

# **An Analysis on Law Vs. Ethics and Morals in a Changing Society**

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## **Introduction:**

The similarities and differences between ethics, morality and law is complex and a matter of considerable disagreement. Some have argued that law properly targets immoral or unethical conduct. Those who defend the liberal view that law should not be used to prohibit immoral conduct that does not harm others need not be legal positivists. While liberals want to restrict the law from forcing certain moral or religious codes of conduct on citizens, they do support the use of law to impose one particular moral conception that holds that all individuals have liberty interests and rights and that it is wrong to violate these rights by causing harm to others.

There is a genuine tension between the desire not to use the law to impose a particular moral code on everyone and the desire that law accord with justice. Many defenders of punishment, often labelled retributivists, argue that the primary purpose of punishing those who break the law is not to deter crime or rehabilitate the offender, but to mete out justice; the criminal has violated society's conception of right, and punishment vindicates right and expresses society's condemnation. Sentences generally are set to match the culpability of the criminal, and American law allows defenses that excuse defendants or mitigate their punishment if we feel they are not fully blameworthy or morally accountable. If the law is separate from morality, as some positivists contend, many versions of retribution, and many features of the criminal law, may be incoherent.

The demands of morality and ethics create tensions for professionals practicing law. For example, a criminal lawyer is bound to defend a client known to be guilty, and doing this effectively may require saying things in court that ordinarily are regarded as misleading. The adversarial system functions well only when individuals adhere to their roles and this requires the defense attorney to present the strongest case, even if it entails defending immoral conduct. Even though the Bar Associations in different nation state drafted the "Rules of Professional Conduct" but, it clearly oppose legal argument based on a knowingly false representation of law or fact.

The two words ethics and morality are very closely associated and therefore their vocabulary usage may be frequently confused. Let, it be clearly understood that while ethics conform to code of behavior with regards to a group such as family, community or professional place; morals are more personalized in their definition. Ethics structure a social system or a philosophy wherein the morals are applicable.

The terminology of ethics encompasses national ethics, social ethics, company ethics, professional ethics, or even family ethics. Since these are fundamental values adopted in one's immediate surroundings, therefore their application may vary within different situations. Ethics

are also cardinal when it comes to social law and politics. Ethical standards benefit in restraining human behaviour from acts of misconduct such as rape, stealing, assassinate, assault, slander and fraud. They also lay down specifications with respect to qualities such as honesty, compassion and loyalty.

Morality, however, is more of a personalized code of conduct. It pertains to one's individual conscience or beliefs of what is true and what is cross. Morals assist in leading a disciplined or worthy life. A spot where the differentiation between ethics and morals can be well comprehended is any work establishment. The ethics of the company outline the values of the organization as a whole that may or may not be in synchronise with one's personal upright beliefs. Similarly, the dissimilarity between the two terms is very apparent in terms of legality as well. In a specific case, a lawyer may personally glean an act cross but the judgment is always based on fair ethics. In the same plot, you may morally disagree with the understanding of homosexuality but it would be ethically contemptible to discriminate human rights based on sexual preferences.

Morality is a social phenomenon. Think about this. If a person is alone on some deserted island would anything that person did be moral or immoral? That person may do things that increase or decrease the chance for survival or rescue but would those acts be moral or immoral? Most of what we are concerned with in Ethics is related to the situation in which humans are living with others. Humans are social animals. Society contributes to making humans what they are. For humans there arises the question of how are humans to behave toward one another.

### **Law Vs. Ethics:**

Law and ethics are two important terms associated with the science of management. Law is a set of universal rules that are framed, accepted when usually enforced. Ethics on the other hand define how individuals prefer to interact with one another. The word ethics is derived from the Latin 'ethos' meaning character. The word 'ethos' combines with another Latin word, 'mores' meaning 'customs' to give the actual meaning.

It is important to note that the definition of law contains terms such as consistent, universal, published, accepted and enforced. A law has to be consistent because there cannot be two contradicting requirements in law since people cannot obey both. It has to be universal because the requirements must be applicable to every one. The requirements have to be in a written form and hence a law is published. The requirements have to be obeyed too and hence a law is accepted in sense. Since the requirements are compelled to be obeyed by the members of a society, the law becomes enforced.

Ethics on the other hand cannot be compelled and hence they cannot be enforced. They need not be universal too. Ethics need not be published. On the contrary ethics totally depends on the individual and the choice of the individual in terms of his interaction with the other members of the society.

Disobeying law is liable for punishment. On the other hand when someone does not adhere to principles of ethics then he is not liable for punishment. Ethics have altogether a

different set of characteristics. Ethics consists in learning what is right and what is wrong and doing the right thing. It is interesting to note that ethical decisions have various consequences, outcomes, alternatives and personal implications. It is thus understood that both law and ethics are applicable to all walks of life and to all professions as well.

### **Ethics Vs. Morality:**

The most of the authors use the term ethics and morals interchangeably. P.F. Strawson in his book "Social Morality and individual Ideal", he describes the difference between social morality and ethics is more than a matter of terminology, because it clarifies the relationship of individual values to those of social and legal order. Further he suggested that "the region of ethical is a region of diverse, certainly incompatible and possibly practically conflicting ideal images or pictures of human life." Ethics is thus the sphere of ideal forms of life set by individuals for themselves. It encompasses the tripartite relation between

- (a) the values that individuals, as conscientious and responsible human beings, set to themselves,
- (b) the moral norms governing a society which reflects a social balance and choice between conflicting individuals and
- (c) the legal order, which must reflect the current social morality but it is far from identical with it.

