrumental value or professional relevance. In this sense law is a great anthropological document. In the Anglo-American world the term most often used to refer to the whole range of inquiries concerned with this broader significance of law is jurisprudence. Jurisprudence is not united by particular methods or perspectives. It includes work grounded in the diverse perspectives of the various social and human sciences and of many kinds of philosophy, as well as other intellectual disciplines.[2]

Legal concept is as difficult as a king the camel to pass through the needle's eyes. In defining law using various approaches. It is an accepted factor in identifying the relation of law to other social science and they equally must be apprised of the impact of early periods of theorization, the Sophists, the Greeks, the Roman etc., on the emergence of the current modren meaning of law. A working definition of law can be said to be "the binding rules of conduct meant to enforce justice and prescribe duty or obligation, and derived largely from custom or formal enactment by the ruler or legislature. For example Austin puts great emphasis on the relation between law and sovereign.[3]

In the words of Thurnan Arnold; Law can never be defined. Various schools of law have defined law from different angles. Some have defined it on the basis of its nature. Some concentrate mainly on its sources. Some define it in terms of its effect on society. There are others who define law in terms of end or purpose of law. A definition which does not

[1] Social Transformation: Interplay Between Law And Social Change, available on file:///C:/Users/RSC/Downloads/SSRN-id1501262.pdf assessed on 25 October 2017

[2] Roger Cotterrell, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy, 1-2(Oxford University Press)

[3] Dr. Mononita Kundu Das, Jurisprudence, Central Law Publications, Allahabad, ed. 1st 2012,(11-12)

cover various aspects of law is bound to be imperfect. Moreover, law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. In order to keep pace with society, the definition and scope of law must continue to change. Legal concepts can remain in the same form while fundamentally changing their social functions. Law can adapt to changed social circumstances without necessarily changing its form or structure.[4]

The positivity of law implies the freedom of rational determination through the application and outcome of analyses. Society thus becomes the object of its own legal mechanism; it is reflected in one of its part systems as a whole[5]. Today it is generally recognised that law is co-determined by societal development and is capable of being co-determinative at the same time. The advocates of this school are neither concerned with the past of the law nor with the future of it, but they confine themselves to the study of law as it actually exists i.e. positus.[6]

The start of the nineteenth century might be taken as, marking the beginning of the positivist's movement. It represented a reaction against the 'prior' methods of thinking that characterized the preceding age.[7] Positive law means law established or 'positum' in an independent political community, by express or tacit authority of its sovereign or supreme government.[8] It is mainly associated with Jeremy Bentham, Austin, Hart and Kelson. The term positivism has been generally understood in the sense law emanating from a real source which is obligatory, binding and involves sanction.

In the modern welfare era, the legal systems intend to operate as purposeful enterprises of achieving social justice. The conception of social justice provides for an efficient social arrangement through which good things of the society, amenities and responsibilities are justly distributed among the members of the society. It ensures a social scheme of equal

[4] Karl Renner, The Institutions of Private Law, (Taylor & Francis Inc., 1949)84
[5] W.Friedman, Law in a Changing Society, (Universal Book Traders, 1996) 228
[6] Edgar Bodenheimer, Jurisprudence – The Philosophy and the Method of the Law, (Universal Law Pub. Co. Pvt. Ltd., 2004) 15.
[7] Dias, Jurisprudence, (Lexis Nexis Publication, ed. 2013) 331.
[8] John Austin, The Province of Jurisprudence Determined, p 363(Universal Law Publishing Co., New Delhi, 2012)5.

access to economic opportunities and social conditions in various sectors of the society. In its essence, social justice means the quality of being fair and just in social relations of human beings.[9]

Applicability of Legal Positivism in India –

However, in reality no human society can exist or survive without law and no nations can continue its existence without a Constitution. Generally, every Constitution includes and aspirations of the people. It also becomes essential that every Constitution must provide solution to any problems inherited from the past, those inherent in the present and those likely to emerge in future. Thus, it is rightly observed "flexibility and responsiveness are the essence of any living social organism. The words and from must sometimes change in order to preserve the spirit. The Constitution of any country is not only legal document but also reflecting the hopes and aspirations of the peoples. Constitution should be a document which carry out the socio-economic and political changes and also bring about the cherished valued of the people.[10] Infact, the power of nature is a power of higher grate and of more potential importance than tiny other power provided for in the Constitution.[11] Infact, Law in India, we could see that during the colonial time, was not used generally as an instrument for bringing about social change and the need of people except for certain instances such as sati abolishment law, child marriage abolishment law. But with advent of the Constitution of India, a slow social transformation was attempted to be initiated.[12] Law day is significant not only to celebrate our journey on the path of the Constitutional democracy but also to take a stock of the promises which, we the people of India have given into ourselves almost six decades. During the six decades, by all accounts, the

