Society and Law

Society and Law:

An Exploration across Disciplines

Edited by

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PREFACE

Human behavior is full of contradictions and contradictory elements. The very fabric of human existence is full of warring elements trying to overwhelm each other. Law is a part of human existence; it is, in fact, the basis of its existence. The importance of legislation, therefore, cannot be over-emphasized. Legislation is vital to bringing about social change. Relations between an individual, society, and the state have always been changing. In this context, various theories have been proffered from time to time. In the beginning, society was governed by customs that only had a social sanction. Then, there emerged the priests, who established themselves as supreme. Subsequently, there arose the secular state, which became very powerful and began to dominate all other institutions. In response to this, thinkers and philosophers began to assert the importance of the individual. As a result, there ensued revolutions and political changes. It became imperative to balance the welfare of society and the individual. The changed political philosophy, new theories of science, the Industrial Revolution, new economic thoughts, and innovative ideas in the other social sciences in the 19th century, also influenced legal thought. French and German thinkers laid the foundation for the ideas of Communism and Socialism, which provided fresh insights into the purpose of law. The end of law is to serve a purpose—not an individual but a social purpose. When the individual purpose comes into conflict with the social purpose, the onus is on the state to protect and further those social purposes, and suppress the individual purposes which clash with them. This end may be served either by regard or by coercion organized in a set form by the state. Law is not only a means to control the social organism but also a way to protect and further all social purposes. Law is only one factor among many others. There are some conditions of social life, such as climate, for which no legal intervention is needed. Social and legal discourses address the purpose of law. Law, then, is a purposeful instrument that promotes benevolent objectives. This is very much in the scheme of things, especially since it is considered that the state itself is born and lives for a noble purpose. Law is a critical instrument for any state, a duty-bound soldier that effectuates the primordial commitment of humans' actions and desires to the cause of good behavior and justice.

The most important aspect of society and law is the output of social change, which arises from different types of group activities—modified interpersonal and inter-class relationships, changed attitudes and approaches of the people and the government toward governance, family, and public life, economic processes, and social outlook. Change is the basic rule of nature; everything changes, except the rule of change. Old orders change, giving way to the new. Preparing society for change through democratic means has logistic implications. Agencies and aspirants of change welcome and try to internalize the change, while the advocates of stagnancy oppose the phenomenon. Since change is a concept linked with society in our discourse, it is essential to understand the framework of society. Society is an organized, interdependent community with functional unity among its diverse members and a tendency toward stability in behavior. Society constantly constructs nature, human resources, and aptitudes for continuous interaction, and all of these make up its basic characteristics. Language, religion, morality, ethnic and regional bases, and economic processes create behavioral constants. Some of the factors apart from law that bring about social change include demography, technology, economy, and culture. Cultural factors, such as basic orientation in religion, morality, and social outlook, influence the direction and extent of social change. Group conscience constructed in the form of literature, art, language, custom, law, and public institution—because of distinct identities projected by it—significantly impacts society's mindset during the process of internalization of social change.

The first chapter in this collection is by **Udai Raj Rai**. This essay attempts to undertake a reality check on the occasion of the 66th anniversary of the Indian Republic. It is limited to an assessment of the strengths of the liberal democratic values of the Constitution and its religious and cultural pluralism. In the context of the disquieting noise that has been heard for quite some time, the chapter refrains from offering any positive and definitive answer. Instead, it leaves the introspection to India's citizenry and countrymen. What is definitive is that Adam Smith believed in both economic and political liberalism—worship of economic liberalism *sans* political liberalism—but this resulted not in democracy but in some other political order, which could possibly weaken social and political unity, and the values which the framers of the Indian Constitution had cherished and longed for.

In his chapter, **Noel Cox** describes how the relationship between law and society is inherently influenced by the nature of the society in which the law operates—it is a product of that society, whether we perceive law from the perspectives of natural law, legal positivism, or realism. It is

important to consider the attitude of the legal system toward the dominant or prevailing cultural environment. In this context, any change in the environmental background, such as changing demographics, may cause tension between law and society.