In contemporary societies the relative spheres of law, morality and ethics differs from one society to another society. But in every contemporary society, there is some tension between these three orders of conduct must be considerable in the pluralistic and relatively individualistic society which characterizes the value system of democracy. There is liberty left for the individual to form and live by one of the many conflicting aspects of life and this is limited by the many constraints of social morality, which flows from the necessities of social life, as well as the ideological restraints imposed necessities of social life, as well as ideological restraints imposed by society of the individual living within it. Hence, there is an increasingly active reciprocal interrelationship between the legal and moral order. On the one hand, moral values press upon the legal system, and on the other hand, the modern law-maker can to an increasingly extent influence and modify the social habits of community.

Another advantage of the tripartite classification would appear to be that it by-passes the ancient and rather age-worn characterization of law as being concerned with external conduct and morals are concerned with internal conduct. As the above statement made by Immanuel Kant, a great philosopher, and after his discovery in metaphysical element, many of the moral and legal philosophers adopted his concept.

A legal system that makes punishment or civil obligation dependent upon malicious intention of capacity to control one's actions reaches into the inner mind of man and modern psychology has refined and enlarged the inter-relationship between the inner working of mind and the external conduct. Even more barren is the converse proposition that morality is only concerned with internal conduct. The distinction between ethical and social conduct, helps to clarify this matter. Instead of the watertight and artificial division into three distinct spheres, we

should think of a fluid inter-relationship, variable with regard to the separation and inter-penetration of the three spheres according to the character of the society in question.

The difference between ethics and morality gets highlighted when a person works in an organization where ethics are not in conformity with his morals. If the ethics of the company or the codes of conduct are not in synch with the morality of the person, he may be torn between his morality and these ethics. In life in general, you may have your own views on homosexuality and consider it as immoral but you would be ethically wrong to discriminate against a person if you know he is homosexual. Let us take another example. Abortion was considered both morally as well as ethically wrong in earlier times. But now that it has been legalized, it is ethically right though your morality may not allow it.

### **Law Vs. Morality:**

It is evident that both law and morality serve to channel our behavior. Law accomplishes this primarily through sanction if we disobey legal rules. Morality too involves incentives i.e., bad acts may result in guilt and disapprobation and good may result in virtuous feelings and praise. The pull and push forces of the morals constitute an important influence on our conduct. In the pre-democratic age, the ethical values of a greater or smaller group of leaders had infinitely greater that of the inarticulate masses. The evolution of many societies, from a stage of kingly or aristocratic leadership to the rise of middle class and from there to the participation of the "common man" clearly produces a progressive widening of the basis for the impact of individual ethics upon social morality. However, the relative weight of the different groups within a society may be, the social morality of a community at any given time will be the composite of a multitude of ethical values. The variety of the latter depends in turn upon the degree of moral freedom. A liberal and pluralistic society will more easily reflect a variety of ethical values than an authoritarian one. The same number of pacifist may, in one society, produce a legal procedure for exemption and conscientious objectors from military service, while in another they may have no impact at all upon the social morality and legal order. Ultimately, a completely conditioned society may reduce or eliminate this fear of individual ethics.

This inter-relationship cannot be by-passed by any legal theory which maintains the law is a self-contained order of enforceable prescriptions. The difference between certain "positivist's theory states that "in one way or another incorporate ethical postulates into the concept of law and the legal order, lies mainly in the question whether the metalegal foundations of a legal order should be sought inside it or outside it. Thus the most strongly anti-idealistic be a study of social phenomena, life of a human community and jurisprudence must have as its task the interpretation of the validity of the law in terms of social effectivity i.e., a certain correspondence between a normative idea content and social phenomena.

In an essay entitled "*Morals and the Criminal Law*," Lord Devlin stated as, "Society means a community of ideas; without shared ideas on politics moral and ethics, no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will

fail; if having based it on common agreement, the agreement goes, the society will disintegrate.”

R.M. Dworkin in his book “Philosophy of Law” stated that, “For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind which needs society, must pay its price.”

### **Law, ethics, morality and social changes:**

Legal order and social effectiveness is maintained by the various processes of legal evolution, a revolution will ultimately destroy the existing legal order and substitute new one. When a feudal order that tied peasant serfs to the land was no longer acceptable, the peasants fled to the free cities and eventually the feudal order collapsed. When a majority of people belongs to black race, never accepts legal, economic or social inferiority to a white minority within a legal order and the change of the legal system through legislative, administrative and judicial reforms fails to keep pace with the change of moral pressure, a revolution will ultimately displace the former order.

The normal process of interrelation between social morality and legal order is one of evolution, i.e., the use of the instrumentalities of legal change for the reduction of tension between the two types of normative order. The intensity of this process of interaction is decisively determined by the degree of organization of a society. Generally in the primitive societies the reach of authority and therefore of law, is limited by physical conditions and social traditions. Most of the social life moves beyond the law, which is concerned with minimum order i.e., defence, a rudimentary system of justice and police, and a minimal revenue system sufficient to maintain government. It is only against the background of undeveloped and slow moving societies that the theories of Savigny, Ehrlich and other advocates of custom as against law-making can be understood. In contemporary society, the reach of the law is far greater and there are correspondingly closer relations between the law, morality and ethics. The transition can, in our time, be closely observed as the many new states of the post-war world seek to transform themselves from traditional static and agricultural societies into societies that aspire at economic development, diversification and social change. The legal machinery becomes the paramount instrument of social change. In the process it often becomes necessary for the law to impose new patterns of social behavior upon the society.

