Law and Social Transformation in India through the lens of Sociological Jurisprudence

Law and Social Transformation in India through the lens of Sociological Jurisprudence

By Deva Prasad *

Cite as: (2011) PL January 24 Introduction There is underlying principle or myth associated with all schools of jurisprudence and the myth of sociological jurisprudence is that of recognising, reconciling and striking a balance between the competing social and individual interest in the society.1 But the problem is that there is no yardstick as to how one interest could be decided over the other. At the same time there is no other school of jurisprudence that could be used to explain and hasten the inevitable change process.

Indian society has transformed over the period of time from a society governed by Smrithi, Sruti, Dharma and other customary law, to western conceptions of law and authority during the colonial period.2 Further with the rights-based Constitution and progressive law-making which includes the codification of religious laws and affirmative action during the post-colonial period, the Indian society has undergone transition.

The contribution of sociological jurisprudence to the social transformation in India, could be well assessed as understood by perceiving the law as a tool of social engineering. Professor Upendra Baxi has emphasised the importance of study of sociology of law in Indian context.3 Importance assigned to sociological school of jurisprudence, is due to the fact that by looking through the lens of this particular school of thought, the response of human behaviour in a society to law and how law has crafted and moulded itself to suit the way the society responds to it could be understood. There also could be instances we could observe, by which we could see even the society at times demands for laws. This interplay of law and society contributes and leads to development of each other.

Pluralism existing in the Indian society and entry of modernism into the various aspects of public and personal life makes the task of law-monitored and law linked social changes in a developing multicultural society like India a complex and difficult task.4 Since this study would involve concepts like law, legal system, social justice, morality and development, an analysis from sociological jurisprudence perspective, a jurisprudential school which stands most close to these concepts, would be the most suited one.

Law has always been looked at as one of the important instruments that could bring about social change. Many academicians have supported the view that law enjoys and uses unifying power to contribute towards better social cohesion5, 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.

6 A functional definition of social transformation needs to be arrived at before we proceed into the detailed analysis. For this purpose, social change needs to be distinguished from social transformation. Social change is understood as â€œnon-repetitive alteration in the established modes of behaviour in societyâ€•7. Further to establish social change, there would be ideally a change in the established social norms, social roles and patterns of social relations.8 But only a â€œmassive, structural or far-reaching social change would be termed as a social transformationâ€•.9 For example from Indian perspective, the effect of the affirmative action or reservation and codification of the Hindu law in India could be very well be understood to as a social transformation, but the effect of a legislation such as the Right to Information Act, 2005, could be assessed from the current scenario only to constitute a social change.

Understanding Sociological Jurisprudential thought Sociological jurisprudence was first introduced by Roscoe Pound in a law-review10 article. He challenged the formal jurisprudence by introducing the concept of using social sciences to develop legal rules. According to Roscoe Pound, for the just claims and desires to be satisfied the law as a form of social control need to be adequately employed and reliance upon the social science is necessary for the understanding of law in society.11 Sociological jurisprudence was more concerned about the effects the law has upon the society and only to very less extent on the social determination of law, which led to a functional approach to law. This is where we also need to look at sociological jurisprudence from the perspective of model for responsive law.12 Sociological jurisprudence is aimed at enabling the legal institution to make more complete and intelligent amount of the sound facts upon which law must proceed and to which it is to be applied.

According to sociological jurisprudence, only through the social norms of â€œliving lawâ€• we could understand the concept of â€œpositive lawâ€•, which clearly shows us that law intended for the society will have to be evolved and also ingrained within a legal system that would keep close touch regarding the development happening in the society and acts in accordance towards the change.13 The shift in jurisprudential thinking from that of human will to human want and in turn the focus on purpose of law rather than on the nature of law is a characteristic of the early twentieth century thinking. Social engineering is aimed at building a society as efficient as possible in which wants of maximum are satisfied with minimum of friction and waste.

