INTRODUCTION

The existing profile of Indian legal system is the product of a series of socio-cultural and political interaction that range over a considerable span of time. A philosophical study of the evolution of such a legal system would thus require an in depth analysis of the culture, society and polity which has worked as the background for such an evolution. The study is based on philosophical formulations of various philosophical schools which influenced the evolution of our society and it’s culture. The contribution of Indian as well as western thoughts which paved the basis of our legal system can be used as a background material.

From a broader perspective it may be observed that the Indian legal system is a joint product of the traditional Indian culture, Indian polity and the European modes and all that have influenced India at various stages of its development. This is well evident not only from the fact that the Indian constitution is not an original work (it has borrowed freely from the different available models) but also from the fact that India had a turbulent history which does not help the consolidation of any particular culture. The culture that was much dependent on the old agrarian mode of production and slow growth of industry, handicrafts etc was seriously tampered by the consolidation of British hold over India (by the British preferential tariffs and
fiscal policies). However, the renaissance that followed and which continued during the struggle for independence almost substituted the old model with a new one. This was because of the dominant culture that emerged could not co-exist with the new conditions of the society. Indian polity, which was on the threshold of modernity had not yet freed itself from the anchors of tradition and was still trying to assimilate the democratic perceptions. On the other hand, some of the well-developed modernized European models were perceived as the ideal legal system for a democratic nation. After independence, the international movements had not contributed much towards evolving an Indian legal system. A detailed analysis of some of the aspects of the legal system would easily reveal that the philosophical foregroundings on which these were structured have almost become obsolete and counter productive in a social sense. The dialectical interactions between a population and their legal systems need to be defined within the Indian context.

Every legal system has its own philosophical foundations. This can clearly be seen when the sources of various laws are studied. Customs and conventions, rituals, taboos, legislations and judicial precedents are the main sources of law. Among those given above, rituals and customs, which are the integral part of every culture, stands as the main source of law. Custom is an important stage among the three, in the development of morality. Other two is
the level of instinct and the level of conscience. In the stage of custom man considers to be right those forms of conduct which are approved by the standards or customary modes of behavior of the social group to which he belongs. In this level the bad action is the action that is ‘not done’ and the good action is the action that has been ‘always done’. The importance of this is suggested by the effect that it has had on our ethical terminology. The word ‘mores’ meaning habits or customs and the name ethics itself comes as a secondary. We can distinguish between customs that are actually practiced by the majority of a society and customs that are approved by the majority for we realize that the majority may see the better and follow the worse. At the level of custom, however, this distinction is not consciously made; what is done is what ought to be done, and the ways in which their ancestors actually lived are the ways approved by the living generation.

Moreover, every culture, which leads a society into a particular ritual, has its philosophical background. The dominant ideology of a state also plays a vital role in framing its laws. In a class society, the legal system has a two-fold function. First its has to thwart the attempts for a social reconstruction and secondly it has to contain all such attempts within its premises.

As a country which accommodates various cultural, religious, political and ideological diversities, the philosophical background of Indian legal

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system has always drawn a special attraction from the lawmakers. British rulers made their laws in accordance with the interests of the pressure groups which stood aside with their ruling class. It is a wonder, that a single legal system is governing this country of vast diversity for many years.

Fast changing social circumstances and social values reflect in our culture, politics and administration of justice. Social change influences political and philosophical ideologies and vice versa. The political structure of a society has an important role in law making. After independence a number of social welfare legislations have evolved and it caused a number of substantial changes in our social system and social philosophy. Many discrepancies were corrected by the legislature itself. For example the abolition of privy purse and other special privileges of ex-rulers of princely states (By amendment to constitution) which was believed to be their natural right shows the dominance of a more democratic ideology over a less developed one.