Thus it may become necessary for the state that seeks economic and social development to destroy existing patterns of land ownership, especially where they are linked with tribal custom and family tenure. In order to become a modern society, India found it necessary to legislate the abolition of the caste system and of the polygamous marriage. The fact is, the legislation has hitherto been far from effective, especially with regard to the abolition of the caste system continuing pattern of social life, shows that the power of the law to influence and change social morality and ethical issues which are yet far from unlimited.

The majority of the legal system move between what Strawson has called “Maximum” and “Minimum” morality, i.e., they vacillate between the incorporation into law of those moral

conditions which are crucial to the survival of the legal structure, and the transformation of all or most of the social norms of the community into legal norms.

The social study of laws has assumed four terms:

- 1) There are inquiries which seek the social origins of laws and legal institutions. They are concerned with the content of the “oughts” and the factors that have and are shaping them.
- 2) There are also examinations of the impact of laws on various aspects of society.
- 3) There are other inquiries which deal with the task which laws should perform in society. The results of these studies generally take the form of prescriptions addressed to persons who make and administer laws and not to members of society at large. Such “prescriptions of administration” are in a different category from the “prescriptive oughts” of laws themselves.
- 4) There is the attempt to find some social criterion by which to test the validity of laws.

### **Relativism:**

People develop their thinking concerning morality over time. They do so as a result of interactions with individuals and social institutions. In different societies each with their own cultures there are different ideas concerning how humans are to behave. Different societies and cultures have different rules, different mores, laws and moral ideas.

In the twentieth century people became quite aware of these differences. The impact of this information when coupled with the theories of the Existentialists and Pragmatists became quite significant in the realm of Ethics. The Existentialists with their theory of radical freedom and human choice and responsibility placed morality within the sphere of human decision-making. There were no essences before existence of beings and there would be no rules before the existence of the beings that would make the rules for themselves. The Pragmatists also departed from belief in absolutes and generalizations and any universal criteria for judgment. For the pragmatists reality itself was not a given but a human construct and reflective of the society’s criteria for judgment concerning truth. So, it came to pass as a part of Post Modernism that there would be a school or tradition of thought that would hold that all thinking about Ethics was also subject to human decision making within a social framework. This school would hold that there are no universal or absolute principles in Ethics to which all humans are to be subject.

The scientific theories well supported by the evidence gathered by cultural anthropologists are stated below:

#### **Morals in USA**

Eating beef  
Drinking Alcohol, Gambling  
Women in School or business  
Women wearing shorts and face uncovered

#### **Immoral in**

India  
Middle Eastern Islamic Countries  
Afghanistan  
Iran Saudi Arabia, Sudan

## **Social changes with respect to Sociological jurisprudence:**

The sociological school's idea of law is a continuation of this persistent process of enquiry into the origin of law as begun by the Historical School. The sociological school carries forward the mission of the historical school and rejects the formal and logical idea of law according to the positivists on the ground that the formal law presents only a partial portrait of the law. In effect, the pre-occupation with the study of the science gave law a prominent place in the new studies and the 19th century unearthed a number of leading sociologists in Europe and America, especially Germany who began to look to the newly found studies of society as a key to a better understanding of law than had been gained from the Natural Law School and the Positivists. The contribution of the various scholars and jurists of sociological persuasion highlighted several points which need mention:

- (1) that law is not unique but only one of the social control norms;
- (2) that the socio-economic problem of the present time cannot be solved by means of the existing laws;
- (3) that the laws in the books and statutes containing formal rules, legislations and expositions of particular subjects is not where the real law in society is to be found;
- (4) that the law is not an absolute and static body of rules in themselves but are relative to time, place and society;
- (5) that there is such a thing as social justice.

Comte had stated that the advancement of knowledge could be through only "observation and experiment" and he furnished a classification of the social sciences that was hierarchical. Comte considered it most fruitful to apply the scientific method to sociology despite the inherent difficulty. He compartmentalized sociology into two i.e. social statics and social dynamics all emanating from his description of sociology as the science of social order and progress. He saw society as an object constantly in development which if viewed in a scientific way could have its growth harnessed for one purpose: progress. The object of the sociological school was to work out in a scientific way the process of determining the variables by which society functioned with regards to law and vice versa.

The importance of the sociological school of law may be immediately noticed when the attitude of law and state is compared. The previous attitude of the state was to confine itself to law and order enforcement and thereby striving to enforce stability in society by enforcing the norms regulating the existing relationship between individuals and society as well as between individuals. This in many ways can be futile. Thus, the allure of the sociological school failed in the laissez faire notion of law and state.

The social, economic and political problems of the 19<sup>th</sup> century have harassed the state and law into casting off the cloak of neutrality towards the society. Bentham has shown by his theory of utility how conscious and deliberate efforts could be made by the law and state to reform the law. This was to allow for the emergence of functional conditions in a society which had subscribed to the laissez faire view of state and law but which did not however, it would seem, avert its mind to what purposes the law must serve. The principle of utility and legislation expounded by him had great influence in bringing about the welfare state law and economy. It was this idea that sociological scholars expounded in insisting that the role of the law must be

seen as a creative one. The law is expected not only to maintain law and order, enthrone the interests of individuals but also to formulate the objects and purposes which society in its evolution or conscious and deliberate determination must achieve. These are the objectives the law and the state must be used to achieve.