The chapter by **Sheela Rai** tries to explain the two platforms—education and its commercialization—within a structure. It speaks about the doctrine of "Aa No Bhadrah Kratvo Yantu Vishwatah" ("let noble ideas come from all directions"). This was the ideal of Indian society in earlier times. However, the threat of cultural extinction led to the development of a closed society in India. With the advent of the British, India opened up once more and allowed Western influence to shake her people from deep slumber. The influence of Western education made the Indians aware and proud of their heritage. Education was commercialized during this period in India and the country's education system began to grow fully. Gradually, the higher education system in India became completely commercialized, with the burgeoning of new, private universities in every district across the country. The hegemony of Western influences on India's higher education system necessitated an examination of the commercialization of higher education vis-à-vis the constitutional ideals of equity and justice. Separation of social reality and education—it was felt—would generate uneducated literates, who would despise society and be rebuffed in return. It could also result in dangerous reactions against everything foreign, resulting in some form of fanaticism. Therefore, it was advocated that a continuous social audit of the higher education system in India be undertaken in order to enable society to flourish. Such a system would generate respect for education, the educational institutions, and the educated.

Sandeepa Bhat B sheds light on the values and debates surrounding abortion in the states of India. She attempts to find the right balance required when dealing with the complexities posed by the act. The chapter explains the meaning and the types of abortion existing today to enable a better understanding of the varied concerns in the different cases studied. It also examines the arguments against abortion not only from the perspectives of religion, but also from the viewpoints of various scholars. Further, the chapter deals with various arguments made in favor of the right to abort, before concluding with the author's personal perspective on the issue.

Lovely Das Gupta discusses the current public discourses relating to sexual harassment in the workplace, raising questions in the domain of law and policy. Her chapter focuses on the role of the legal fraternity and its response to the issue. Considering that the legal fraternity is divisible into

groups of practicing lawyers, non-practicing lawyers, and judges, the response is expected to be different, in keeping with the position each group occupies. However, the responses of these groups have been similar to the extent that they have helped maintain the status quo of the aggressor. These responses have only reinforced the power dynamics between the victim and the aggressor. The chapter argues that the issue of workplace sexual harassment will continue to be treated ambiguously by the legal fraternity, unless all groups (legal and non-legal) break their silence and reject all deference to power dynamics and status quo.

Dev Nath Pathak and Md. Mostafa Hosain examine the legal and social truisms surrounding, and the relations between, human behavior and law, all of which are integral to society. The existence of law without the existence of society makes little sense. Law underpins the idea of the social order and, thereby, the platitudes of peace and harmony. Curiously, laws too have social inception. In addition, the idealism that oversees the social formation of laws mandates that the latter should be in consonance with the socio-cultural normative structures. The yardstick by which to assess society's name and fame entails an examination of the law prevalent in that society. In contemporary society, law comprises primarily black-and-white texts or codified customs. This essay attempts to highlight the significance of jurisprudence in the context of law and society. It studies the essence of the socio-cultural configurations of law and attempts to present a framework of the scope of jurisprudence.

Debarati Halder argues about the rights of unwed mothers. Rape victims and prostitutes may get special benefits, for themselves as well as for their "unwanted children" (under special circumstances). However, a series of contradictory "rights" clash head-on when such children are abandoned or surrendered by unwed mothers. These include unwed mothers' right to abandon their children and the children's right to stay with their mothers (who may otherwise be fit guardians), among others.

Subhashree Sanyal and Moumita Laha handle the issue of the "None of the Above" option (NOTA)—a recent addition to the Indian electoral process. It fosters transparency and gives people the opportunity to express their dissent. This is important, as it introduces greater accountability and reduces the adverse dominance of political wings in the country. This chapter analyzes the option of NOTA and the role it can play in the electoral process of any country. The chapter also incorporates the recent implementations of NOTA (after 2013) and its effects on the Union and State Assembly elections in India. It concludes by considering why the impact of its implementation and its significance may be difficult to realize, despite NOTA's pressing importance.

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I know the words at the command are inadequate to express my glowing salutation to my beloved parents and my venerated brother and his family, Vaidehi and Sara for their deep affection, extreme devotion, extraordinary care and unique help throughout my life. I express my emotional sense of feeling and affectionate to my wife for her love, inspiration, sacrifice, encouragement and cooperation. I also want to thank my daughter Hiranya and my son Trinabh. Above all, I thank God almighty for his blessings and for showing me the right path that empowered me to reach this far.

