Shifts in the Jurisprudential School of Thoughts in Indian Legal System: A Conscious or Sub-Conscious Transformation

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I. Introduction

The importance of positive moral norms in law has always been a subject of debate. Positivism is that theory which defines law to the exclusion of morality. Positivism asserts that a law to be valid needs to emanate from an authority who is competent to enact the same. Thus absence of morality in law does not effect the validity of the same. The school of positivism was born out of the necessity of having identifiable and authoritative source of law in the face of increasing secular activities on one hand and the declining relevance of natural law and morality.

This school was widely followed both in independent India and other countries during the early period of 20th century in order to assert the unlimited power of the sovereign. However, this school was rejected time and again both in India and outside India to uphold the principles of natural justice. Legal positivism was criticized by the International tribunal in Nuremberg trial.

Legal positivism was also used in India in several instances to prove the legality and validity of Sovereign's order which sometimes used to be arbitrary. However, in Maneka Gandhi's case for the first time the Indian judiciary took into consideration the function along with the purpose of the law besides the source of law. Thus it has been observed that any law ultra vires of natural justice is not a law at all no matter it emanates from the highest authority.

Thus the case of *Maneka Gandhi* vs. *Union of India*[1] turns out to be the watershed year when India while retaining the positivistic structure adopted a conscious paradigm shift towards socialistic pattern of the society with respect to the functionality of law. The other watershed year happens to be 1991 when India opened the priority areas of essential infrastructure of goods & services, technology & exportation of mineral oil, resources & postal services to private sector investment thereby limiting the public sector units. This is a turning point when India again witnessed a paradigm shift towards capitalism. All these shifts have occurred almost silently & invisibly through case laws which did not require any amendments of the Constitution. Thus India has undergone several paradigm shifts in the area of jurisprudential idealism.

Keeping pace with the ever changing society law too must keep evolving, and as such ideologies too shift keeping pace with the demand of time. In this change the role played by lawyers and judiciary is undoubtedly significant. Being of general

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[1]AIR 1978 SC 597

application law per se does not have any value till it is argued by the lawyers and interpreted by the judiciary with regard to a concrete problem. Indian legal regime has undergone transformation since the day of its independence. The way of interpretation of various laws and of the Indian Constitution by the Judiciary has far reaching legal and social consequences. The role of a lawyer in a case is important as he/she assists the court of law to understand the law and to reach a decision. It is the lawyer who argues and brings out the flaws in a law if any. The contentions of a lawyer in a court always hold importance as it is one of the tools through which the court of law reaches its decision.

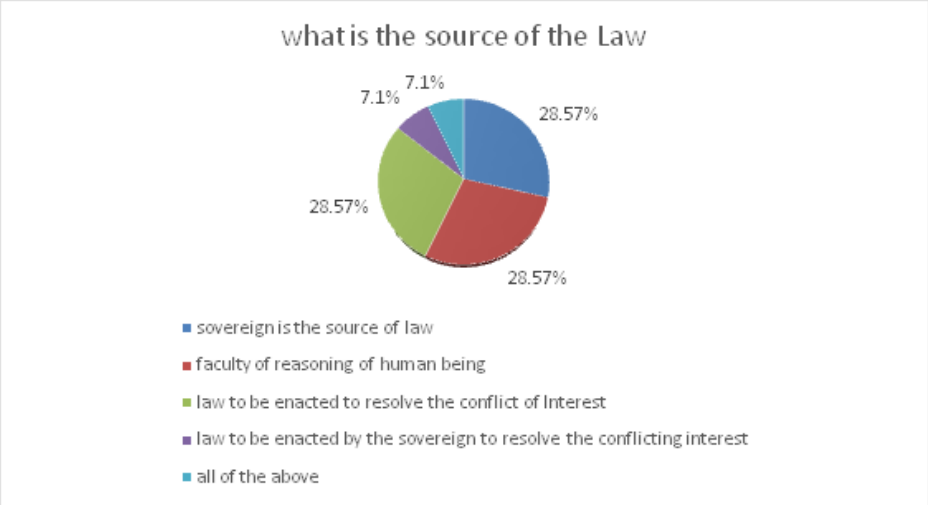
However, all these reformation and interpretations of law that brings about social change and legal transformation, shift in political & legal idealism is not done in a concerted, coordinated & planned manner. There is an element of unconscious universality to the process making it a transcendental, metaphysical abstract experience. The legal fraternity remains blissfully unaware of the profound consequences of its activities.