[9] Marc. Galanter and Rajeev Dhawan, Law and Society in Modern India, (Oxford University Press, 1989)138
[10] Rajeev Dhawan and Alice Jacob, Indian Constitution trends and issues, (N. M Tripathi Pvt. Ltd. ,Bombay 1978)56
[11] Lester Berhardt. Orfield, The Amending of the Federal Constitution, (Literary Licensing LLC, 1942),13
[12] Deva Prasad , Law and Social Transformation in India, available on http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=20264 assessed on 21 October 2017.

judiciary compared to the other two wings of the government has performed well sustaining the trust of the people in its independence, fairness and impartiality.[13]

In its function of the courts to maintain rule of law in the country and to assure that the government run according to law. In a country with a written Constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all the authorities within the Constitutional framework.[14]

The arch of the Constitution of India pregnant from its preamble, Part-III and Part-IV of the Indian Constitution is to establish an egalitarian social order guaranteeing fundamental freedoms and to secure social justice, economics and political to every citizen through rule of law. The Parliament position has been given to the judiciary under Article's 32 and 226 of the Constitution as in a democracy governed by the rules of law under a written Constitution; judiciary is sentinel on the quinines to protect the fundamental Right and to poise even scales of justice between the citizen and the state or the State entries.[15] "The judiciary is an arm of the social revolution upholding the equality that Indian had longed for."

In Primitive society, individual had to resort to self help and it was based on private vengeance. After the individuals organized themselves in the form of society then the administration of justice was abhorred by the society. The society made efforts to provide remedy to the individual ……. The slowly and gradually, the state came into being for the protection of the citizen and for its own protection. It became necessary for state to maintain law and order. This is the beginning of the term judiciary in its modern sense.[16]

Applicability of Austin Theory in India:

We do not have a legally unlimited or indivisible sovereign. Our Constitution is supreme though it can be amended but basic structure cannot be.

[13] K.G. Balakrishnan, Judiciary in India: Problems and Prospective, Journal of the Indian Law Institute, Vol. 50 No. 4, (Oct.- Dec. 2008) 461 &468

[14] M.P. Jain, Indian Constitutional Law, (LexisNexis Publication, 2006) 191.

[15] J. N. Pandey, Constitution Las of India, [Allahabad Central Law Agency, 2000] p.106

[16] J. N. Pandey, Constitution Law of India, [Allahabad Central Law Agency, 2000] p.406

- Though, there is separation of powers yet sometimes judiciary makes law (Article 141). Example Vishaka case and D.K. Basu case.
- Ordinance making power of the Governor and the President. (Article 123 and Article 224).
- We have a quasi-federal system. Though the President has the supreme power, but the same is exercised by the Prime Minister.
- Directive Principles of State Policy are not positive law as per Austin, though Directive Principles are non-justiciable. Yet they are important as they govern the guidelines for the society.[17]

In the light of social transformation, we will now go through a few important decisions of the Indian Courts in relation to some important issues.

State of Madras vs. Srimathi Champakam Dorairajan and State of Madras vs. C.R. Srinivasan[18]**-** the Supreme Court guided by the logic of legal positivism observed that since this was a conflict between the fundamental rights and the directive principles of state policy and since the former were non-enforceable, the order should be declared void. In the prophetic words of justice Krishna Iyer, The Constitution became the National Charter pregnant with social revolution, not a legal Parchment barren of militant values, to usher in a democratic, secular, socialist society which equally belongs to the masses including Harijan and Girijan millions hungering for a humane deal after feudal-colonial history's long night'. Thus in India there is urgency to part company with Austinian positivism being a relic of colonial jurisprudence essentially being pro-foreign interests, status quo oriented and anti-Indian in slant. The Indian Parliament accordingly embarked on an ambitious legislative programme to give fair deal to weaker sections and suppressed masses of the society. However, in giving effect to land and agrarian reforms and other industrial and economic reforms, the Supreme Court of India came in conflict with such parliamentary efforts especially **in Shankari Prasad**[19] and **Sajjan Singh**[20]

[17] Analytical School/ Positivism Theory of Law, available on www.lawdessertation.blogspot.in assesses on 4 November, 2016.

[18] 1951 SCR 525. vol. 2
[19] Shankari Prasad v. Union of India , AIR 1951 SC458
[20] Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

case in regard to the validity of land acquisition. However, the Supreme Court adopted positivistic approach in Golak Nath in determining what parliament can do and what it cannot do by arrogating to itself the supra-legislative power. It was held by 6 to 5 that Article 13 (2) does not exclude a Constitutional amendment. The validity of the 24th constitutional amendment was challenged before the Supreme Court **in Kesavananda Bharati v. State of Kerala** (1973**i**n which the Court overruled Golak Nath and upheld the validity of Constitution 24th Amendment. It further held that Article 368 does not entitle Parliament to alter the basic structure or the framework of the Constitution.[21]

In **Maneka Gandhi v. Union of India,** it was said that all attributes that make up personality of individual constitute personal liberty, whose deprival can be made only by a procedure just, fair and reasonable. In the case of **Smt. Indira Nehru Gandhi v. Sri Raj Narain**[22] a Constitution Bench of the Supreme Court declared that the 39th Amendment violated the basic structure of the Constitution. Subsequently, upholding the concept of 'basic structure' as propounded by the court in Keshavananda Bharati, the Supreme Court in **Minerva Mills Ltd. V. Union of India**[23]

Starting on positivist note in 1950[24], it subscribed to natural law school of thought by 1967,[25] only return to positivism by 1976,[26] and then again adopted the natural law approach by 1978.[27]

In modren system and the doctrine of judicial review is sine qua non to keep alive the spirit of the Constitution. However, in a process the judiciary cannot override the legal norms set by the founding fathers of the Constitution.[28] This view was affirmed by the Apex court in its observation that 'the court itself is not above the law'.