The laws derived from a sociological investigation of society will be extracted from:

- (1) Social morphology: the form of social structures;
- (2) Social change;
- (3) Social pathology involving social disturbance and maladjustment e.g. the depression;
- (4) Social control including law, morality, religion, fashions etc; and
- (5) Group behaviour which deals with the interaction between individuals, individuals and groups and between groups.

The gain of the advent of the sociological school of jurisprudence remains enormous. The school has opened new methods in examining the interaction between law and society. The school has also shown that law is not a study of just abstracts but plays a creative and dynamic role in a society. In that vein a lawyer's role in society has been widened to encompass more creative and dynamic functions. Lawyers are no longer warriors of just the rights of individuals but have formed the vanguard for society as well. An inter-disciplinary approach in law has also come into the foreground with the emergence of the school. It has also affected the concept of legal education in many countries e.g. the United States of America.

The sociological school of jurisprudence became inundated with its own array of scholars who went on to build upon Comte's expositions. This brought about a catalogue of ideas and terminologies rotating around the historical and economic interpretation of society and law. While these were not exclusive of other factors, they remained the pivot of the ideas of the sociological school.

### **Rudolf Von Ihering(1818-1890):**

As a traditional member of the German Historical School, Ihering studied Roman law and published four volumes of a theme, *The Spirit of Roman Law*. He became convinced that the origin of law was embedded in sociological precepts and left the volume unfinished. He came to believe in his sociological treatise that the basis of a right was an interest. His most influential work was "Purpose in Law". According to Ihering who originally had belonged to the Historical school, the individual acts in order to attain something. In effect he had stated that there was always a distinctive relationship between the act of an individual and the purpose such individual strives to achieve. The basic springboard for laws that were to be found satisfactory by society lay in this notion of purpose. In every society there were individual interests as well as group interests. There was also the interest of the society. Inevitably, even in the most docile of societies, this catalogue of interests will conflict eventually. It is the obligation of the law and state to be in consonance with these interests and to protect them. Where these interests conflict, the state and law is under a duty to resolve them. In the hierarchical position of animals, the man as a social animal enjoys a higher and more influential position than most. In this regard, the cases of conflict of interests vis-a-vis individuals and between the individual and society can be



resolved in a logical progression with the interest of society being paramount as against the interest of the individual. This notion is most enhanced in the view in most statute books that the individual's right to property is always subject to the overriding consideration of the needs and requirements of the society. The law for a very great part severs the individual from any choice in the coercive method inflicted for this harmonization of conflicting interests. The position in the ladder of success of a legal system remains the way in which this harmony is brought about and the balance achieved in the exercise. This is the great achievement of the basic purpose of law. Inhering has however been criticized for his inability to provide a scale of values for achieving his conflict between the ideas of interest and purpose. He gave very little insight into how this balance could be achieved through observation and prediction. Some scholars posit that Ihering's genius was in the origin of laws rather than in its application.

### **Eugen Ehrlich (1862-1922):**

Ehrlich's, "The Fundamental Principles of the Sociology of Law", stressed on the "living law" of the society as distinguished from the formal law encapsulated by decided cases and statutes. To him the formal law as symbolized by judicial decisions and statutes presented an imperfect picture of the real goings on in the community. The norms that govern society, according to him, always leave the formal law in their wake with regards to the development of the society. The real law is the actual law that governs the life of the society. He distinguished norms of decision from norms of conduct. The former were traditionally understood to be laws while norms of conduct govern everyday life of the society. In this wise, a commercial usage may with time develop, but it is only after a considerable period of time that the court will incorporate it into contracts. In even further development, it may eventually be embodied in statutes by the legislation making body at the time. However, by the time these usages and practices find their way into judicial decisions and legislation, they may have undergone changes or modifications. Also, new usages and practices may have evolved and as such the process continues perpetually.

There are social facts that are the basis of all laws and as such living law preexist the formal law. The social facts which bring the law into existence are usually in the form of usages, ownership, possession, and declaration. The formal law arrives to recognize and give effect to the obligations and duties created by these social facts. This is by validating them or vice versa and attaching sanctions for their enforcement. The issue at hand, according to Ehrlich, was that the living law of the society must be sought outside the available legal materials and the law maker must journey into the society to codify living laws. Because only a minute fraction of social life comes before the law courts and this usually when dysfunctional, law relating to education for instance must be found in the educational campus. In the same token, the destination of any observer into how the existing laws have been ignored, followed, modified and/or supplemented ends in the educational institution in this particular case. The same goes for factories, merchants and so on. The main obligation of formal lawmakers is to keep it as close to the living law as humanly possible.

When it was asked how the living law is to be discovered, the answer according to Ehrlich was

- (1) Judicial decisions which were only evidentiary;

- (2) Modern business documents against which judicial decisions needed to be checked, and above all
- (3) Observation of people, by living among them and noting their behaviour.

