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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **METAMORPHOSIS OF LAW FROM SOCIAL CHANGE AND VICE-VERSA: ANALYSING THE INTERCONNECTION BETWEEN SOCIAL CHANGE AND LAW**

AUTHORED BY - CHRISTOPHER THOMAS

*“The safety of the people shall be the highest law”<sup>1</sup>*

*-Marcus Tullius Cicero*

## **Introduction**

Law and society have been interwoven from time immemorial. However, in ancient times humanity did not have codified laws as we now see today. There existed the concept of law and how one should conduct himself within society. And the conduct was established through basic practices and customs that have developed, and religion had a greater role in shaping these customs and later these customs into laws. We live in a world of constant change; from the earth to sea everything changes, new seasons come old will perish and new will be born. Similarly, society and its customs are dynamic, subject to change to new ideologies, and new perspectives are always part of human life. Law is defined as a tool to control society and going to the definition by John Austin “Law is a command issued from a sovereign power to an inferior and enforced by coercion”<sup>2</sup>. There are several other definitions of law which try to give meaning that law is something which is posited; this view is propounded by the analytical legal positivist school and various other schools also have their definitions of law which try to define law through the eye of history<sup>3</sup> and also as a part of the society<sup>4</sup>.

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<sup>1</sup> <https://www.quotetab.com/quotes/by-marcus-tullius-cicero>

<sup>2</sup> Dr Bhagyashree A Deshpande, *Law & Social Transformation in India* (1st edn, Central Law Publication 2018).

<sup>3</sup> According to this theory – the historical school of law, the law is the result of past forces and past influencers. Moreover, the law is built and grown on the general consciousness of people. The consciousness, however, starts from the very beginning of society. In addition, some factors that affect this long historical development are as follows: Society and social customs—many religious and conventional principles. Also, the economic needs of society play a crucial role. Last but not least, the needs, and desires of the citizens.

<sup>4</sup> The sociological school of jurisprudence illuminates the relationship between law and society. Because the researchers of this school place focus on the law-society interrelationship, it can be assumed that the fundamental goal of the sociological school's inception is to study about the relationship between law and society.

Social Change can be defined as a change which is brought in the societal values, norms and customs over a period owing to the need of the time. According to Jones “Social change is a term used to describe variations in or modification of any aspect of social process, social patterns, social interaction or social organization.”<sup>5</sup> The question is whether social change can promulgate a law or whether a new law can change the existing norms and beliefs in society.

## **“Living Law”- Changes in Law over time**

Law is a set of principles followed by mankind from the age in which he began to form civilisation, they concluded that for order and peace in society<sup>6</sup>, there should be a set of common principles which should be adhered to by everyone. The historical school believes in the concept of the evolution of law over some time by the general consciousness of the people. The Volkgeist, i.e. the spirit of the people as propounded by Savigny provides law as an expression of the will of the people.<sup>7</sup>

Eugen Ehrlich a notable legal philosopher and jurist has propounded the theory of living law. The organic concept of the living law envisages that the law is not a set of laws framed by the legislation but is accustomed to and has evolved through the practices and customs in society. The central point of his theory is that ‘the law of a community is to be found in social facts and not in formal sources of law’. He says: “At present as well as at any other time the centre of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decision, but in society itself.”<sup>8</sup> Thus going by the notion of Ehrlich, society is one that makes changes in law, and it is true from various instances around the world.

Racial discrimination and segregation were practised in the 20<sup>th</sup> century and this was done with the help of laws to systematically strip the nation’s black majority of all political, economic, and human rights. The apartheid followed in South Africa was ended only because the changing norms and practices of the civilised world changed and began to see apartheid as a social evil. The racial segregation laws were prevalent in South Africa, but later those laws were abolished because of

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<sup>5</sup> <https://www.civilserviceindia.com/subject/Sociology/notes/social-change.html>

<sup>6</sup> Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985)

<sup>7</sup> Frederick C Beiser, *The German Historicist Tradition* (Oxford University Press 2011) <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199691555.001.0001/acprof-9780199691555>> accessed 7 August 2023.