Dr. Ayan Hazra

LIST OF ABBREVIATIONS

CARA	Central Adoption Resource Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CBS	Cradle Baby Scheme
CLS	Critical Legal Studies
CWC	Child Welfare Committees
FDI	Foreign direct investment
ICC	Internal Complaints Committee
IISL	International Institute of Space Law
IPC	Indian Penal Code
ISRO	Indian Space Research Organization
JNU	Jawaharlal Nehru University
LCC	Local Complaints Committee
MSW	Masters in Social Work
NEET	National Eligibility cum Entrance Test
NGO	Non-governmental organization
NLSIU	National Law School of India University
NOTA	None of the Above
NUJS	National University of Juridical Sciences
UGC	University Grants Commission
WHOA	Working for Halting Online Abuse

CHAPTER ONE

VALUE ABSORPTION AND SOCIAL PRACTICES: AN AUDIT OF THE IMPACT OF THE INDIAN CONSTITUTION

UDAI RAJ RAI

(1)

Constitutional historian Granville Austin, in his famous book *The Indian Constitution: Cornerstone of a Nation* (1972, 50), said that the Indian Constitution is essentially a social document. It not only provides a framework for governance but also contains a blueprint for the social transformation of the country. That blueprint is largely to be found in Parts III and IV of the Constitution. As is well known, Part III contains the Fundamental Rights and Part IV the Directive Principles of state policy. To get an essence of the provisions of these two parts, it is enough to have a glimpse of the Preamble, which promises Justice: social, economic, and political; Liberty of thought, expression, belief, faith, and worship; Equality of status and of opportunity; and the intention to promote Fraternity among the people, assuring the dignity of the individual and unity and integrity of the nation.

A short while ago, we celebrated the 66th anniversary of the Indian Republic. Given the Constitution has been in force for the last 65 years in the country, it would be appropriate to take stock of some of the changes that have characterized the country's socio-political system in terms of the prescriptions contained in the Constitution. To cover the whole area would be a tall order and the narrative, post-research, would fill a few volumes. The objective of the present chapter, however, is rather modest. It examines only one theme with the help of some known Supreme Court decisions, that is, the freedom of thought and expression—a prerequisite for democracy—as established by the Constitution. The chapter does not have any empirical inputs except the broad impression formed by reading

newspapers. Since it depends entirely on litigation materials based on media sources, a social scientist can form either of the following conclusions: One may say that these are mere aberrations in an otherwise healthy system or, one may conclude the opposite and call it the tip of an iceberg. One could, therefore, either grab the attention of the media, or muster resources and, with determination, challenge the transgression of the right in a court of law. The author himself is non-committal. The readers, assisted by their own experiences, may draw their own conclusions.

(2)

The constitutional mission addresses the people and the state. The responsibility of the state is naturally higher. A state has to not only honor the constitutional values but also protect the coercive state machinery from those who oppose the new values and practices. A citizen has every reason to expect that political leaders, state officials, and judges would have started their post-1950 journey of navigating the state by fully immersing themselves in the new constitutional values. However, some of the facts which have come to light, create serious doubts in this respect. A few examples in this regard should be enough. It is common knowledge that the national movement led by the Congress consistently opposed the system of separate electorates for minorities and communal quotas for different communities with regard to recruitment to different services and admissions to educational institutions. The Constitution of the Republic of India fully embodies the above philosophy of the national movement.[1] However, despite this, in the initial years of India as a Republic, the Congress Party-led state governments, in some cases, acted against the long-held views of their own party and violated the basic theme of the Constitution. The Uttar Pradesh (U.P.) municipal electorate[2] and the State of Madras used the communal quota circular for recruitment to the services and for admission to educational institutions. When challenged in court, the Supreme Court intervened in defense of the Constitution.[3] Instead of feeling ashamed for violating a principle which they themselves had propounded, the senior leaders of the Congress Party painted it as a conflict between the Rights and the Directives, and accused the Court of according a secondary position to the Directives.

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[1] See Article 325 of the Constitution.

[2] See Nainsukhdas v. State of U.P. AIR 1953 SC 384.

[3] See State of Madras v. Smt. Champakam Dorairajan AIR 1951SC 226; and Venkataraman v. State of Madras AIR 1951 SC 229.