Consensus and Conflict Model The sociological jurisprudence started with a consensus model of society in which the conflicting interests are adjusted and reconciled by law. But today no society, including Indian society, does exist as a static, cohesive and homogenous in nature. The present day societies are existing in conflict paradigm14, with the

various interest-groups trying to mould the legal system according to their needs and so as to protect their interests.15 In a conflict model law is a social product while in the consensus model law is more of a social force. The role of sociological jurisprudence in a conflict model is to understand and conceptualise the various group conflict, with different power arrangement, resulting in a pluralistic conflict.

Recent Developments in Sociological Jurisprudence Sociology of law is a new dimension that has emerged within the sociological jurisprudence in the recent times. Sociology of law does not advocate for the use of any new methods, theories or outlook from the discipline of sociology, but emphasises upon the aspect of trans-disciplinary understanding.16 Further sociology of law, drives home the point of having to re-look at the law on a consistent basis to understand law systematically and empirically as a social phenomenon.17 Maurice Hauriou, a great French sociologist and jurist has aptly put â€œA little sociology leads away from law but much sociology leads back to itâ€•18 and Georges Gurvitch has quite correctly mentioned in his writing that â€œ[A] little law leads away from sociology but much law leads back to itâ€•.

19 Law and society or rather socio-legal studies, also falls within the broad ambit of sociological jurisprudence. Law and society tried to trace the relationship and site the law in the theoretical tradition of sociology and further enquiring into what the theoretical tradition could offer for the study of law.20 For example, with the post-modernism which reject the grand narratives and advocates the individualistic perspective, a view point is mooted that population is becoming a silent spectator devoid of political energy and just a mere recipient of government action. An after effect of this would be that law as tool for social engineering cannot look at society for legitimisation or course that it should take.

Analysing Social Transformation in India from the Perspective of Sociological Jurisprudence In an attempt to analyse the social transformation in India from the sociological jurisprudential perspective, we look at the way the interaction between law and society have led to social change and modernisation and in the process, the way judicial process is affected by law and society interaction. M.N. Srinivas, the great Indian sociologist, had observed that sanskritisation, westernisation, caste mobility, secularisation, the alteration in value arrangement that India has witnessed, could be seen as examples of social change.21 Another Indian sociologist, Yogendra Singh,22 has mentioned that abolishment of untouchability, other discriminatory practices such as child marriage and sati and in modern India, the reaffirmation of importance of Panchayati Raj System through constitutional amendment could be very well perceived as instances of law induced social transformation.

Colonial Period As mentioned earlier, Indian society had the Anglo-Saxon laws being imposed upon them during the colonial time. This had led to the erosion of by smrithi, sruti, dharma and other customary law. Though the recognition of personal laws was the policy adopted by the colonial administration, as a matter of respect to the culture and tradition of India and conflict avoidance mechanism, due to the sudden application of an alien law. But still the British law had a backdoor entry into the Indian legal system, with the use of â€œjustice, equity and good conscienceâ€• as a residuary source of law.23 Further, due to the strict standard of proof enforced by the colonial court, many customary practices cannot be proved and was not enforced.24 Even other factor such as the colonial courts consultation with pundits and maulavis and strict enforcement of the stare decis also are indicated as a reason for the influx of the British law into India. The colonial administration had also imposed codification of laws in criminal as well as civil side based on the Anglo-Saxon model into India.25 This includes laws such as the Penal Code, the Criminal Procedure Code, the Code of Civil Procedure and Evidence Act. An important point to be noted here is that, all these legislations had brought into India the English concepts of law.

Looking from the sociological school of jurisprudence during the time of colonial administration in India, social change had obviously taken place, but the situation that existed in which the laws were imposed by the colonial administration, gives a perception of a situation for the positivist jurisprudence to exist. British administration cannot be said to have perceived law as social engineering tool for the Indian society. Further, largely there was no reference to the want of the people in the law-making during colonial times. The colonial system of law-making cannot be demarcated into consensus or conflict model, as the peopleâ€™s participation, perceptive or want was not of much concern for the law-making at that time. But ruling out all the law made during colonial administration out of ambit of sociological jurisprudence is also not possible. British administration was more interested in forming laws that will help in forming a pan-India level framework for the governance of the country.26 But due to the public opinion also certain laws were enacted.27 This includes matters such as sati and child marriage abolishment legislations. This indicates that the need of people, reflected in the public opinion also had an impact on the legislations even during the colonial period.