In the scheme according to Ehrlich, it becomes clear that the adjudicating arm of state and the sanctioning arm are more or less aspects of what constitutes the living law which must be discovered. He states that the living law is not a legislation that is habitually disregarded by the society but that which is obeyed and given importance. Further, the customs of a particular society as well as its morals etc. may play a role in the society in which such custom or moral attains such devotion as to be termed part of the living law of that society. The notion of obedience or disobedience of formal laws as against living laws is deeply rooted in the psychology of the society. This, in itself, is not immutable. The laws that are living and socially important may change from society to society and in fact may change from time to time. It is this change that must be reflected again and again in the formal laws of the society. There is no gain reiterating again the importance of Ehrlich's thesis on sociological jurisprudence. It was of profound influence in diverting the attention of jurists from over dependence on formal laws and giving more insight into the problems and facts of social life vis-a-vis the acceptance of formal laws and its obedience. However, it is not clear whether Ehrlich's contempt for formal laws as it were, was too judgmental. He did not endow formal law with any creative qualities and saw it as inscrutable, and as such non-functional. While it is true that reforming legislation at the heels of the tide of public opinion was important, it is also credible to state that in many cases, statutes have been the vanguard of change for the society, and this mainly through the state's enforcement. His distinction between norms of decision and norms of behaviour had become a little belated even when he propounded it. The formal law had become even more important because it had gained its own effectiveness not merely on the back of the living law. At any rate he was not very forthcoming in the relations between these two norms. Again it was fruitful to seek to study law against society's happenings but the mode by which this study was to be conducted according to Ehrlich would have erased the significance of formal laws completely. This would not have been helpful.

### **Roscoe Pound (1870 -1964):**

The jurisprudence of interest as propounded by Ihering was further expatiated upon by Roscoe Pound, an American jurist of the present period. The basis of Pound's theories lay in the search for the solutions to the problems of American society at the time. This was with particular reference to what was perceived as equitable in the distribution of the abundant natural resources in America at the time. His studies believed in using the knowledge of the social sciences as an instrument of bringing about social change. This change was grounded on control, adjustment of social relations and general troubleshooting.

Pound's sociological jurisprudence placed a lot of importance on the study of law in its direct relationship to the society. He believed the society must be made as a prelude to the making, interpretation and application of laws. For legal enforcement to be effective, the lawyer, jurist and legislator must study society. Pound espoused the idea of having a justice ministry that was concerned with the psychology and philosophy of judicial matter against the background of

sociological studies so that the purpose and object of the law could be achieved. This achievement could be through only constant and consistent study of society.

Pound realized that the whole of the common law was filled by the impression of the individual and posited that individual interest could be adequately protected and enforced. Such as:

- (1) The jurists must have an inventory or catalogue of the interest of the individual, the public and the society;
- (2) The jurists must select and recognize those interests as being worthy of protection;
- (3) The jurists must determine the limits within which those recognized interests could be realized; and
- (4) The jurists must select the means for realizing and giving effect to those recognized interests within the limits so determined.

The role of the lawyer is likened to that of an engineer and his aim being to build a structure of society in such a way as to establish the satisfaction of the maximum of wants while having the minimum of friction and waste. The law must try to bring the various conflicting interests in society in tandem with each other. Pound defines an interest as a demand, desire or an expectation which human beings either individually or as a group seek to achieve. He went further to classify these interests into:

- (1) individual interest;
- (2) public interest; and
- (3) social interest.

The “individual interest” is the claims, demands, desires and expectations that are purely individualistic in nature. As such, individual interest could be said to be an interest of substance, personality, domestic relations, honour, reputation, privacy, physical person, belief, opinion and so on. “Public interest” refers to the claims, demands, desires or expectation of the individual looked at from the standpoint of the state. An example is property acquired by the state. In “social interest”, most of the issue stated under individual life is the same except that this is held in a social context. Also, there is the social interest of state in the general health etc. of society. There is also the social interest in morals, religion and so on. The object of the exercise is to balance these interests against each other by the jurists. However, there may be difficulties when interests of different classes are in conflict e.g. the individual interest against public interest. This type of “balancing” has mostly highlighted the fact that law was a potent instrument for social progress.

Roscoe Pound has not been without his critics:

- (1) Pound’s analogy of engineering has been said to be inept. This is because engineering was done with skilled ambience and it was possible to predict waste and stress as well as the quantity. This was not the case with law. At any rate, law and society changed too consistently for such a description.
- (2) He assumed that interests were there for the law to recognize and protect. This is untrue as a lot of the times; it was the law courts that created the interest for the first time.

- (3) The determination of interests cannot be done in a mathematical form. It only depends on the standard with which the interest is determined.
- (4) Balancing interests in law is not the same thing as balancing two objects.

There have been other scholars who have had great impact in the studies of the sociological approach to the field. Montesquieu (1689-1892) had propounded his own theory laying great stress on the influence of the climactic and geographical conditions of law of which history was a backdrop to this study. Duguit (1859-1928) insisted that social life should be viewed as it is lived. He forged his idea based on the interdependence of man and called it the principle of social solidarity. All these scholars enthroned one idea, the study of law through the eyes of the society and vice versa.

The term “social change” is used to indicate the changes that take place in human interactions and interrelations. Society is a “web of relationships” and social change obviously means a change in the system of social relationships where a social relationship is understood in terms of social processes and social interactions and social and social organizations. Thus, the term “social change” is used to desirable variations in social interaction, social processes and social organization. It includes alterations in the structure and functions in the society.

Sociological jurists find a greater thrust in their arguments as law has a binding force which exceeds any such proportion that which any other means of social control can only envisage. Thus, the punitive content, which is suo moto carried along with the enforcement of law and is declared to be inflicted upon its non compliance, brings about greater cohesiveness in the masses on account of the fact that it's only seeks them to do what is the positive general trend of the society. Thus law as an instrument of social change also finds a great approval, even if we seem to brush aside the argument of the sociological school for a second that law is to be understood in the social context. As, even if a law is once made in isolation to the societal position, the moment it acts in the context of and towards the accomplishment of social change, it automatically obtains the desired social content in it that is necessary for it to act as an instrument for furtherance of social progress through social change.