It was not only the executive that took considerable time to live up to the standards it had prescribed in the Constitution it had framed; the judiciary also took a long time to realize the importance of constitutional values—especially those contained in Part III, which discussed fundamental rights. It had been a constant demand, which the British Parliament had declined to accept. From a narrow point of view, it may be said that constitutional provisions containing guaranteed fundamental rights are nothing more than legally enforceable rules. However, if correctly understood, they are much more than that. First, the constitutional language tries to embody certain ideas and concepts, whose width, magnitude, and potential for further growth cannot be compared with any other formal rule of law. Second, these rights embody certain values in the form of reassurances to the people that restrain their rulers from behaving in a manner which is abhorrent to those values and the culture. It would appear that the Indian Supreme Court—in some of the vital areas, such as personal liberty,[4] free expression,[5] and equality[6]—was very slow to grasp the full importance of a charter of basic rights. Perhaps because of the importance of the communal and ethnic problems witnessed during India's pre-independence days, it appeared to have been fully sensitized to the importance of the rights to religious freedom and minorities' rights to administer their educational institutions.[7] It, of course, zealously guarded property rights, which brought it into confrontation with Parliament.[8] However, in the important areas of equality, free expression, personal liberty, and fair trial, it exhibited an attitude which was narrow and formalistic, and tended to accommodate governmental susceptibilities beyond all bounds of reasonableness. Some notable examples are given below.

The Supreme Court decision in the "Kesavan Madhav Menon v. State of Bombay"[9] case illustrates the attitude of the Court as well as that of the political elite toward fundamental rights, especially with regard to the matter of political dissidence in a democracy. The case clearly shows that there was no difference between the colonial government and the post-independence set-up with respect to political dissidence. In this case, Mr. Menon had violated the Press Emergency Powers Act, 1931, by publishing

[4] See A.K. Gopalan v. State of Madras AIR 1950 SC 27.
[5] See Kesavan Madhav Menon v. State of Bombay (1951) SCR 228.
[6] See Chiranjeet Lal Choudhary v. Union of India AIR 1951 SC 41.
[7] In Re The Kerala Education Bill, 1957 AIR 1958 SC 956.
[8] One such case is State of West Bengal v. Bela Banerjee & Ors. AIR 1954 SC 170.
[9] 1951 SCR 228.

a pamphlet without obtaining prior permission from the government as required under the Act. This exposed him to criminal liability. The violation had occurred after India had attained its independence, but before the promulgation of the Constitution. Therefore, he could not seek the protection of the Right to Free Expression guaranteed under Article 19(1)(a) of the Constitution. It was not disputed that the law was repressive. However, the law was meant to curb the freedom of movement and was inconsistent with Article 19(1)(a). Still, the state government of Bombay, in free India, decided to prosecute Menon, and the prosecution continued even after the commencement of the Constitution, which contained Article 19(1)(a). The short question before the Supreme Court was whether this was permissible. The answer of the Court was in the affirmative. In purely formalistic terms, the Court reasoned that fundamental rights did not have a retrospective effect; that Mr. Menon had violated the law on a day when it had not yet become void; that the rights and liabilities that had already accrued under the law would not vanish after the law became void; and that, therefore, his prosecution would continue and his punishment would be constitutionally valid. The only thing that is disquieting here is that the Court did not bother to think that the attainment of independence, the inauguration of the democratic Constitution, and the guarantee of basic human rights, including the Right of Political Dissidence, were meant to herald the dawn of a new era, qualitatively different from the one it replaced. At a time when jurists and scholars such as Radbruch, Fuller, and Hart were arguing about how best to punish people who had acted legally but according to evil laws under the discredited regime of Hitler in Germany (Friedmann 1967), the Indian Supreme Court, by applying an extra-formalistic and extra-positivistic logic, was validating the punishment of an Indian citizen for violating an evil law of a repressive regime after the country had become independent and proclaimed itself a sovereign, democratic republic.

Some further examples may be given to show how some of the judges and political elites sought to devalue the force and importance of these fundamental rights. It would suffice to point out, without entering into a discussion of the cases, that doctrines and theories were propounded, and that these maintained that despite the mandate of Article 13, any law inconsistent with a fundamental right was void. Such laws only became dormant and not totally null (Rai 2011, 723–729) as a result of the Constitution's First Amendment Act, 1951, Article 31 B. These were added to the Constitution along with Schedule IX. The Parliament, by a special majority, could put any law in the Schedule, which exempted that

law from complying with the fundamental rights.[10] In substance, the Amendment confirmed the special majority of the Parliament—a kind of dispensing power. One of the sins of King James II of England was that he claimed dispensing power, because of which he lost his throne and had to flee to France.