Upendra Baxi28 also points out to Lalitha Panigrahiâ€™s study on the implementation of the Infanticide Act and demonstrates that this particular legislation was a purposive legislation which has positive and negative sanctions, along with the effective administrative mechanism, which had led to substantial decrease in the female infanticide practice. This could be very well being understood as a use of law as an instrument for social control by the colonial administration.

Post-Colonial Period Post-colonial period witnessed significant amount of law-making that effected much of social transformation in India. This started with the framing of Indian Constitution, a document which could be referred to as socio-political and right-based in approach. The Constitution has actually sown the seeds of a slow social revolution that had triggered many progressive and purposive law-making.29 The Constitution by incorporating provisions that brings in

affirmative action, promotes multiculturalism and measures of an obligation upon the State leading to a welfare mechanism is an epitome of a law made within the framework of sociological jurisprudence. Even though the Constituent Assembly was not an elected body, the views and issues that were discussed and further got reflected in the Constitution, had definitely the aspirations of the people and considered the various aspects of interest of the Indian society.30 Further, we could very well derive that the Constitution of India, is a purposive law-making for leading India into a slow social revolution, and over the period of time Constitution has moulded its shape with the changing need of the nation. In the following part an attempt have been made to look into certain instances by which the law as a tool for social control and purposive policy making have been used so as to transform the society.

(a) Affirmative Action Affirmative action in India could be traced to the Constitution. The provisions relating to affirmative action are Article 4631 in Part IV of the Constitution, which deals with directive principles of State policy and also in Part III dealing with fundamental rights by way of Article 15(4)32 and Article 16(4)33 for education and government jobs. Article 15(4) and Article 16(4) are brought about by the first amendment to the Constitution, so as to balance the original provisions, prohibiting any discrimination on the basis of caste, class, and sex.

Marc Galanter identifies that policy choice to provide affirmative action mentioned in the Constitution â€œproceeded from an awareness of the entrenched and cumulative nature of group inequalitiesâ€•34. Galanter further states that affirmative action, as many of the fundamental rights and directive principles provisions were brought in with the idea of greater social equality.35 This clearly shows that the affirmative action in India was incorporated in the Constitution of India, which is the basic policy document, as a reconciliation of individual and societal interest and to emphasising on purposive law making method under the sociological jurisprudence, to address the need of Indian society at large, by removing the caste-based discrimination and inaccessibility to opportunities. So in turn the affirmative action would lead to removal of caste-based demarcation and lead to social transformation. But many academic works36 have pointed out to the fact that making caste as major criteria for reservation in public jobs and education had led to a situation of multiplicity and re-enforcement of caste system.

(b) Hindu Law Codification Hindu law codification, was one the steps taken by the Indian Government during mid-1950â€™s, so as to carry forward the notion of womenâ€™s equality and legitimising it in Indian society.37 Hindu law reform wa seen as the first step towards this. Commonly referred to as the Hindu code, the codified laws include the Hindu Marriage Act, 1955, the Hindu Minority and Guardianship Act, 1956, the Hindu Succession Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956.

The Hindu Marriage Act, 1955 brought about major changes such as removing the necessity of being in the same caste for both husband and wife which was previously a precondition. Further, important concept of monogamy and uniform provision for dissolution of marriage was brought in. Academic writings have criticised the Hindu law reform on grounds of not bringing in uniform practices, which is in certain manner more procedural and inflexible than the existing practices in certain parts of India, but have accepted largely that Hindu law codification had led to the gradual reform and brought about social transformation in Indian society.38 In Mullaâ€™s Principles of Hindu Law, it is stated that â€œThe outstanding feature of the changes made in the law is that all disparity in the rights of men and women and disabilities based on sex are eliminated in matters of marriage, succession and adoptionâ€•.39 This also leads to a situation where the female and male heirs would be seen at par when it comes to succession.