Therefore, the objective of the survey is to understand the reaction of lawyers on shift from one jurisprudential ideologies to another. The survey is also done to understand how lawyers are coping up with this evolution.

The researcher faces a finite universe of extremely large size. The number of lawyers in the High Court of Calcutta is roughly around 8000. In a span of a week and for a pilot survey a snowballing method of survey was undertaken. The technique of survey was through open ended questionnaire and interviews. The responses received during the survey were recorded in writing. Samples in this report have been collected from High Court of Calcutta. The survey was done by way of interviewing practicing lawyers of High Court of Calcutta.14 senior advocates of the High Court of Calcutta were interviewed for the purpose of the present pilot field work.The survey at the High Court of Calcutta was conducted between 5th January to 9th January, 2018. 14 advocates were met and they were asked the questions. The report shows the opinion of practicing lawyers. This report does not reflect the opinion of researcher. The Report of that survey is presented hereinafter.

II. Data Analysis: Responses of Practising Lawyers of High Court of Calcutta

An empirical study has been carried out in order to assess whether the transformation in the legal system is a conscious or sub-conscious choice of legal fraternity. This part of the paper consists of analysis of those datas collected during the empirical study.

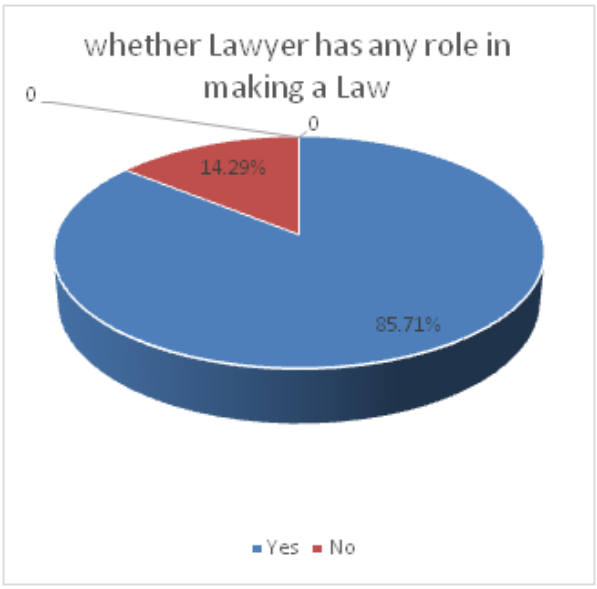


The abovementioned Pie-chart shows that 4 out of 14 lawyers (28.57%) think that the source of law is the sovereign. Another 4 out 14 (28.57%) lawyers think that the source of law is the faculty of reason of human being. Again another 4 (28.57%) lawyers think that the law has been enacted to resolve the conflict of interest in the society. However, one lawyer (7.1%) thinks that law is the outcome of the use of faculty of reasoning by human being and is also an outcome of the process of resolving conflicting interest in the society. Another one lawyer (7.1%) thinks that the source of law can be various and therefore includes all the schools of jurisprudence. Following is the reason justifying her response-

'Law is nourishment of society through formulation of provisions to regulate the society and avoid anarchy. It consists of every reasoning and hence includes Natural law school, positivism, revival of natural law school, sociological school, realist school of jurisprudence.'