(3)

In the preceding section, Kesavan's case relating to the freedom of expression has been mentioned only to point out the lack of sensitivity toward an important constitutional value—a value that is considered the backbone of a democracy when the Constitution claims that the new political system established under it is a democratic republic. Now, it is time to discuss freedom of expression as such. Under Article 19(1)(a) of the Constitution, every citizen has the Right to Freedom of Speech and Expression, and under Article 19(2) this right can be reasonably restricted by law in the interest of India's sovereignty and integrity, security of the state, public order, friendly relations with foreign states and administration of justice, protection of reputation and privacy, decency and morality, and to prevent incitement to an offense. Subject to the possible limitations that may be imposed on these grounds, the right of expression is as wide as the term "expression" itself. This includes both kinds of expressions: those which communicate with an audience, and those which do not have any audience in view and are mere spontaneous expressions of feelings and emotions, such as joy or sorrow. When the discussion is in the context of democracy, it is the first kind of expression that is particularly important. However, the second is not totally irrelevant because the right to speech is an aid to democratic virtues. It guarantees certain liberties to the people in their private and social lives. Moreover, many writers, poets, and artists believe in the theory of art for art's sake and write or paint for their own satisfaction. In addition, when one wants to communicate an idea or message, one is free to adopt any conceivable and available mode that helps the attainment of one's objective. If certain devices are available whereby one's thoughts or messages can be spread among a larger number of people, the freedom to use that device also stands guaranteed. The content of the messages can be political or non-political, serious or non-serious. However, everything must be within the limits of decency and should not create alarm or defame someone, or incite or provoke people to

[10] See article 31 B of the Constitution, which was inserted in 1951.

create disorder. As the famous saying of Justice Holmes goes, "you cannot shout fire in a crowded theater."[11]

In a democracy, the most important role is played by the media, which is owned and run by those who can make substantial financial investments. The media enjoys the right of free expression and since it comprises the purveyors of news and views, it has the ability to mold public opinion. In a democracy, this makes a difference and, often, considerably impacts electoral results. Therefore, there are problems centered on media ethics and access. It is in this regard that two theoretical propositions may be put forth.

First, editorial freedom is the essence of media freedom; and while news is sacred, the media may have its own views. However, the problem is slightly distorted in India. Most of the newspapers are owned by people whose main concern is some other business.[12] Thus, the media–business nexus is reflected in different ways. The editor's freedom is converted into the proprietor's freedom, and in the circumstances very few editors have real security of tenure. The government can easily influence editorial policy by coercing the businessman-proprietor.

Second, of late, it has been observed that some politicians may have struck deals with some newspapers, leading them to publish news that impacts the elections.

In principle, there is always the problem of the concentration of media.[13] It has not been possible to deal with the problem effectively without affecting the freedom of the press. Steps have been taken to prevent monopoly and encourage circulation of multiple and diverse newspapers in every district and area in the country, and the progress thus far has been considerable. The Press Council has been seen to function within certain limitations. The newspaper readership has been rising but the sad part of the story is that, though the readership of vernacular newspapers is high, there are not many standard-vernacular newspapers. Even the English-language newspapers do not quite match up to the current international standards. One positive development is that quite a few newspapers have started to follow a system of employing an internal ombudsman.[14]

Electronic media has spread very fast. There is a need for an independent body, similar to the Broadcasting Authority of India, that would remain free from all governmental influences and ensure proper

[11] Schenk v. US 249 U.S. 47, 52 (1919).
[12] AIR 1962 sc 955, 132–138. See also the Report of the II Press Commission.
[13] AIR 1962 sc 955, 132–138.
[14] One such newspaper is *The Hindu*.

standards of broadcasts and telecasts. The situation is so serious that, at times, it becomes difficult to distinguish between the anchor of a program and its participants.

All said, the country has made reasonable progress in the area of freedom of expression, including in media freedom. The courts' jurisprudence has also kept pace such that they have come to the rescue of aggrieved citizens. However, the dark side must also be noted, attributed as it is, perhaps, to the lack of proper political education and, partly, to the lack of total commitment to the constitutional values. There are people who behave like aliens to the system and create one sensational news story or another. Such people can be found even at the helm of affairs at the local level. It is not necessary to enumerate and name every case and incident. It is enough to say that such cases have been considerable enough to cause concern, though not widespread alarm: a professor at a university in West Bengal was arrested and put in prison for posting a cartoon on the Internet; unauthorized people seemed to have suddenly assumed the role of censors; reputed authors and publishers withdrew books from circulation to buy peace; a Tamil-language novelist vowed never to write fiction again. The list is endless. Film producers, thus far, have been able to display stronger will against blackmail, possibly because they have already invested their fortunes in the production process. Young men and women, however, have to be careful when visiting public parks or other public places, lest they become targets of certain self-appointed moral police squads; reputed centers of reference material have to protect themselves lest they are vandalized because some author used their material to write something which the vandals found objectionable. Freedom of thought and expression, which necessarily includes the freedom to dissent, is a value that can flourish only in an atmosphere of tolerance, not only on the part of the government but also of society at large. Of course, every society takes its own time to imbibe this value. As a matter of fact, it has to be actively nurtured. However, it appears that the job is being performed only by the judiciary. Though Supreme Court decisions are expected to be treated as models, there appears to have developed a situation where the same wrong is repeated in other cases and every aggrieved person is required to re-establish the same thing repeatedly, through a court of law. The strange thing is that every wrong is sought to be justified in the name of our ancient civilization. We are informed by Prof. Amartya Sen that this civilization produced argumentative Indians (Sen 2006). Dissent was relished and differences were sought to be resolved and reconciled by reasoned arguments and not by coercion or threat of coercion. Intolerance, rigidity, violence, and