From the perspective of sociological jurisprudence, the need of society is not clearly reflected in the Hindu law reform, as it is the leaders who were involved in the nationalist movement and later governed the country, who thought of need for such a codification and uniform law being applied to Hindu community. Academic writings40 have referred to the aspect of the Indian people not very aware or even interested in the codification and coming under the procedural rigour of a Hindu law. But this could be well viewed as a conflict approach to law-making, with certain progressive thinkers and women organisations supporting and lobbying for the law, while at large people were unaware or not interested in the law.

(c) Panchayati Raj Institutions (PRI) Though Mahatma Gandhi, had advocated for a village model of development, with self-dependent villages having resources and even the dispute resolution being done at the village level, the constitutional framers were not very much in favour of such a model.41 The model that finally got implanted in India is a top-down approach model, with a partial mention to the need for village level administration in Article 4042 of Constitution of India. Works of Upendra Baxi and Marc Galanter points towards the Nyaya Panchyatâ€™s role in the process of informal, effective, faster and economical access to justice for the people in the rural areas.43 But at the same time, Panchayati Raj Institutions (PRI) as a method of decentralised mechanism of administration, with participatory method got constitutional recognition in the real sense, quite late with the Seventy Third Amendment to the Constitution of India. An attempt to scrutinise whether PRI have contributed to the social transformation, with the people plan and participatory governance prioritising the agenda for their own development, would lead us to the answer that the PRI is not given enough funds and powers in effect, thus leading to an overcrowded regime of paper laws for panchayats.44 This depicts the sad state of no effective social change being through PRI mode of administration.

From the sociological jurisprudence aspect, the importance of giving the want of people is totally not taken into account here. Also decentralised PRI is the real manner in which want of the people and responsive laws at the lowest level could be framed. Hence, there is need for giving more emphasis on the PRI system of administration. The Nyaya

Panchayat Act, 2009 was passed but no effective implementation in this regard has been initiated.

(d) Access to justice and PIL The greatest contribution the Indian judiciary has provided regarding access to justice for the people of India, could very well be identified as the concept of public interest litigation (PIL). Prof. Upendra Baxi has referred this judicial activism trend by the nomenclature of Social Action Litigation (SAL) as this is an Indian brand of class action suits and noted that the Supreme Court of India is â€œtaking suffering seriouslyâ€•.45 The most important aspect regarding PIL is that of relaxing the locus standi concept, any â€œpublic-spirited personâ€•46 can approach the constitutional courts and could bring into the courts notice the blatant violations of fundamental rights of people who are not capable of being approaching the courts themselves. PIL is a concept aimed at increasing the accessibility to justice and forms a part of constitutional jurisprudence in India. An academic article has mentioned that â€œ[T]he need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court â€¦ especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stakeâ€•.

47 The PIL which started around 1970â€™s had cases related to the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women as the subject-matter of the case. But this trend underwent a change and the subjects of PIL got shifted to matters of collective concern such as environment and policy matters in the 1980â€™s and early 1990â€™s. PILâ€™s have contributed to the social change in the that without such a mechanism many of the problems that had been faced by the poor and those inaccessible people would have never come before the court.

Another important aspect that has also contributed to the development of the Supreme Court as an important institution in social change is the liberal and pro-active interpretation of the Constitutional provisions by the Supreme Court of India. This judicial activism was mainly carried forward by the way of making Article 21 of the Constitution of India an umbrella provision by stretching the ambit of the provision.

48 Judge-jurist Cardozo has clearly shown the importance of judiciary for social progress. He had emphasised the judges should ensure that the social progress and desired change is being carried on without hindrance.49 From the sociological jurisprudential perspective, the Supreme Court of India has played an important role in the social transformation with providing access to justice being made available for all through PIL and taking up important issues leading to the policy moulding with the purpose of striking balance between interest claims of society and individuals.