Sociological jurisprudence was first defined in 1911 in a law review article by Roscoe Pound. It rebelled against the formal jurisprudence that had dominated the nation's legal community since the Civil War. While formal jurisprudence used deductive logic to reason from assumed principles to holdings in specific cases, sociological jurisprudence advocated the use of the social sciences to develop legal rules and argued for more flexible legal rules to allow individual judges freedom to do justice in individual cases. By the 1930s, advocates of this new jurisprudence had begun to change the methodology of the Supreme Court. Jurists such as Justices Holmes, Brandeis, Cardozo, and Stone began to discard formal jurisprudence and to explicitly consider and balance the social interests at stake in their decisions. Characteristic of formal jurisprudence was the use of means-ends analysis, which was used not to consider the actual effects of a law, but to determine the law's purpose. Formal jurists considered this purpose to be the law's nature and by knowing the true nature of the law, they could then determine its validity without considering its effects. The growth in American jurisprudence helps us to understand the sociological school greatly. In the late nineteenth century, two schools of constitutional jurisprudence began to emerge. The first school can be described as "traditional."

This school believed that the Constitution had a fixed meaning and that the judiciary's role was to serve as an elitist institution that limits popularly controlled legislatures from exceeding constitutional boundaries. The competing school of constitutional thought was the progenitor of sociological jurisprudence, which believed that social science and public mores should be weighed heavily in constitutional adjudication and ultimately advocated extreme judicial deference to legislative enactments. Sociological jurisprudence holds that the purpose of law is to achieve social aims, and that legal rule, including constitutional rules, cannot be deduced from first principles. Accordingly, sociological jurisprudence believed abstract notions of rights should not bind judges.

Sociological jurisprudence also believed that judges should not strictly rely on traditional analytical tools such as analysis of the Framers' intent, natural rights, or precedent when deciding constitutional cases with social import. Instead, judges should consider the public interest and modern social conditions or "social facts" when interpreting the Constitution. In stark contrast to traditional theories that relied on immutable principles such as natural rights, sociological jurisprudence depended on the theory that law was tied to the evolving nature of society because society determined people's rights. Sociological jurisprudence believed that courts should consider public opinion when interpreting the Constitution because such opinion represented the evolving social mores of the community. Justice Benjamin N. Cardozo, in his famous work entitled *The Nature of the Judicial Process* posited that judges legislate "interstitially" when charting the course of the common law. He believed a value judgment is behind every decision that could be decided either way based on the precedents. Cardozo argued that whenever possible, it is the judge's duty to repress his or her own subjective values and apply the values and mores of the community at large when choosing which course to follow. He said that judges must think like legislators. And he called upon the legal profession to employ the methods of sociology to objectively determine the values and mores of the contemporary community that are essential in order for courts to properly decide cases.

The Austrian-born legal philosopher Eugen Ehrlich, briefly wrote "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." Ehrlich argued against law as "a body of legal propositions" and put forward that "the inner order of the associations of human beings is not only the original, but also, down to the present time, the basic form of law." To understand law, one must understand the actual relations and associations within the society. For Ehrlich, law is social, not individual. He expressed the need to remove law from purely positivist and academic considerations eloquently; "Every social and economic change causes a change in the law, and it is impossible to change the legal bases of society and of economic life without bringing about a correspondence change in the law. If the changes in the law are arbitrary and of such a nature that the economic institutions cannot adapt themselves to them, the order of the latter is destroyed without compensation."

Pound as a "sociological jurist" was among those who argued that law could not be analyzed in isolation, and that jurisprudence was not a "pure" science. Rather, law as a science must be studied in conjunction with other disciplines: The "program" of sociological jurists, then, accommodates some or all of the following: (1) study of actual social effects of legal institutions, precepts and doctrines; (2) sociological study in preparation for lawmaking; (3) study of means of making legal precepts effective in action; (4) study of judicial process and

ideals; (5) sociological legal history (including effect of laws on society); (6) recognition of importance of just solutions of individual cases; (7) a ministry of justice in common-law countries; and (8) "the end, towards which the foregoing points are but some of the means, is to make effort more effective in achieving the purposes of the legal order.

Sociological jurisprudence does not mean, and has never been used to argue, that positive or natural law propositions have no validity. Nor does it confuse "ought" concepts with "is" concepts. It does not seek to be prescriptive. Rather, the concept of "living law" injects into the analysis a flexibility that, like legal realism, views law in the context of times and circumstances, and allows courts to consider such issues. In fact, scholars of Pound's sociological jurisprudence saw the ultimate authority of law originating in the value of law as a mechanism to secure social interests.

### **Role of Supreme Court in social change**

The case of *Ashok Kumar Gupta & Ors. Vs. State of U.P. & Ors.* (1997) 5 SCC 201 and the observations made therein are pivotal to determine the understanding of the Court as to social change. The case related to challenge made against the promotion of certain respondents in the Public Works Department of the State of U.P. It is not the outcome of the case that is pertinent for our analysis but the obiter of the Court made to justify the stand it took while protecting the deprived and the underprivileged.

The Court observed, "it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally. The judicial function of the Court, thereby, is to build up, by judicial statesmanship and judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and IV a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is armour to realize distributive justice. Keeping the above perspective in the backdrop of our consideration, let us broach whether the rights of the employees belonging to the general category are violation of Article 14; inconsistent with and derogatory to right to equality and are void ab initio."

