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Research Paper

Social Science

Common Man And The Uncommon Law : An Overview

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ABSTRACT

Law is the instrument of the common millions. It is the structured and crystallized form of norms and values. In post-independent India, law is sought to be employed as a lever of basic social change, which implies that changes in some of the norms and values are sought to be brought about through the enactment of law. Laws are enacted by a handful of people and it cannot be assumed that the values underlying the legal enactments will be acceptable and applicable to all sections of the population. This assumption is not only likely to make law ineffective but also to cause unintended consequences. Distortions are bound to occur unless attention is given to the existing social realities while enacting laws, implementing them and deciding matters related with them. A two-way process of communication between the public and the lawmakers is indispensable, both for the health of the legal system and for the proper functioning of democracy. The lawmakers need to be adequately aware of the inclinations and feelings of the various sections of society.

KEYWORDS: Social facts, Common man, Presumption of Innocence, Undertrial Prisoners, Ineffectiveness.

Introduction

Law is a rule or system of rules recognized by a country or community as regulating the actions of its members and enforced by the imposition of penalties. It is one of the several social codes. The function of social codes is to sustain the social order by upholding the norms and values of society. Besides law, other social codes are the religious code, customs, institutions and so on. Each kind of social code is backed by its own particular type of sanctions. Violation of any of the codes results in punishment by its particular type of sanction. For example, violation of customs is punished by social disapproval. Similarly violation of laws is expected to lead to penalization or punishment by the state. Hence, law is a formal instrument of social control, the purpose of which is to ensure all that is constitutionally guaranteed. In countries like India, which endeavour to bring about social transformation at a fast pace, law is being employed not only as a means of social control but also as a lever of social change. It is indicative of the progress of society. The distinction between primitive and civilized societies is based upon the absence of legislation in the former. Law is created and shaped by the social philosophies and social values of a given society at a particular time. For example, all early law was characterized by lack of differentiation between legal and religious rules. There was a close connection between law and religion. However, the general tendency of legislation over the years has been its increasing separation from religion. This led to its continuous rationalization and spread of the ideals of individualism, freedom, equality, individual rights, social justice and social welfare. Today, in India crisis of the society give rise to legal enactments. Although the enactments are shaped by social philosophies and social values it does not necessarily mean that there is consensus on those social philosophies and social values from all sections of society. Those values and philosophies could be of a handful of reformers, social activists, legislators, political elites and so on. The enactments, which are constructed on the social doctrines of a chunk of countries population, is then sought to benefit the masses without appreciating their 'Social Facts'. Here, social facts refer to the characteristic ground realities, which surround and influence the life of the masses. For example, poverty or status of women. These realities are external to them and exercise constraint on their behaviour. The legislative organs are distances away from the social facts of the lost and the lowliest, who form the major part of Indian population. Until our legislators identify themselves with the humblest and making, interpretation and application of laws take account of their social facts, law will run the risk of not only being non-functional but also dysfunctional. The prevailing attitudes of different sections of the people need to be assessed objectively and the areas of resistance have to be recognized carefully. Dialogue rather than monologue have to be adopted to resolve the resistance. All this calls for systematic sociological research without which legislations although enacted with pious intentions will tend to remain only on the statute book. In the absence of such a research, in the post independent India, the numerous legal enactments has created a jungle of laws where it is difficult for a common man to find his way. Sociological ignorance tends to make Indian juristic thought formal rather than real, autocratic rather than democratic (Deva 2005).

Historically, Indian law was characterized by a close connection between law and religion. The development of industry, trade, urban centers and western education brought about changes in opinion, which ultimately affected law through the growing body of legislation. India adopted its Republican constitution in 1950. It is the basic law of all laws in this country. No one is above the constitution, away from the constitution or can ever say that he or she or any organization is beyond any provision in the constitution. The basic spirit of the constitution of India can actually be found in the preamble of the constitution. The preamble of the Indian constitution, reads as, "We the people of India---give to ourselves this constitution". We the people of India refer to the common people, the citizens of India, including the women who are an integral part of the country, equal to any man anywhere at anytime. Give to ourselves refer to that this is our constitution, not the governments or anyone else. The Indian constitution is one of the largest written constitutions in the world. It has in it many of the noblest concepts, human mind had conceived of, before it was drafted. The Indian constitution was drafted after the path breaking French Revolution, American Revolution, Russian Revolution and after the unification of the German and Italian nation. Therefore, every progressive, human and noble thoughts of the world have been adopted and built into it. The sole aim of its framers was to make it as rational as possible. The constitution holds many promises and hopes to the citizens. Since the attainment of independence the tendency of legislation has been to extend the legal rights of the individual for example the Hindu women rights to property, 1937 (Prasad 2008). Furthermore, there is increasing rationalization of law in the administration of justice as well as in the legal rules. The rationalization of the legal rules has been brought about by the growth of systematic legislation in order to deal with the social problems of a developing industrial society. Hence, in independent India rationality rather than theology is the norm for dealing with human deviance (Bottomore 1975)

Indian constitution in tune with international efforts provides certain basic principles to govern the criminal justice system. Out of these, two principles, i.e. Presumption of Innocence and Due Process Concept are related to human dignity, life and liberty. The former refers to the principle that an individual is presumed to be innocent till the contrary is proved against him. The later refers that no person shall be deprived of his life and liberty except according to the procedure established by law. Both the principles are enshrined in Article 21 of the Indian constitution (whose scope has been extended by judicial interpretation by the Supreme Court) and in Article 14 (2) and Article 9 of the International Covenant on Civil and Political Rights, 1966 (Joshi 2006). These constitutional rights have been faithfully incorporated in our Criminal Procedure Code, 1973 as mandatory procedure for the executive authorities in order to benefit the accused.