authoritarianism are the characteristics of the Taliban, who have created havoc in Pakistan and Afghanistan. It would be nothing less than blasphemy to ascribe these characteristics to the glorious culture of ours that flourished in ancient India. It is to be added that the culture has survived, despite all adversities and onslaughts, only because of its flexibility and adaptability. What is important is the essence and not the form or appearance.

(4)

The right to dissent is an important aspect of the freedom of thought and expression. It deserves to be discussed separately with the help of a few important decisions made by the Supreme Court. The first case that I would cite is "S. Rangrajan v P. Jagjiwan Ram.[15] This concerned a Tamil film that opposed caste-based reservations. The movie was cleared by the Censor Board for unrestricted public screening. However, its exhibition was not permitted by the state government. The objection was twofold. First, it contended that the theme of the movie was against the policy in which both the union and the state governments believed. Second, it was contended that there was a general resentment (among the public) about the screening of the film and that if this were allowed it would create serious problems in terms of public disturbances. The Supreme Court rejected both these contentions. After all, constitutional protection was needed only for the expression of unpopular views, and not for what was in agreement with the government's policy or what was favored by the views and tastes of the people. Minorities needed government protection, and it was the government's duty to offer that against all odds.

While Rangrajan is a case where dissent was voiced on an issue of social and political policy, "S. Khushboo v. Kanniammal"[16] was a case of moral dissent. The appellant had been interviewed by a weekly magazine, and her response was interpreted as an advocacy of premarital sex for girls. The matter was politicized and several criminal cases were registered against her in different parts of the country. She felt harassed and sought relief first in the High Court. On not succeeding there, she approached the Supreme Court. A three-judge Bench allowed the appeal. The Court made it clear that even if the allegations were correct, no case could be made. However, the decision was delivered on constitutional grounds. Rangrajan was relied upon in order to assert that there was a right to dissent,

[15] (1982) 2 SCC 574.
[16] (2010) 5 SCC 600.

including dissent on moral issues. B.S. Chauhan, J., who delivered the judgment at the Court, said that unpopular views needed to be countered by advocating the opposite viewpoint and should not be suppressed. The Constitution contemplates vigorous debate and dialog on controversial issues on which opinion is divided. Indeed, it is this debate and dialog which educates people. By entering into a debate, the debaters themselves learn a lot.

Though dissent can be of many varieties—political, moral, and social—political dissent obviously occupies the most prominent place in a democracy. Along the patterns of the British Parliament, we recognize not only the ruling party but also the opposition. In other words, we accept the proposition that the acceptance of the opposition is a normal feature of democracy. But this does not comport easily with Section 124-A of the Indian Penal Code (IPC), which assumes a monarch-like ruler, against whose rule well-intentioned subjects can voice their criticism with a view to suggesting some reform. On the other hand, in a democracy, the opposition is there to take advantage of every slip and flaw in government policy with a view to discrediting it. The opposition, then, is perpetually ready to replace the government. The government often has to concede to the opposition if it wants cooperation in conducting its legislative business. Therefore, the retention of Section 124-A does not credit the political leaders and their commitment to democracy, nor does it credit the Law Ministry and the Law Commission, which constantly talk of and plan for all kinds of reforms.