<sup>8</sup> Eugene Ehrlich and Klaus A Ziegert, *Fundamental Principles of the Sociology of Law* (Routledge 2017).



social and international pressure.<sup>9</sup>

In India, the social reformations brought into the society by various reformers such as Raja Ram Mohan Roy, Swami Dayanand Saraswati, Justice Ranade, Shahu Maharaj, Jotiba Phule, Gandhiji, and Dr B.R. Ambedkar and other such prominent social thinkers were essential to change the laws prevailing that time. Even though such reformations do not have any legal binding, these reformations in the society led to the passing of certain legislation which can be taken as an example of Law changing the society.

## **Law Changing the Society**

So far, we have discussed as society was changed the prevailing laws of the time, as the customs and practices of society have changed. Now the reverse relationship between law and society will be looked into. The law acts as an instrument of social change in various instances; in the opinion of Roscoe Pound, “Laws must be stable and yet cannot stand still.”<sup>10</sup> The social engineering theory propounded by him illustrates how a law can be instrumental in changing the values, customs and practices followed by society.<sup>11</sup> His theory is still relevant today because it emphasises the importance of the law recognising and protecting a wide range of interests, including public and social and private ones.<sup>12</sup> The Environmental Laws promulgated have put the sense of environmental protection to a certain extent in society; the shift from Anthropocene to an eco-centric approach can be seen as an important feat which came as a result of various environmental laws both at national and international levels.

There are various instances wherein the promulgation of laws has made a significant social change. The established pattern of inter-human contact between Caste Hindus and Scheduled Castes was touch-me-not-ism since the Caste Hindus were regarded to be polluting them. The social transformation in the aforesaid ideological stratification demanded modification in the changing and already transformed social scene following India’s independence in 1947 and the coming into force of the Indian constitution. Caste Hindus’ norms of conduct were required to adjust in accordance with constitutional provisions. Thus, legal mechanisms, namely the Indian

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<sup>9</sup> Liz Sonneborn, *The End of Apartheid in South Africa* (Infobase Publishing 2010).

<sup>10</sup> GP Tripathi and GG Padmakar Tripathi, *Law and Social Transformation* (Central Law Publications 2015). ; See also: Linus J McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound* (Abbey Student Press 1953).

<sup>11</sup> Roscoe Pound, *Social Control Through Law* (Routledge 2017).

<sup>12</sup> *ibid.*

Constitution, were used to effect change in established patterns of inter-human relationships and standards of conduct. The equal laws like I.P.C. (Indian Penal Code) /Cr.P.C. (Code of Criminal Procedure) / Evidence Act etc. and finally and especially through the Untouchability (Offences) Act, 1955 and the Protection of Civil Rights Act, 1955 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has brought an end to various practices prevalent in the society.

These change was not only limited to India, but worldwide; we can see the changes the law brought to society. The Thirteenth, Fourteenth and Fifteenth amendment to the Constitution of America was instrumental in recognising the various rights and bringing subsequent societal changes. The thirteenth amendment banned slavery, the Fourteenth Amendment made it illegal for states to enact laws that limit the rights of US citizens, the Fifteenth Amendment forbids any state in the United States from denying a citizen the right to vote based on colour, race, or former condition of slavery. Bentham anticipated that from the start of European industry and urbanisation, legal reforms would respond fast to new social needs and reconstruct society. He freely advised the leaders of the French Revolution because he believed that countries at similar stages of economic growth need similar solutions to their common issues.

### **Judicial decisions as an instrument of Social Change**

Judicial decisions result from the judicial process, i.e. the things done by judges by delivering a judgement. In a common law country, judge-made laws are laws in themselves wherein the decided cases set a precedent for the cases subsequently coming. Thus it is essential to understand what is a judicial process and how such judicial decisions can make changes in society. According to B.N.Cardozo, Judicial Process is everything done by a judge in the process of delivering justice. “The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth-century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.”<sup>13</sup> Thus, for him, the

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<sup>13</sup> Benjamin N Cardozo, *The Nature of the Judicial Process* (Cosimo, Inc 2009).

social philosophy of a judge is crucial when it comes to the decisions he will render. The necessary social philosophy will also be affected by the culture, traditions and other instances. Social philosophy of judge might differ from commonly respected norms of the society, but the judge with a view bring a social change might produce a verdict so as to effect such a social change.

Social institutions are always affected by judicial decisions and have undergone wide changes only because of the necessary intervention of the judiciary. The various social institutions such as Property, Marriage, Religion, Education, Family and Economy has wide-ranging changings due to various judicial decisions, which we will be discussing with the help of case laws.

