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Interplay of Rule of Law and Social Transformation

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ABSTRACT

Like every mother wants her child to imbibe certain ideals, character for life, our constitution framers also desired certain ideals, character and values for our society. The preamble to the Indian Constitution gives a glimpse of these fundamentals in a nutshell. But except for certain basic characters/structures, with the manoeuvring wheel of time, just like humans even societal behaviour, gets subjected to growth, decay, revival, and accommodation. This phenomenon of social change needs to be accurately tracked by the spirit of constitutionalism, dynamics of Law, Legislation, and judicial interpretations, in order to “secure justice, liberty, equality to all citizens and promote fraternity to maintain unity and integrity of the nation”. This journey of bridging the shores of idealism with realism is the basic difference between constitutionalism and the Rule of Law. The present Article attempts to arrest such instrumentalities/consequences of these Social Changes, wherein two modes of this aspect are broadly discussed. First is where “Law brings the change in Society”, meaning thereby, that the law compels societal behaviour to change according to it and the second is where “Society changes the Law” according to time and societal need, legislative wisdom. The study is supplemented with the instances, judicial precedents, and legislations witnessed in recent times. Article also highlights some other factors affecting the need and relationship between Law & Social Change. The study is contemporary in nature and is significant to understand the ramifications of changing societal behaviour vis-a-vis the Rule of Law, its dynamic functioning, and interplay of constitutionalism as a guarding soul of the Basic structure of the Indian Constitution.

Keywords: Constitution, Societal Behaviour, Social Change, Rule of law, Transformation.

I. INTRODUCTION

“Every generation needs a new revolution.” - Thomas Jefferson³

Constitution of any country is the foundation source of its law. Indian Constitution is the result of revolution and is synonymous to centuries old struggle⁴. History evidences that every

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⁴BojjaTharakam, “In Quest of Equality: Indian Constitution Since Independence”

revolution/struggle emerge from a deep desire to bring the change. Like our freedom struggle from British domination, the incessant desire for independence; desire to have a “homemade” constitution, instead of one drafted by colonial office(s), the quest to indigenously write the future of our country; to become self-empowered/self-governed; to advocate the spirit of oneness, solidarity; to proudly conserve/acknowledge/practice/promote our customs, traditions, culture, faith, to assert our unmatched thousand years old history/tradition of happily living with unity in diversity; to revisit the lessons learnt from our colonial past, to reminisce the sacrifices of our freedom fighters, to cherish our values for generations to come and this list can never be exhaustive, the preamble to Indian Constitution gives a glimpse of these fundamentals in nutshell⁵, All these factors, triggered as an inspiration for the framers of our constitution. These factors are the basic spirit/identity of Indian constitution, the supreme norm just like *kelsen’s theory of grundnorm*⁶, which is sacrosanct, also described as the *basic structure of Indian Constitution*⁷.

These fundamentals are the ultimate testing pad, which keeps the basic check and balance⁸. Constitutional functionaries may not be bound by the bare text of Indian constitution, but their fidelity is with respect to this spirit of constitution⁹ i.e. *Constitutionalism*, as these pre-existing/long-driven/thoughtfully-chosen *overarching principles*¹⁰ organize our society together and runs through every Article of Indian Constitution. Any interference/derogation with the spirit of constitutionalism is generally prohibited¹¹.

But just like a reptile shed its skin to continue to grow, with the manoeuvring wheel of time, societal behaviour also get subjected to growth, decay, revival and accommodation. Our constitution framers were cognizant of this fact and that is the reason, Indian Constitution is described as “*a living document*”¹², because it has survived 72 years, and continues to function in 2022, as it is pragmatically drafted with a deep foresight, to strikes a balance between the possibility to change and safeguarding the basic structure of Indian Constitution¹³. As in the process of evolution our Constitution will not lose/destroy its basic identity.

⁵ In Re: The Berubari Union and Exchange of Enclaves v. Reference under Article 143(1) of the Constitution of India

⁶ Dr. V. D. Mahajan “Jurisprudence and Legal Theory”

⁷ Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala (WP(C)135 of 1970) (Supreme Court)

⁸ State of West Bengal v. Committee for Protection of Democratic Rights (Civil Appeal No. 6249-6250 of 2001) (Supreme Court)

⁹ M. Nagaraj v. Union of India (WP(C)61 of 2002) (Supreme Court)

¹⁰ Ashoka Kumar Thakur v. Union of India (WP(C)265 of 2006) (Supreme Court)

¹¹ Swaran Singh v. State of UP (1998) 4 SCC 75.

¹² B.R. Kapoor v. State of Tamil Nadu (WP(C)242 of 2001) (Supreme Court)

¹³ I.R. Coelho (dead) by L.R. v. State of Tamil Nadu (Appeal (Civil) 1344-45 of 1976) (Supreme Court)

Nevertheless, the phenomenon of social change needs to be accurately tracked by the spirit of constitutionalism, dynamics of Law, Legislations and judicial interpretations, in order to “secure justice, liberty, equality to all citizens and promote fraternity to maintain unity and integrity of the nation”¹⁴. This balancing journey of bridging the shores of idealism with realism is the basic difference between constitutionalism and Rule of Law¹⁵. Hence, observed by Apex Court¹⁶ that “...the principle of constitutionalism is a work in progress which is meant to infuse life and blood into an existing scheme which has stood the test of constitutional validity and not to nudge with the scheme itself. It may only be deployed to evolve minimum standards of procedures prescribed by law. It is not to undermine or supplant the elaborate statutory regulatory schemes.”