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2 William Lilly p.56.
3 The Kerala Land Reforms Act, 1963 (Act 1 of 1964), which included in the Ninth Schedule to the Constitution.
4 This amendment was made for the purpose of abolition of privy purses which was being paid to former Rulers pursuant to the agreement reached between Union of India and the rulers of the former princely states at the time of merger, consequent on the judgment of the Supreme Court in Madhav Rao Scindia V Union of India (AIR 1973, SC 1461) declaring the executive orders de recognizing Rulers which had the effect of depriving their privy purses and other privileges invalid. (M.Ramajois, p.365)
Human rights protection is the prime consideration of the present day legislation in many of the European countries. However, Indian penal code contains much that is believed to be inconsistent with the developing concept of human dignity and it is much worse in practice. Many of the theories of ethics and morality, which suggests punishment, lost their relevance in the present era. However, the same continues without much change in our codes. The fight between what is established and what newly evolves is seen in many of the tussles between judiciary and legislature and consequent amendments to constitution. The objective of the present study is to point out the specific point of law making in India and arrive at a philosophical conclusion about these social phenomena. As it proceeds the study might have to focus on a specific topic and bring a larger perspective in to it with a view to arrive at conclusions. The study would involve a detailed analysis of Indian society, culture, polity and the philosophical background behind the process of evolution of laws. It will have to focus on the changing profile of the Indian legal systems to arrive at the underlying parameters that support the evolution.

PHILOSOPHY AND THE SOCIAL SCIENCES

Philosophical aspects of man’s social life is an important area of social science. This is due to the recent developments in socio-scientific and socio-philosophic disciplines in the modern academic scenario. All endeavors to
find out the unique methods and functions of social philosophy as distinguished from those of the social sciences like politics, law, sociology etc will enrich both the areas. The functions and methodological distinction between social philosophy and social sciences does not effect the inter-link between these schools. This is because their reference to the main subject is the social man. Here the social surroundings which mould the behavior of man is as important as his natural or biological environment. The becoming of man depends on the life of other human beings around him. What enables a man to identify himself as a human being is in principle identical with what enables him to identify other human beings. Man is man in relation to other human beings.

It is clear that the material to be dealt by social philosophers and social scientists is one and the same. Even in the work of classical philosophers like Plato, Aristotle etc. we can find the synthesis of the scientific and philosophical dimensions of the theories of man as a social being. The human sciences of Psychology, Sociology, Anthropology- afford us with invariable and ever growing material dealing with the behaviour of Individual and collective man and with the basic components of human life and civilisation. This is an immense help in our effort to penetrate the world of man. But all this material and this immense treasure of facts would be of no avail if it were not interpreted, so as to enlighten us on what man is. It is up to the philosopher to undertake this task of interpretation.
We find how the facts of social sciences are important in deriving a distinct concept which is to be done by the philosopher. Here an important point is that social sciences in general make an objective study of the various expressions of the human social life. For example the psychologist focuses his attention on the behaviour of man in his social contexts. The interest of the sociologist is in the objective categories of social phenomenon such as associations, social organisations and institutions. Hence we can say that the studies offered by social sciences are basically concerned with what is ‘given’ about social reality. But the function of Philosophy in this context is different from that of social sciences in as much as it inquires in to ‘what ought to be’. Approach in social science is in general descriptive where as social philosophy essentially follows the prescriptive method. Sociologists, Political scientist etc concentrate on the actual where as social philosophers, though interested in the actual, endeavours to bring out the ideal. As the task of the social philosopher is to find out ‘what ought to be’ this school can be used to find out the new methods in various social subjects. By using the tool formulated by social philosophy the present system of law, politics, culture etc can be analysed. Such an analysis leads to inevitable changes in evaluation the social sciences. The task of social philosophy in suggesting what ought to be is relevant in making progressive changes to social structure whether the structure is one based on written laws or on customs.
ROOTS OF LAW – SOCIOLOGY AND PSYCHOLOGY

Every society develops its own values, habits and institutions. Any violation of these institutional values or laws or principles leads to internal discord within the society. The internal discord or unpleasant feelings arise because of man's strong social impulse, the social conditioning from childhood and the power of suggestion by the group which largely determines the content of individual consciousness. The antipathy of the group against deviation is an emotional out break involved in the conditions of social selection and survival.