Post-Liberalisation and Globalisation Post-liberalisation has made the governmental and law-making processes a method of negotiation in which the demands of various forces in the society for transfer of resources do take place.50 Forces and groups claiming for the various resources would include corporate conglomerates to poor and marginalised people.51 Here an important factor of democracy in India is that the electoral vote bank politics does play a role in providing the poor and marginalised people, even after the time of liberalisation, for laying claims in the allocation of resources of the State.

Viewing from the lens of sociological jurisprudence, we could say that conflict model which exist in India, still provide the poor and marginalised people a say in the government policy and law-making and still purposive and responsive law is made with striking the balance of need of society and individuals. Legislations such the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and the pending Food Security Bill are examples of the same.

Khap Panchayat Recent issue of Khap Panchayat, which are tribal councils formed for their intra and inter-conflict resolution52, giving rulings for honour killing have shown the importance of sociology of law based study under the sociological jurisprudence. Aspect of how law as a tool for social engineering could affect the issues of social ostracism and peer pressure on the basis of caste has nowcome to the forefront. Even though the marriages in the same gothra are valid as the Hindu Marriage Act53, the peer pressure and fear of social ostracism have made the families to follow the rulings of Khap Panchayat and even led to killing of their own relatives. Demand of society for moulding criminal laws so as to make the people who issue such illegal rulings for honour killing is an example of demand of people for change in the law from sociological jurisprudential perspective.

Conclusion The sociological jurisprudence based analysis has helped us to understand the way law and society had interacted with each other during the colonial and post-colonial times. It has also shown us that sociological jurisprudence has contributed much to the social transformation and judicial process in India.

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. From analysing the issues such as affirmative action, Hindu law codification, Panchayati Raj Institutions from the perspective of sociological jurisprudence, we could see that though social change have taken place, we cannot claim that there were social transformation in a developmental sense. While looking at the Indian Supreme Court, it has played an important role in policy control in important matters which have helped in furthering social change. The post liberalisation situation in India, helps us to understand the existence of a conflict model in India and the Khap Panchayat situation

throws light to the understanding of importance of the sociology of law perspective even in modern India.

Moreover, as Robert Stern54 has pointed out, while looking at the developmental terms, we talk about per capita development, in the actual sense, it is not happening that way. Most of the benefits are being bagged by the middle class in India and they are the directors of change in India. From sociological jurisprudential perspective this clearly shows a conflict model of society existing in India. For a real social transformation to take place inclusive development need to be adopted, in which poor and marginalised also become part of the process.

*LLM candidate, National Law School of India University.