Every legislation, judicial intervention, recommendations of commissions/committees, political resistance, protest march etc ,are drawn, with a purpose of doing away with some social disparities, defining certain norms necessitating social welfare, rules of conduct/custom developed by society through experience, etc., law being regulating instrument of a society also needs to timely assimilate, address such social changes and still qualify the basic structure of the constitution, in order to retain its binding force, sanction and its lively character. There are broadly two approaches to this trait:

Law Changing the Society: Law is a tool to regulate society. Regulations are necessitated to keep/maintain a harmonious balance amongst society, social changing behaviour and people living within the society, for their pleasant interdependent co-existence. Law being a dynamic field of science helps/compel a society to change. Hence, it is generally said that when “*law changes the society*” it indicates the foundation pillar for the development of a society. Legislature through enactments and Judiciary through interpretations aids in administering/enforcing the law with a binding-force, requisite sanctions. It is generally said, that if someone wants to understand a particular society, he needs to read its law and enactments, Law is a mirror of society.

When India got independence, we were plagued with numerous social issues, such as poverty, discrimination, biases, bonded labour, untouchability etc., these were deep rooted in our society, our independence would have been meaningless without arresting and severing off these issues from our society as the word independence signifies each of us gets an equal right of breathing the air of freedom, independence must not be a subjective term but an equal unconditional right,

¹⁴Preamble to Indian Constitution

¹⁵Maurice Adams, Anne Meuwese, and Ernst HirschBallin “Constitutionalism and the Rule of Law”

¹⁶Rajeev Suri v. Delhi Development Authority (Transferred Case(Civil)No.229 of 2020)(para 172)

that is why it is said “Injustice anywhere is a threat to justice everywhere¹⁷”.

This small article may not justify our 72 years of legislation/judicial precedents, for societal growth and upliftment, however, an attempt is made to highlight some of our legislative/judicial initiatives i.e. Article 23 of constitution of India protect trafficking of human being and forced labour as a part of fundamental rights, Section 370, 371 of Indian Penal Code 1860, declared slavery as a punishable offence. Labour welfare legislations and to measures to curb bonded labour is effectively done/monitored through enactments; Child marriage entails not only sociological but also psychological consequences as well such as denial of right to education, difficulties in physical and mental development, early parenthood. etc., these repercussions have proved to be more shattering for girls then for boys, therefore legislatures enacted Child Marriage Restraint Act, 1929, recently enacted Prohibition of Child Marriage Act 2006, and the Prohibition of Child Marriage (Amendment) Bill, 2021, intends to bring the minimum age of marriage of a female child at par with male child to 21 years, recently the Apex Court has held that the exception to Section 375 of the Indian Penal Code should be read down as follows “Sexual intercourse or sexual acts by a man with his own wife, the wife not being below 18 years, is not rape.”¹⁸; abolishment of sati, dowry system, introduction of coparcenary rights for women, Art.17 of Indian Constitution against untouchability, provision for reservation for social upliftment of Scheduled Caste, Scheduled Tribes, Backward Class, Economically weaker section, women, person with disabilities and other classes in need, elimination of child labour, Right to free and compulsory education for every child aged between 6 to 14 years as enshrined under Article 21A of Indian Constitution, Law against female infanticide through negative sanction of hard punishments through Indian Penal Code and propagating the society the vision of “Beti Bachao Beti Padhao”, subsidies and high interest investment schemes for girl child i.e. Sukanya Samridhi Yojana, etc, so on and so forth.

Even judicial interventions for social growth has tremendously helped in shaping our society, Supreme Court of India is also called the guardian angel of Indian Constitution, times and again the judicial verdicts have proven these statements to be true in entirety. Some of the recent landmark judgments are highlighted herewith for a quick reference. Recently, the Apex Court, ruled for the right to privacy as a constitutional right and protected under art.21 of Indian Constitution¹⁹, declared the unconstitutional the Sabarimala Temple’s custom of prohibiting women in their menstruating years from entering the temple²⁰, gave legal sanction to passive

¹⁷Martin Luther King Jr. Quoted

¹⁸Independent Thought v. Union of India (2017)10 SCC 800

¹⁹Justice K.S.Puttaswamy (Retd.) v. Union of India (WP(C) 494 of 2012) (Supreme Court)

²⁰KantaruRajeevaru v. Indian Young Lawyers Association (WP(C)373 of 2006) (Supreme Court)

ethanasia to a patient in vegetative state acknowledging Right to die as a fundamental right too²¹, husband is not a master of his wife, declared Section 497 of Indian Penal Code, as arbitrary and unconstitutional²², declared triple talaq as an unconstitutional practice of dissolution of marriage under Muslim Law²³, decriminalised homosexuality in India by striking down Section 377 of Indian Penal Code, to the extend it criminalize sex between two consenting adults²⁴, held that bride includes trans women under Hindu Marriage Act, 1955 as a measure for social justice²⁵. Observed that sedition laws are heavily misused by authorities and needs to be revisited, by acknowledging right to criticise,²⁶ etc, these judicial pronouncements, not only have a check over the legislative functions, safeguard the basic structure of the Constitution but also create checks and balances, acknowledges/enforces the social change in society.