However, much of the legislation seems to remain primarily symbolic

or ritualistic. The effectiveness of law lies not in what it contains as statutory provision but what it does for the common man. It is doubtful whether it has been successful in reaching its objectives. Laws are generally framed without the requisite knowledge of social, cultural and economic constraints, which engulf the life of a common man. Nor have there been adequate scientific investigations to assess the level of success in attaining their objectives and their unintended consequences. The criminal justice system in independent India demonstrates a paradigm shift from presumption of innocence to presumption of guilt. Prison statistics clearly indicate that a large number of unconvicted persons, presumed to be innocent, awaiting trial or judgment are placed behind bars for extensive period of time. Moreover, their number often exceeds that of convicts. It is reported that in the beginning of the year 2010, around 3,58,000 people were lodged in jails against a sanctioned capacity of 2,45,000. Out of the total jail population of 3,58,000 prisoners, only 98,000 were convicted. Whereas 2,60,000 (73 percent) were undertrials. (http://www.oheraldo.in/newpage.php?month=1&day=7&year=2010&catid=14). The plight of an undertrial is that though nothing has been proved against him but he is bound to suffer the hardships of prison life. It causes the loss of most precious human possession viz a viz liberty. If one has not been deprived of liberty one cannot really understand what imprisonment is really like? Prison has been defined by Bharucha as hell where one would not have to die to reach there (Bharucha 2005). Overcrowding, corruption, violence, contact with hardened criminals, inhuman living conditions, abuse of power, disease (psychological and physical), neglect and so on are only few of the salient features of prison. The chances of acquittal definitely become remoter in the case of a person detained while facing trial. An undertrial prisoner is of little value to his lawyer during the preparation of his defence. He cannot look for witnesses or personally contact anyone who might be able to assist in his trial. In many cases an undertrial prisoner cannot earn money to employ a counsel and meet other expenses connected with his defence. This results in delay and such a person has to languish in jail for an unspecific term. Every passing moment strengthens his bitterness and disillusionment towards the system. Imprisonment causes tremendous suffering not only for the prisoners but also for their children and other dependents (Singh 1997).

Michael Foucault mentions that way back in the early 18th century in Europe imprisonment was the dominated form of punishment. There was consensus on the use of imprisonment as a legal penalty. However, prisons were also used for detaining people who were sent there by the arbitrary power of the king through a lettre de cachet. People denounced such detention and considered it to be illegal, arbitrary, indeterminate, abuse of power and incompatible with good justice. Foucault states, "sometimes in the name of the effects of imprisonment, which punishes those who have not yet been convicted, which communicates and generalizes the evil that it ought to prevent, and which runs counter to the principle of the individuality of penalties by punishing a whole family…" (Foucault 1979 : 119). If this was the state of affairs in the early 18th century, the prison statistics of our democratic and socialist country is a realistic measure of our progress and civilization.

Justice V.R. Krishna Iyer was once detained in prison in North Malabar, quiet unjustly and without trial for thirty days. He describes his experience of life in prison as "a painful month in prison taught me more about human rights than literature and lecture by activists and tribunals whose rhetoric lacks the intense anger needed to appreciate the loneliness, privations, shock and shame, indignity, near-nudity, psychic torture, the deeper longing for a glimpse of one's dear and near and the hunger to see the sky and be free from bites of bugs and stings of mosquitoes". Again he writes that he understood Oscar Wilde better than all other judges who have read the verse: 'Something was dead in each of us, and what was dead was Hope'. (Iyer 2001 : vii). It is unfortunate that in India despite the constitutional provision of presumption of innocence, more than sixty percent of the prison population is being held pre-trial i.e. custodially rather than punitively. This is an astonishingly high proportion, far higher than found in most other jurisdictions. The Russian author Feodor Dostoyevsky aptly remarks, "The degree of civilization in a society can be judged by entering its prison". (Shankardass 2000 : 85). Such a situation is one of the many examples of ineffectiveness of law in our country, which is brought about because of its inaccessibility by the masses. Explanations for this state of affair are not far to seek. These explanations demand attention, as they are important in understanding the whole gambit in which law in India operates for the common man. There is gap in the communication between law making and the people. People are not sufficiently aware of the laws and legal procedure. Moreover the legislature is insensitive to the perceptions and sentiments of the common people. The level of knowledge and awareness regarding the basic laws of the country is very low among the common man. Unfortunately, this is not the case only with the illiterate people living in the villages but also with the literate and learned population living in the urban areas. This is because no effort is made to disseminate necessary knowledge about laws and legal procedures. Dissemination of information about a product or an activity is important. It is because of this that business groups spend huge amounts on advertisement and marketing. Through this they aim to make the product reach to the masses. Serious consideration needs to be given to the building and maintenance of an adequate system of communication for disseminating basic knowledge about existing laws and legal procedures. Such knowledge should be included in the courses of study from the school level. If the students are expected to know about the stars and planets, why should they not have basic knowledge of that which touches all? Effort should also be made to disseminate such knowledge through electronic media (Deva 2005).