- O. Chinnappa Reddy, â€œNeed for a Socialist Jurisprudenceâ€•, (1987) 4 SCC (J) 4.
- P. Ishwara Bhat, Law and Social Transformation (1st Edn. 2009) 83.
- Upendra Baxi, Towards a Sociology of Indian Law (1st Edn. 1986) 1-3.
- Bhat, supra, n. 2, 4.
- Peter Fitzpatrick, Modernism and the Grounds of Law (2001) 133.
- N.V. Paranjape, â€œSociology of Law-Perspectives and Issuesâ€•, 1992, Vol. 5, Central India Law Quarterly, 224, 226.
- Bhat, supra, n. 2, 14.
- Roger Cotterrell, The Sociology of Law 2007, 47.
- Yogendra Singh, Social Change in India: Crisis and Resilence 1993, 41.
- Roscoe Pound, â€œThe Scope and Purpose of Sociological Jurisprudenceâ€• (1911) 24 Harvard Law Review 591.
- Richard Langone, â€œThe Science of Sociological Jurisprudence as a Methodology For Legal Analysisâ€• (2001) 17 Touro L Rev 769, 779.
- Philippe Nonet, Philip Selzinck, et al, Law and Society in Transition: Towards a Responsive Law (2001) 73.
- Richard, supra, n. 11, 783.
- M.D.A Freeman, Llyodâ€™s Introduction to Jurisprudence (8th Edn., 2008) 853. There is also an integrated model of approach. But sociological jurisprudence do not perceive such a situation.
- Ibid.
- R. Cotterrell, â€œWhy Must Legal Ideas Be Interpreted Sociologicallyâ€•, Vol. 25, Journal of Law and Society, 171, extracted at ibid, 925.
- Ibid, (1) Considering law as a social phenomenon, (2) which should be understood empirically, (3) in a systematic fashion, are three postulates of the sociological interpretation of legal ideas.
- Georges Gurvitch & Alan Hunt, Sociology of Law, Vol. 2 (2001).
- Ibid.
- Freeman, supra, n. 14, 957.
- M.V. Srinivas, Social Change in Modern India (1995).
- Singh, supra, n. 9.
- Marc Galanter, Law and Society in Modern India (1989) 17-21.
- Ibid.
- Baxi, supra, n. 3, 23.
- Ibid, 24.
- Bhat, supra, n. 2, 101.
- Baxi, supra, n. 3, 42.
- Granville Austin, The Indian Constitution: Cornerstone of a Nation (1999) 27.
- Ibid, 25.
- Article 46, Constitution of India reads as:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.â€”The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

- Article 15(4), Constitution of India reads as: 15. (4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

- Article 16(4), Constitution of India reads as:

16. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

- As quoted in Frank de Zwart, The Logic of Affirmative Action: Caste, Class and Quotas in India (43 Acta Sociologica 2000) 235, 238.
- Ibid.
- See generally ibid; see also Dharma Kumar, â€œThe Affirmative Action Debate in Indiaâ€• 1992, 32 Asian Survey Vol. 290.
- Madhu Kishwar, â€œCodified Hindu Law: Myth and Realityâ€• 1994, Vol. 29, Economical and Political Weekly, 2145.
- See generally Rina Williams, Post-Colonial Politics and Personal Laws, (2006).
- As quoted in Kishwar, supra, n. 37, 2146.

- Supra, n. 38, 110-14 (2006).
- Baxi, supra, n. 3, 45.
- Article 40, Constitution of India reads as:
  40. Organisation of village panchayats.â€"The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

- See generally Marc Galanter & Catherine S. Meschievity, â€œIn Search of Nyaya Panchayat: The Politics of a Moribund Institutionâ€•, Vol. 2, The Politics of Informal Justice, 47; see also Baxi, supra, n. 3.
- Videh Upadhyay, â€œPanchayats and Paper Lawsâ€•, 2002, Economical and Political Weekly 2002, 2988, 2989.
- See Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India (1985) 107.
- In S.P. Gupta v. Union of India, the Supreme Court had relaxed the rule of locus standi and has allowed public-spirited persons to bring the matter to the notice of the court. See S.P. Gupta v. Union of India, 1981 Supp SCC 87 at p. 233 (Supreme Court of India).
- Surya Deva, â€œPublic Interest Litigation in India: A Critical Reviewâ€• 2009, Vol. 28, Civil Justice Quarterly, 19, 24.
- Article 21 of the Constitution of India reads as:
  21. Protection of life and personal liberty.â€"No person shall be deprived of his life or personal liberty except according to procedure established by law.

- Benjamin N. Cardozo, The Nature of Judicial Process (2009) 98-112.
- See generally, Partha Chatterjee, â€œDemocracy and Economic Transformation in Indiaâ€• 2008 Economical and Political Weekly, 53.
- Ibid.
- Ranbir Singh, â€œThe Need to Tame the Khap Panchayatsâ€• 2010 Economical and Political Weekly, 17.
- Pinky Anand, â€œParadox of 21st Centuryâ€•, http://www.thehindu.com/opinion/op-ed/ article432445.ece last accessed 18-10 2010.
- Robert W. Stern, Changing India, (2nd Edn., 2003) 6.