In the instant case, the Court cited the observation of a Constitution Bench in *Union of India & Another Vs. Reghubir Singh* (1989) 2 SCC 754-756, wherein it was held that, "like all principles evolved by man for the regulation of the social order, the doctrine of binding precedent is circumscribed in its government by perceptible limitations, limitations, arising by reference to the need for re-adjustment in a changing society, a re-adjustment of legal norms demanded by a changed social context. This need for adapting the law to new urges in society brings home that truth that the life of the law has not been logic, but it has been experienced. The law is forever adopting new principles from life at one end and "sloughing off" old ones at the

other. The choice is between competing legal propositions rather than by the operation of logic upon existing legal propositions that the growth of law tends to be determined. Interpretation of the Constitution is a continuous process. The concepts engraved therein keep changing with the demands of changing needs and time.”

Thus it can be that the Court realises its importance and role in determining the growth of the society and having realised its importance, the Court further perceives the importance of taking into account the aspects of the social conduct and the experience of the ages while determining new norms. However, having observed the views of the Court, one must remember that this idea mooted by the Court has to be ingrained in its functioning and its approach to the cases before it and must be reflected from its decisions. A mere expository declaration to this regard will not suffice the purpose nor will accomplish the objective. Thus the approach followed thereon is not to analyse what the Hon’ble apex Court has stated on its role or duty towards social progress but to examine, with critical precision, the decisions that it has meted and how far they have influenced and have been instrumental in bringing about social change in the country.

The approach adopted from herein is to examine a specific aspect of change, either introduced or affirmed by the Court, in exhaustive detail. The aim is to take different classes of society in a specific category and observe the role of the Court in their promotion of development wherein the classes here formed represent those weaker and downtrodden sections of the society which have withstood oppression and suffering at the hands of the powerful sections. Thus the approach discounts to examination of each specific class separately, figuring out the role of the Court in adequate safeguard and protection.

#### **(a) Backward classes and their protection**

The huge litigation continues to be controversial with a continuous tussle between the so called upward and the backward classes, has witnesses changing trends of the Court. While earlier the Supreme Court believed in a literal interpretation of the Constitution, devoid from practical realities, later on, in an advent to secure the devices meant for the upliftment of the backward class, the Supreme Court turned assumed a proactive role for itself and stood tall for their protection and the trend continues to be there today as well. The case of State of Madras Vs. Champakam Dorairajan AIR 1951 SC 226 reflects the earliest ideology of the Supreme Court in this regard. The Communal Government Order of 1951, which provided for reservation in Medical Colleges on lines of caste, was challenged in this case as being violation of fundamental right under Article 15(1) and Article 29(2) wherein the right not to be discriminated in government admissions on multifarious considerations was guaranteed. The Court did not agree to the justification given by the State that Article 46, as a directive principle, mandated the state to make provisions for the promotion of the educational and economic interests of the Scheduled Castes and Scheduled Tribes. The Court opined that being a directive principle, Article 46 could not override the fundamental rights under Article 15 and 29 and therefore, the Government Order was declared ultra vires the Constitution. Therein, thus, the Court took a positivist stand and ensured that the backward classes were not promoted at the cost of the other well to do classes. The opinion of a seven judge bench, however, was otherwise when the issue of reservation was again before them in the illustrious case of Indra Sawhney Vs. Union of India AIR1993 SC 477

wherein the concept of reservation was not only validated but in fact was permitted upto 50% i.e. the fact that half of all the government seats and posts could be set aside for a portion of population not more than 15% of the entire population of country, was approved by the Court. Thus the zeal to bring about parity in the people, both in terms of opportunity and also instilling the ability to exploit the opportunity made the Court think in terms of applying the 'pull up' theory when 'push up' theory was already at work under the Constitution. The present trend is that even if there is one post that is sought to be filled and the Government applies 40 point Roster (which provides for reservation and manner in which the post is to be filled) in filling that post, which may even amount to 100% reservation and total exclusion of the General category, it is not considered to be violative of Article 14 and 21.

In *Union of India Vs. Madhav* (1997) 2 SCC 332, the Court held that, even though there is a single post, if the Government has applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidate belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution. Right to reservation was declared to be a fundamental right by the Supreme Court in the case of *State of Kerala Vs. N.M. Thomas* (1976) 2 SCC 310. Thus the intent of the Court to ensure the upheaval of the backwards can be evenly witnessed.

#### **(b) Abolition of Untouchability:**

Article 17 of the Constitution abolishes untouchability. This has been done to castrate the stigma and disgrace that was cast upon on a particular section of the society merely because they were a deprived lot and were assigned the most abhor able work of the society. The provision adopted here sought to end an age old practice which had found an almost permanent place in the highly indoctrinated Indian society. Nevertheless, though the Constitution prohibited untouchability in any form, its enforcement was not an easy task. In a recent case *N. Adithayan Vs. Travancore Devaswom Board & Ors.*, AIR 2002 SC 3538, the question which arose before the Supreme Court was, whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (Priest) of the Temple in question Kongorpilly Neerikode Siva Temple at Alangad Village in Ernakulam District, Kerala State, is violative of the constitutional and statutory rights of the appellants. It was contended that only Namboodri Brahmins alone were allowed to perform poojas or daily rituals by entering into the Sanctum Sanctorum of Temples in Kerala, particularly the Temple in question, and that had been the religious practice and usage all along and that such a custom cannot be thrown over by the Travancore Devaswom Board, which was responsible for the administration of the Temple.