It is not only sufficient to inform the people about the existing laws but also to inform them regarding the essential portions of the legal enactments that are in the process of making; and to have their feedback so that laws may be shaped in accordance with the requirements of the people. Such a dialogue between the common man and legislators, members of the judiciary and officials who execute laws is important for the effectiveness of the law and for the proper functioning of the democracy. Justice V.R. Krishna Iyer emphasizing on the idea of people participation in the making of law remarked, "whatever touches us all should be decided by all". (Iyer 1993 : 18). Law- making should not be the exclusive prerogative of a small cross-section of elites. If this happens law would be nothing but the convenience of the powerful. It will necessarily affect both the quality of the law enacted and its social communication, diffusion, acceptance and effectivity. It is time that considerable thought may be given to the substantial amount of public participation in the process of law making (Baxi 1982)

The legal procedure in India is one in which the chances of error are admitted to be high. Elaborate machinery has been provided by statute for the correction of error at different levels. Unlike in other forms of activity (for example, medical profession, where wrong is regarded as a matter of regret and in recent times as a matter of compensation), in the Indian legal system wrong is regarded as a matter of course. The existing three-tier system suggests a lack of confidence in the judiciary. It is expensive, time consuming, disadvantageous for both the parties. Even if the suitor turns out victorious, the victory is not worth having after the delay has tried his patience and purse to the limit and has caused all serious damage. It is a paradox that injustice is being done to them in the name of justice. In a poor country one appeal and then a revision, in cases of serious miscarriage of justice, must be sufficient. Criticisms and complaints regarding courts decision are not voiced by the people for the fear of 'contempt'. The useful criticisms and suggestions do not come to the forefront for fear of offending the sensitivity of the court. This makes people feel that they are living under the shadow of judicial regime, which cannot take up any criticism of itself. The learned lawyers of our country must work to change it (Nariman 2006)

Ordinary people respect lawyers and see them as 'more equal' than themselves. They regard lawyers as trained to use the freedoms granted by the country constitution, as persons who know better than ordinary people how to use their freedoms. However, lawyers become dishonourable when they treat their profession as a business and give the impression that they will do anything for payment. They become disreputed when they choose not to appear for clients in the courts, tribunals and authorities before which they claim a right to practice. They demean themselves and their profession when they paralyze the working of the courts where not only public cases but also public causes, hopefully look up to them for their expertise. All this has led to change in the public perception of practicing lawyers and the current view regarding them is that the true measure of a competent advocate is that he can delay cases even longer than his colleagues. The general public opinion about lawyers is that they are crafty and interested mainly in enhancing their personal gain by complicating and prolonging cases. In most cases the scheme of legal aid to the poor have only served to provide poor people as clients to the worthless lawyers who could not

otherwise find any clients. It can well be understood how the cases of the poor are being pleaded by such lawyers (Nariman 2006).

It appears that most people are scared of going to the court. What is worse is that some mischievous and dishonest persons make use of the complicated, expensive, and dilatory nature of the current judicial system to perpetuate injustice on innocent people. It is commonly held that in rural as well as urban areas the judicial system is often used by those who have a strong foothold in the courts for harassing their opponents or anyone else who dares to protest against their misuse of power (Deva 2005). If one has the resources to effect a 'barter', breaking the law is in short-run more worthwhile than following it. Corruption need not always be monetary. Political influence, promised patronage and coercion are all forms of corruption (Baxi 1982). Under an adversarial system like ours, courts insist on the search for proof rather than the search for truth. The Malimath Committee observed that the judge in his effort, to remain neutral never takes any initiative to discover the truth. He does not correct the aberrations in the investigation or in the production of evidence before the court. As the adversarial system does not impose a positive duty on the judge to discover the truth, he plays a passive role. A good trial judge needs to have a 'third ear', that is to hear and comprehend what is not said (Nariman 2006).

For all this, no new law is required. Only acquaintance with the facts of life and man's concern for man would take care of the situation. Law is a means to an end, justice being the goal. The basis of law is life and it is created for the protection of life. However, legal and criminal justice officials are not concerned with the morality of the law, but only with its interpretation and enforcement. Law would be ineffective if it is enforced in ways where man does not matter. A jurisprudence where man matters could be born only when the rule of law and the rule of life run close together (Iyer 1992). It is not sufficient for law to be 'for' the people. The 'legislating factory' needs to make it 'of' the people by acquiring knowledge about them through discourse. The effectiveness of legal regulations never rests solely upon the threat of physical sanctions, but upon a general attitude of respect for law and for a particular legal order. People and law need to go together. For, people without law are not human and law without people is fruitless.

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