Society changing the Law: Recalling our freedom fighters movements i.e. the champaran, and kheda satyagraha of Gandhi ji, mulshi satyagraha of Senapati Bapat; Tebhaga movement by Subodh Roy ji, Anna Hazare movement for Lok Pal Bill and recent Farmers' Protest against the three Farms Acts etc., there had been many occasions in past, where the governments were compelled by societal sentiments, political resistance, protest, march etc., to set up commissions, enact/annul legislations to accord with social change/needs/desire/behaviour, Thus, the demand/desire to change may also takes root and shakes up the government to either reform/scrap the existing legislative decision or compels the creation of one.

The most astonishing yet significant movement pertains to the case of *Nirbhaya*, the brutal gang-rape committed in the heart of the country, the capital of Nation, lead to outburst the public anger and a massive protest through-out the Nation, demanding a strong action/legislation/political will in terms of culpability and enforceability of the heinous offence of rape, consequently the government was compelled to form Justice Verma Committee²⁷ to holistically examine and report the offences against women and bring recommendations for stronger laws to safeguard and protect our women against such heinous crime, Recommendations of Justice Verma Committee lead to amendment of our Criminal Laws²⁸.

²¹Common Cause v. Union of India (WP(C)215 of 2005) (Supreme Court)

²²Joseph Shine v. Union of India (2019)3 SCC 39)

²³ShayaraBano v. Union of India (2017)(9)SCALE 178)

²⁴Navtej Singh Johar v. Union of India (WP(C)76 of 2016)(Supreme Court)

²⁵Arun Kumar v. Inspector General of Registration, Tamil Nadu (Madras High Court)(WP(MD)No.4125 of 2019)

²⁶Kishore Chandra Wangkhem v. Union of India (WP(C)18 of 2018)(Supreme Court)

²⁷<https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary#:~:text=Justice%20Verma%20Committee%20was%20constituted,report%20on%20January%202023%2C%202013.>

²⁸Criminal Law (Amendment) Act, 2013

Recently, the three Farm Acts²⁹, were repealed by Parliament, in the wake of unending protest by Indian Farmers owing to issues with respect to fearing manipulation of prices of essential commodities through hoarding of essential commodities, future fear of monopoly by multinational companies, fear of loss of bargaining power to small farmers, disinvestment by government and entry of private players in agriculture sector, will lead to overshadowing the social welfare objective over the commercial profit making strategies, and may lead to end of mandi system, lack of clarity in vision and objectives of law etc., were alleged to be some of the principle cause of farmers protest.

The movement for Jan Lokpal Bill, when anti-corruption activist Anna Hazare began a hunger strike at Jantar Mantar monument in Delhi. The aim was the appointment of Lokpal/Ombudsman, representing public interest in the Republic of India, with administrative, quasi-judicial powers, as a guardian of Public interest, consequently Lokpal and Lokayukta Act was passed in 2013. So on and So forth.

Apart from above there are certain other factors, which highlights the requirement of law to change, i.e. economic factors, as India being a developing nation, needs to bring ease in business transactions in order to attract big business opportunities for country which not only gives push to our economy but also open new avenues of employment. Skill development, technology up-gradation and foreign investment, consequently decriminalization of many commercial offences into a compoundable offence, i.e. cheque bounce, offences under companies Act, 2013 (Companies Amendment Bill, 2020 is pending before Lok Sabha in this regard), Real Estate Regulation Act, 2016, etc. While arguing decriminalization, it is also suggested in many international articles that on account of the therapeutic use/application of cannabis oil, a few segment of class of people also suggest the legalisation of weed³⁰.

Misuse factor, i.e. misuse of law of sedition (As right to criticise government is included in freedom to speech and expression), Misuse of provisions of Section 498-A of Indian Penal Code, (where on account of the act/offense of cruelty by Husband, Husbands relative could also be prosecuted), etc.

II. CONCLUSION

“Change is the law of nature”, our social beliefs/behaviour/needs are subject to incessant change, there has been tremendous social aspects where law has/is brought/ bringing the

²⁹The Farmers Produce Trade and Commerce (Promotion and Facilitation Act, 2020; Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020; Essential Commodities (Amendment) Act, 2020

³⁰<https://timesofindia.indiatimes.com/readersblog/sameer/legalization-of-cannabis-in-india-25286/>

socially purposed transformation, like a safety shield to protect from erosion/decay. Law is a medium that puts the social needs and aspiration into practice, both acts as a lifeline for each other, India being a democratic, socialist and a secular country, has a greater responsibility to keep the public trust alive. This is a responsibility of a welfare state and includes the very basic structure of Indian Constitution.