[21] Prof. S.N. Dhyani, Jurisprudence and Indian Legal Theory, (Central Law Agency, Allahabad, 2015), p 63-70
[22] AIR 1975 SC 2299
[23] AIR 1980 SC 1789
[24] A.K.Gopalan v. State of Madras, AIR 1950 SC 27
[25] Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[26] A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
[27] Maneka Gandhi v. Union of India, AIR 1978 SC 597, Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.
[28] P. Ravi Jashuva and M/s Shahin Shaik, "The Necessity of Accountability in Judicial Review Power", vol. 29 (3& 4) *IBR*, 203-04 (2002).

Thus, the most important function of the state in order to promote the citizens welfare is to provide social justice. The state has to create the conditions which assure social justice by removing social inequalities, social justice means material, culture, spiritual and all basic requirements of man must be fulfilled. The concept of social justice has been interpreted by justice Krishna Ayer as follows:- "Social justice is a generous concept which assures every citizen to a fair deal. Any remedial injury, injustice, inadequacy or disability suffered by a member, for which he is not directly responsible falls within the liberal connotation of social injustice."[29]

It is the duty of the state to provide all basic services to the citizens without making any discrimination among them. As it has G. Austin observes that "the real satisfaction of the fundamental needs of the common man is the part of social justice." The state should assure social justice to the citizens, it can provide social justice through enactment of compensatory laws, insurance laws, maternity laws, industrial laws, security laws. [30]

For example: **M. C. Mehta Vs Union of India[31], Kasturi Lal V State of J&K**[32], It was held by Supreme Court that the efficacy and ethics of the governmental authorities are progressively coming under challenge before Supreme Court by way of PIL for the failure to perform their statutory duties. It this continues, a day might come when the rule of law will stand reduced to "a rope of sand**".** In case of **T. A Qureshi Vs CIT**[33], cases are decided not one's own moral view's, because law is different from morality as the positivist jurists Bentham and Austin pointed out. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by part III in the fullest measure.

However, for many centuries India society cherished two basic value of life i.e. 'Satya' (truth) and 'ashima' (non-violence) Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these value in their daily life, Truth considered as an integral part of the justice-delivery system which was in vogue in the pre-independence era and

[29] Shailja Chander in "Justice Krishna Ayyer on Fundamental Rights and Directive Principle, Ed. 1992 P-10

[30] G. Austin, The Indian Constitution – Cornerstone of a Nation, Ed. 1974 P-127

[31] 1997 (1) SCC 110

[32] (1980) 45 SCC 1

[33] (2007) 1 SCC 759

the people used to feel proud to tell the truth in the court irrespective of the consequences. However, the post-independence period has been drastic changes in our value system. Materialism overshadowed the old ethos and the quest for personal gain has become so intense that personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, suppression of facts and misrepresentation in court proceedings. So, In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountains of justice with traited hands, is not entitled to any relief, interim or final.

For example**, the triple Talaq**: The apex court was set to uphold the validity of triple talaq. The SC of India has declared the practice of triple talaq as unconstitutional by 3:2 majority. It is clear that this form of talaq is manifestly arbitrary in the sense that the material tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This formed talaq must therefore, be held to be violative the fundamental rights of female contained the constitution of India. In for so as it seeks to recognise and enforce (the 1937) Act triple talaq, is within the meaning of the expression "Law's in force" in Article 13 (1) and must be struck down as being void to the extent that it recognise and enforce triple talaq.[34]

Thus it is the duty of the state to create a healthy atmosphere where the citizen have opportunities to develop their personality and inner faculties in other words their over all well being. In the words of Elliot Dodds, "Welfare is actually a form of liberty in as much as it liberates men from social conditions which narrow their choices and thwart their self-development as truly as any governmental or person coercion.[35]

Conclusion

The modern concept of Indian law still presupposes that a good law always corresponds to demands of justice or morality or men's notion of what ought to be. But it is based on

[34] Available on Live Law News's, assessed on 22 August 2017, 1.19PM

[35] Elliot Dodds, Liberty and Weflare, (George Watson Ed. 1957) 17

the premises that there is a fundamental distinction between law and morality. The laws today are enacted on account of expedience and are based on reasonableness. This analysis would also show the modern Indian jurisprudence has a glorious past in the ancient scriptures. The historical approach to study of modern Indian law is relevant even today to understand its various phases of development of India law.