Psycho-analysis\(^5\), a modern school of psychology emphasize the significance of the instincts of aggression, destruction or death in the human individual that are ambivalent with the instincts of life, love and restitution. An individual's primal hostility and revenge against the parents in infancy express themselves in aggression against the group or the whole community, which controls, stimulates and aggravate such revenge. Here the individual obtains a profound satisfaction from his obedience to his conscience as well as the legal and moral order that represent the super ego\(^6\) and by which he

\(^{5}\) Developed by Sigmund Freud ;1856-1939, this type of therapy is known for long term treatment, typically several times per week, where the unresolved issues from the individual's childhood are analyzed and resolved. These issues are considered to be primarily unconscious in nature and are kept from consciousness through a complex defense system. (Allpsych online,2006 may 12,<http://allpsych.com/dictionary/p.html>).

\(^{6}\) In Psychoanalytical theory, the part of the personality that represents the conscience- ibid.
recognises himself through the sense of guilt and remorse with the objects of his love.

The prime biological function that law takes is then to internalise social norms and prohibitions and to assimilate them in the self as the super ego. The urge to confession that is universally met with in offenders signifies that the super ego comes to assert itself and that the offender who fears the possibility of loosing his love object hopes to regain it by confession. The offender feels the unconscious urge to confession so as to restore him self to the group against which he has committed his aggression. Thus confession or self-censure is the first step towards the reconciliation of the ego with the norms and standards of society that the law stands for.

W.I. Thomas (William Isaac Thomas (1863-1947), was an American sociologist. He is noted for his pioneering work on the sociology of migration on which he co-operated with Florian Znaniecki, and for his formulation of what became known as the Thomas theorem, a fundamental law of sociology: "If men define situations as real they are real in their consequences", gives a large number of instances of the offenders resort to confession and his confident anticipation of salvation in primitive society. He observes

"the development of confession as pattern of control is associated with the concept that conscience is a symptom of

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7 [Thomas, William I.; Thomas, Dorothy: The Child in America (Alfred Knopf, 1929, 2nd ed., p. 572)]
spiritual displeasure of the violation of taboos and is an anticipation of spiritual punishment. Disasters will further happen to the whole group if the individual offenders are not regulated and this regulation consists of purification. This may be in the form of a physical purgation through an emetic, but usually the verbal confession is a purification and sometimes the confession of an evil practice say destructive magic may be all that the society requires". This point is referred to by Persons in a comparison of 'Zunni and Aztect practices'.

Confession and clearing of conscience are first steps in the restoration of the offenders mental equilibrium. These are associated with the assertion of super ego. Law functions as much by bringing the ego under the surveillance and judgement of the super ego that represents conscience or the social norms as through the threat of an physical punishment. Another point to be noted is that law, in performing its functions, sometimes effect too severe repression of mans libidinal and aggressive tendencies in order to socialise him. This provokes in him the desire to 'get even' rage and destructiveness – crime and social deviation in all its forms that as Freud observes, gives mental relief.

At the same time in the process of the minds maturation and socialisation develops the normal super ego and accepts the punishment of law within his own self with profound delight, derived from the satisfaction of the fundamental unconscious tendencies of love, reparation and restitution that are ambivalent with hatred and aggression. In the community

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9 (In Psychoanalytical theory, the part of the personality which maintains a balance between our impulses (id) and our conscience –superego- Allpsych online,2006 may 12,<http://allpsych.com/dictionary/p.html>
consciousness due to social discussion it is the desire for self censure, a reparation and creation that reconcile the guilty person through the feeling of shame and remorse, with those objects threatened by his dangerous aggression and hatred, and underlies the sentiment of justice for the reparation of any breach of custom and social habit or the violation of the social or moral order. Modern psychology shows that man’s fundamental tendencies are blended with one another in an intimate way and some are in the foreground and others in the background of consciousness. In the manifestations of law and punishment there is the play of the unconscious tendencies of remorse, restitution and self-censure in the libido.\(^{10}\)

As the enactment of various laws depends up on the sociological and psychological aspects of man and his society the study regarding the socio-psychological basis of law is also important. More over such a study will expose more clearly how the system is to be changed according to modern life.

\(^{10}\) Sigmund Freud’s terminology of sexual energy or sexual drive, *Ibid.*