One of the most unfortunate situations was that of Chief Justice B.P. Sinha, who headed the Supreme Court Constitution Bench that validated the constitutionality of the Section in "Kedarnath Singh v. State of Bihar."[17] I will discuss, in detail, the legal and constitutional infirmities of the decision below. However, in order to understand the total incongruity of Section 124-A in the political system of independent India, one has to note that the provision is deeply embedded in the political history of the country, since a time when India was trying to free itself from the yoke of slavery. The Section maintains that the offense of sedition is committed when making a speech that "brings or attempts to bring into hatred, or excites or attempts to excite disaffection toward the government established by the law in India." Bal Gangadhar Tilak was convicted under Section 124-A for his alleged seditious writings and sentenced to lifetime transportation. I do not have to remind the reader that it was he who said, "freedom is our birth right and we shall have it**."** After attaining that freedom, we have now established a sovereign democratic republic,

[17] AIR 1962 sc 955.

wherein an offense like sedition, defined in Section 124-A, should be anathema. Here, we can take some lessons from the political and constitutional history of the United States. During the term of the Federalist President Adams, the American Congress enacted what is known as the Anti-Sedition Law at the turn of the 18th century. People convicted under the law were pardoned by the next President, Jefferson, who ordered a refund of the fines paid. Ultimately, in "New York Times Co. v. Sullivan,"[18] the American Supreme Court noted that the offense of sedition could not coexist with the guarantee of free expression under the First Amendment of the United States Constitution. The Court, speaking through Brennan, J., also said that in a thriving democracy, criticisms and comments should be biting and sharp, and debate should be vigorous and robust. It is also the law that the government or any other public authority cannot sue for defamation.[19] Individual functionaries can do so, however, but they have to prove that the statement or comment to which they have taken exception was made either in the knowledge that it was false or without taking care to establish whether it was true or false. In "Rajgopal v. State of Tamil Nadu,"[20] this was accepted as part of our laws as well. However, it had to keep company with a strange companion—the offense of sedition as defined in Section 124-A of the IPC.

Section 124-A was inserted into the IPC in the year 1870. It is in Chapter VI and is an offense against the state. As pointed out above, creating a feeling of contempt, hatred, or disaffection toward the government is punishable according to the law. Disaffection is further defined to include disloyalty and a feeling of enmity. The offense has origins in common law and law that existed earlier. Any affront to the Crown and other dignitaries of the state could amount to sedition. However, in England, it has not been difficult for the judge-made law to change its meaning and tenor in a way that befits a democratic age. Our statutory laws and the First Press Commission quite correctly recommended its repeal. Earlier in the "Nihrendu Mazumdar v. King-Emperor"[21] case, the Federal Court of India had tried to interpret the Section so as to imply that the objectionable speech should be intended to cause some disorder, and mere generation of a feeling of disaffection or disloyalty was not enough. But the attempt was thwarted by the Privy Council in its decision

[18] 376 US 254 (1964).
[19] See Derbyshire County Council v. Times Newspapers 1993 (2) W.L.R. 449 (H.L.).
[20] (1994) 6 SCC 632.
[21] (1942) FCR 38.

in the "King-Emperor v. Sadashiv Narayan"[22] case with the observation that a statute had to be interpreted in terms of its language and not with the help of ideas and notions imported from outside. In addition, as far as the literal meaning of the Section was concerned, in order to make someone liable, it was enough that the speech created a feeling of ill will or enmity against the government. That was what was held in the Tilak[23] case by the Bombay High Court, and the Privy Council accepted that interpretation as being correct all along.

The details mentioned above provide the background against which the Constitution Bench of the Supreme Court was called upon to determine whether Section 124-A was in conformity with Article 19(1)(a), read with Clause (2) of the Article. It may again be pointed out here that Article 19(1)(a) guarantees every citizen the Right to Freedom of Speech and Expression, and under Clause (2) imposes reasonable restrictions, among other things in the interest of public order. The Bench referred to the divergent views of the Federal Court and the Privy Council with regard to the meaning of Section 124-A. It also referred to the proposition that out of the two conflicting meanings given to the provision of law, the Court should accept the one which could make it constitutionally valid rather than the opposite. Naturally enough, the Constitution Bench held that Section 124-A was constitutionally valid and carried the meaning given to it by the Federal Court in the "Nihrendu Mazumdar" case. The only connection which the Bench could find between the language of Section 124-A and an overt act of disorder was the speech's tendency to produce that result. This would mean that any criticism or attack—through the use of strong language—on the government's policy could result in prosecution for sedition. Kedarnath himself had been punished for using intemperate language. The Bench had avoided getting into the question by offering the lame excuse that no arguments had been addressed on the merits. All this was in direct conflict with the observations made in the Rajgopal case. The case stated that there should be a vigorous and robust debate on political questions, and comments should be sharp and biting. Indian democracy itself was being practiced in the above manner, wherein the debates were robust and the comments sharp. In other words, the facts of real life have gone much beyond what a formal reading of Kedarnath would suggest. In other words, Section 124-A of the IPC and the decision in Kedarnath Singh's case uphold pure anachronisms and deserve to be consigned to the dustbins of history.