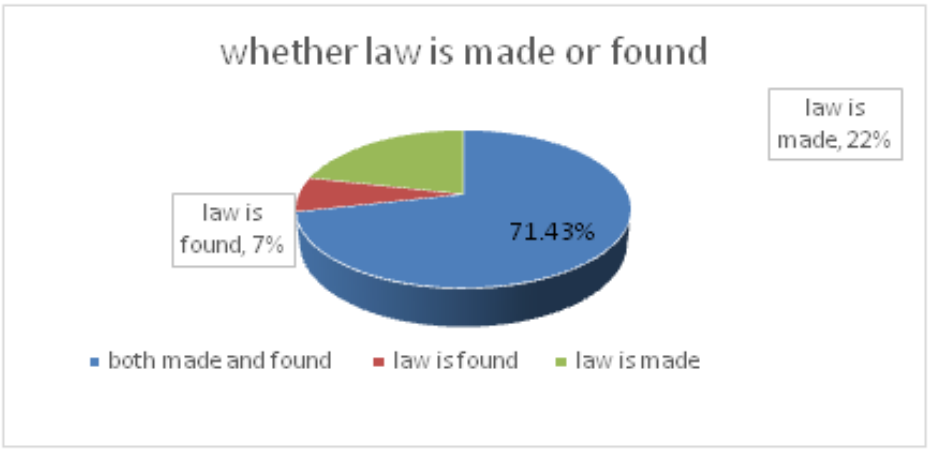
The responses given for the question regarding the source of law have prompted the researcher to assume that there is no clarity about the source of law amongst the legal fraternity.

The abovementioned Chart shows that 13 out of 14 (92.85%) lawyers think that judges do play an important role in law making. However, one lawyer (7.15%) thinks opposite.



The abovementioned chart shows that 12 out of 14 (85.71%) lawyers think that lawyers play important role in law making. However, 2 (14.29%) lawyers think that in law making there is no role of a practicing lawyer.

Thus, according to the legal fraternity, besides sovereign judges and lawyers have significant role to play in shaping the law.

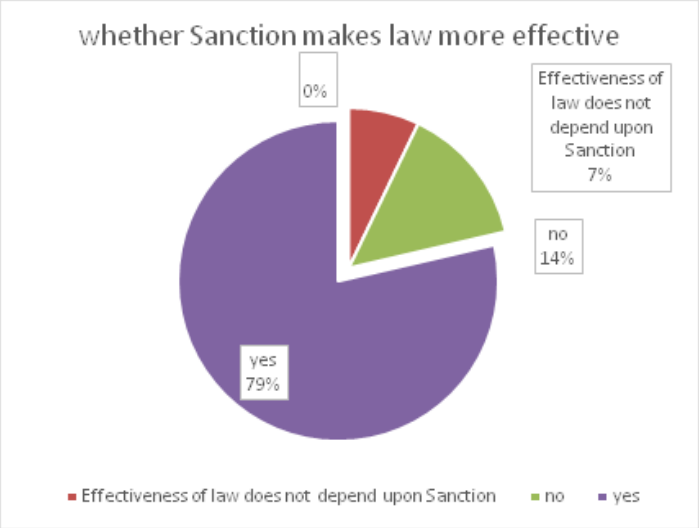


The abovementioned chart shows that 10 lawyers out of 14 (71.43%) think that law is both made and found. However only 1 (7.14%) lawyer during the survey was found to think that law is found which indicates the historical school of jurisprudence. 3 lawyers out of 14 (21.43%) think that law is made by the sovereign and there is no question of finding the same.