However, the Court observed that distinction based on caste could not be allowed to permeate in the social fabric of the society as far as everyday working was concerned. Since worshipping in a temple had become a secular aspect, in this case, the Petitioner could not contend that becoming a pujari in the temple was an exclusive right of a particular class because people belonging to other class were not permitted in the temple, a practice which was already abolished by Article 17 and positively established as under Article 25. Thus the Court reaffirmed its stand that discrimination of any sort, amounting to untouchability would not be tolerated in any form, express or implied. In a similar case wherein, a complaint was filed that the respondent



obstructed the Harijans from taking water from the well as they were "Mahras" and that there was a separate well for them, saying that if the Harijans insist on taking water the result would be unhappy but the same was dismissed the High Court in appeal, the Supreme Court observed that, under Article 17 of the Constitution and also under the Protection of Civil Rights Act, 1955, the thrust was to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral basis and further seeks to establishment new ideal for the society and in interpreting the Act, the judge should be cognizant to and always keep at the back of his mind the constitutional goals and the purpose of the act and should interpret the provisions in the light to an annihilate, untouchability and to afford to the Dalits and Tribes right to equality, social integration and fraternity. Therefore the Court concluded that where the Harijans were stopped from taking water from well on the ground of their being untouchable, the offence under

Section 4 of Protection of Civil Rights Act, 1955 was clearly made out. Registering the plight of the dalits, K. Ramaswamy, J. observed, "Poverty and penury made the dalits as dependants and became vulnerable to oppression. The slightest attempt to assert equality or its perceived exercise receives the ire of the dominant sections of the society and the Dalits would become the object of atrocities and oppression.

#### **(d) Upholding the dignity of women**

In *C.B. Muthamma Vs. Union of India* (1979) 4 SCC 260 wherein Rule 8(2) of the Indian Foreign Services (Conduct & Discipline) Rules, 1961, required a women member of the Indian Foreign Services to resign from the service if the Government was satisfied that her family and domestic commitments were likely to come in the way of due and effective discharge of her duties was declared as illegal and unconstitutional. The Court observed, "We do not mean to universalize or dogmatize that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern." Thus it can be stated with definitiveness that the Court has always played a pro-active role in standing for bringing about a social change and here, standing for the rights and the dignity of the women, the Court in categorical terms held that it would not permit differentiation unless found essential in the facts of the case.

In similar circumstances, in *AIR India Vs. Nargesh Mirza* (1981) 4 SCC 335 the Court declared Air India Regulation 46(i)(c) which provided for the services of the Air Hostesses to stand terminated on first pregnancy, as violation of Article 14 as it sought to discriminate only on grounds of sex. In categorical terms the Court observed, "the provision according to which the services of Air Hostesses would stand terminated on first pregnancy is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violation of Article 14 of the Constitution. It amounts to compelling the Hostesses not to have any children and thus interfere with and divert the ordinary course of human nature. By making pregnancy as a bar to continuance of ordinary course of Air Hostess, the Corporation seems to have made an individualized approach to a women's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach. The termination of the services of an Air Hostess under such circumstances is not only

a callous and cruel act but an open insult to Indian womanhood the most sacrosanct and cherished institution. Such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits the quality of unfairness and exhibits naked despotism and is, therefore, violation of Article 14”

## **Conclusion**

The above two paragraphs of J. Cardozo clearly define the progress of the legal system while also summarising the duty of the judge in the evolution of this social changes.

Rules derived by a change of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady and erosive actions of utility and justice. We see the same process at work in other fields. We no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit. We read covenants into them by implication when we find them in conflict with them “instinct with an obligation” imperfectly expressed. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman and every slip was fatal.

There has been much debate among the foreign jurists whether the norms of right and useful conduct, the patterns of social welfare, are to be found by the judge in conformity with an objective or a subjective standard. His duty is to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right-minded men and women which he is to enforce by his decree.”

The role of the judge, therefore, to ensure social progress rests undisputed. Evaluating the part played by the Supreme Court in this role, it goes without saying that the Court have indeed came up to the occasion almost whenever it was required to interpret and mould social norms and practices in line with the social aim that it envisaged for the national strata. Much has been said and written in praise of the Court already and the present study also concludes to confirm that belief to a large extent. However, complacency must not be allowed to creep in this role of the Court. Our society is yet to achieve a level of tranquillity sufficient to sustain the national growth in its own volition. A pro-active role of the Court is desired no doubt, but also it must ensure that it does not cripple the social growth by being the only cause responsible for the growth. The Court must supplant such vigour which renders the fellowmen themselves competent to invoke their mental faculties and surpass, vide the aid of morality and cultural values, the orthodox beliefs which come in way of a spontaneous and self-generating march towards social change.

Thus, the march of law is clearly in favour of Supreme Court having performed a pro-active role in social change of the languishing masses. It certainly has acted as a catalyst in the process of social transformation of people wherein the dilution of caste inequalities, protective measures for the weak and vulnerable sections, providing for the dignified existence of those living under unwholesome conditions, etc. are the illustrious examples in this regard. Thus, all that remains to be said is that though the permutations and circumstance existing at the time of

independence may not exist today but still the Indian society requires a vitalising trigger which should duly be ensured by the Court from time to time. Thus the changes in the society based on law or moral or ethical issues are determined by the court of law to emancipate the welfare society.

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