In *Indra Sawhney v. Union of India*<sup>14</sup>, the Apex Court pioneered the notion of the creamy layer test to ensure social justice benefits to the backward class, poor people, and excluded citizens belonging to the creamy layer.

Bigamy is a societal evil that frequently causes social dysfunction. The Supreme Court has tightened the noose around people who dodge punishment by claiming conversion to Islam. The Apex Court held in *Lily Thomas v. Union of India*,<sup>15</sup> that a Hindu husband's second marriage after conversion to Islam would be invalid, the second marriage would be void in terms of the provisions of Section 494, IPC, and the apostate-husband would be guilty of the offence punishable under Section 494, IPC. This Supreme Court decision will undoubtedly has aided in the abolition of the social evil of bigamy.

In *Mohd. Ahmed Khan v. Shah Bano*,<sup>16</sup> the Supreme Court granted support to a divorced Muslim woman under Section 125 Cr. P. C., ignoring her personal law and considering the idea of equality before the law. And the decision in *Dimple Gupta v. Rajiv Gupta*,<sup>17</sup> the Supreme Court ordered Maintenance to an illegitimate child under Section 125 of the Indian Penal Code. This ground-breaking decision has given life to innocent youngsters who were victims through no fault. These judgements serve as judicial tools for social ordering.

In *Shayara Bano v Union of India*,<sup>18</sup> the Supreme Court held that triple talaq is unconstitutional. This has brought drastic changes in the lives of Muslim women, as the court has gone into the

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<sup>14</sup> AIR 1993 SC 477

<sup>15</sup> AIR 2000 SC 1650

<sup>16</sup> AIR 1985 SC 945

<sup>17</sup> AIR 2008 S C 239

<sup>18</sup> (2017) 9 SCC 1

personal laws of Muslims.

*In National Legal Services Authority vs Union of India*,<sup>19</sup> the apex court held and recognised transgenders as the third gender. They held that they have the right to all of the fundamental rights envisaged in the constitution of India and also directed the Centre to promulgate laws for their protection. Thus, the judiciary has taken a huge step in accepting transgenders and their rights in a society, wherein society has always stigmatised being transgender. Still, such stigmatisation is changing due to the efforts taken by the judiciary.

*Navtej Singh Johar v UOI*<sup>20</sup> and *Akkai Padmashali v UOI*<sup>21</sup> held that Section 377 is unconstitutional and partially struck down, which made same gender sex legal in India if it is consensual. This should be considered a landmark judgement which is favouring social change with respect to same-sex relationships; the LGBTQ+ communities are to be protected and should not be stigmatised for their sexual orientation.

*In Joseph Shine v Union of India*,<sup>22</sup> the Supreme Court in its judgement rendered in 2018 decriminalised section 497 which made adultery an offence. The court also had an opinion that the Wife is not the property of the Husband and should be treated equally and section 497 runs against the spirit of the Indian Constitution.

## Conclusion

Legal changes are codifications of traditions, and they can only be national, never universal, because customs emerge out of the habits and beliefs of individual people rather than expressing those of an abstract humanity. There are two opposing perspectives on this relationship: 1. Law is determined by the population's sense of fairness and moral sentiments, and legislation can only achieve outcomes by remaining reasonably close to established societal norms. 2. Law, particularly legislation, is a mechanism for bringing about designed social change.

In general, a highly urbanised and industrialised culture, such as the United States, has a big role in social change, and vice versa, much more than traditional societies or traditional sociological

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<sup>19</sup> (2014) 5 SCC 438

<sup>20</sup> AIR 2018 SC 4321

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<sup>22</sup> (2019) 3 SCC 39

theory. e.g. In terms of interfamily interactions, urbanisation, with its small apartments and crowded conditions, has made three-generation families in a single household less desirable. This societal change contributed to the establishment of social security regulations, which in turn contributed to changes in the labour force and in social institutions for the elderly.

Change is the law of nature; what exists today will differ from what exists tomorrow. The social structure is always changing. Society is an ever-changing phenomenon, growing, dying, renewing, and adapting to changing surroundings while undergoing huge changes over time. Change refers to a difference in something observed through time. Law and Society are always intertwined and entangled like a spider web. There are times wherein law becomes the vehicle through which necessary social change happens either through the legislation promulgated by parliament or through judge-made laws. And at times social changes in themselves prompt the judiciary or the parliament to make sufficient changes in the law to meet the will of the people.