[22] 74 I.A. 89 (1947)
[23] Q.E.V. Bal Gangadhar Tilak (1898) 22 Bom 112.

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This short and, in a way, selective survey suggests that the value and the culture of democracy have taken firm root in India. However, the paradox is that freedom of speech, the main component of a democratic culture, does not appear to be very strongly entrenched outside the circle of professional politicians. Electoral democracy is good, but it is not enough. This is the age of deliberative democracy and every citizen has the right to political participation, not necessarily by entering into electoral politics. By all means, political speech is important, but social and moral freedom is essential; and freedom of social and moral dissent is equally significant. Authors and artists have their own rights to freedom of expression. In all these fields, we are currently far behind expectations. The reasons for this appear to be our social values that have not yet changed. Most of all, it must be admitted that we are too slow to imbibe the habit of tolerance, and that is at the root of everything else.

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CHAPTER TWO

LAW, MORALITY, AND RELIGION IN THE COURTS IN ENGLAND AND WALES IN THE 21ST CENTURY

NOEL COX

Introduction

The relationship between law and society is inherently influenced by the society in which the law operates. It is a product of that society irrespective of whether the law is a natural law, legal positivism, or realist perspective. It is important to consider the attitude of the legal system in the light of the dominant or prevailing cultural environment. In this context, any change in this environmental background, such as changing demographics, can cause tensions between law and society. One example, of the many possible here, is the changing attitude of the courts in England and Wales toward religion.

"The law holds a neutral view toward religious belief," said the President of the Family Division of the High Court of England and Wales, in a keynote address at the first annual conference of the Law Society's Family Law section, in 2014. On the theme "The Sacred and the Secular," the Right Honorable Sir James Munby said that the courts and society as a whole face "enormous challenges" in today's largely secular and religiously pluralistic society. In this context, Lord Justice Munby stressed the secular nature of the judges' jobs.

> We live in a society which on many of the medical, social and religious topics that the courts recently have to grapple with, no longer speaks with one voice. These are topics on which men and women of different faiths or no faith at all hold starkly different views. All of these views are entitled to greatest respect, but it is not for a judge to choose between them.

Although historically, the country has an established Christian church, Munby insisted that judges sit as "secular judges serving a multicultural community of many faiths sworn to do justice to all manner of people."

"We live in this country, in a democratic and pluralistic society, in a secular state, not a theocracy," he said, in which judges have long since "abandoned their pretensions to be the guardians of public morality."

This view of the relationship between law and religion is one which is open to challenges, at least in parts. Indeed, it comes close to conflating the linked yet distinct concepts of the individual freedom of religion, the separation of the church and the state, and the underlying Christian basis of much of the law (Cox 2012b) in the undoubted rise of secularism, in a society which now has only a nominal Christian majority.

This chapter considers the role of religion in law. It commences with a brief comment on the rise of secularism and the absence of an underlining Grundnorm.

The Rise of Secularism

One of the aspects of 21st-century culture which is most remarkable is the intellectual dominance of secularism (Cox 2012a). Society is undergoing—in the West, at least—a rapid and seemingly irreversible secularization. This evolution has not been without its effects on the constitution of states, despite the oft-quoted principle of the separation of the church and the state (Smith 2008). A state is not without some elements of an ethos, or an underlying philosophical or moral identity (Cox 2012b). However, a widespread disillusionment with the liberal democratic models of government, with capitalism and with materialism (Taylor-Gooby 1991), has left the state in many societies unable to provide a degree of conceptual unity of focus, which it might be expected to do. This has been worsened by declining homogeneity and increased political, social, cultural, and economic polarization and marginalization. Increased diversity in a pluralist society is said to bring strength (Bohman 2006), but it may not be able to do so if this means there is little or no common identity with the state. Only when diversity becomes the underlying principle of the state, as arguably it has been in several countries, including the United Kingdom and the United States of America, can it strengthen. However, there is already something that provides legal and societal cohesion—the law. In addition, the law in our Western, democratic, and liberal society has undoubted and marked Christian influences and