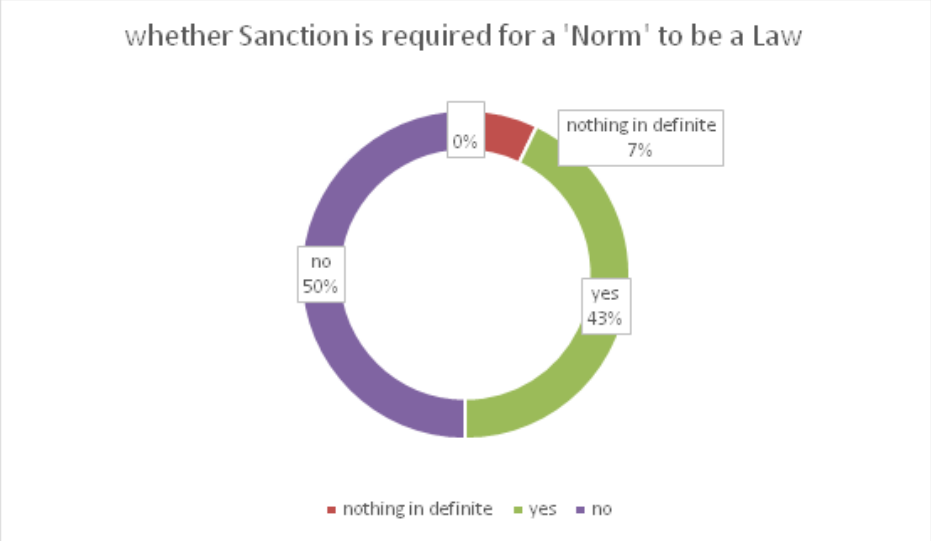
The following Index shows responses of the question as to **whether a law should comprise of a positive moral norms.**

Serial number	respondent	Law should comprise of positive moral norms	Law should not comprise of positive moral norms
1	1	✓	
2	2	✓	
3	3	✓	
4	4	✓	
5	5	✓	
6	6	✓	
7	7	✓	
8	8	✓	
9	9	✓	
10	10	✓	
11	11	✓	
12	12	✓	
13	13	✓	
14	14	✓	

This Index shows that all the 14 (100%) lawyers think that law can not exist to the exclusion of positive moral norms.

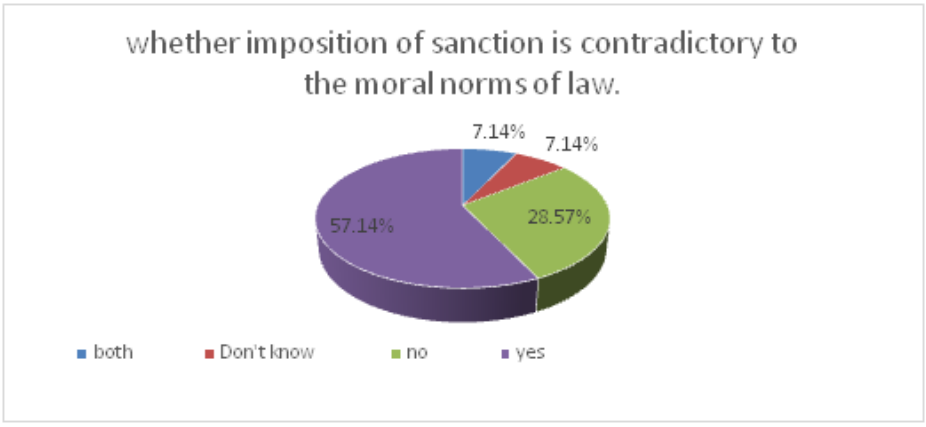


The abovementioned chart shows that only 2 out of 14 (14.23%) lawyers think that sanction does not make a law more effective. However, 11 out of 14 (78.57%) lawyers think that a law in order to be effective must be backed by sanction. One sample out of 14 (7.14&) shows that the effectiveness of a law is not depending on the sanction.



This chart shows that 7 out of 14 (50%) lawyers think that a norm does not need to have sanction in order to be a law. Rest 6 (42.86%) lawyers think that sanction is needed for a norm to be the law. One sample (7.14%) is such where the opinion of the lawyer is 'a statutory provision always have a legal sanction. However, the provision can always be challenged.'

5 samples in the abovementioned chart hold the view that norm in order to be the law does not need to be attached to sanction have reflected the view in Index number 6 that sanction makes law more effective.



The aforementioned chart shows that 8 lawyers out of 14 (57.14%) reflect the view that imposition of sanction is not contradictory to moral norms of law. However, 4 (28.57%) lawyers reflect that imposition of sanction is contradictory. One (7.14%) lawyer has remained silent on this issue. One sample (7.14%) is showing that response could be both because 'there is no straight jacket formula to distinctly answer this question. It is more circumstantial and varies from case to case.'

These two charts show response of the question **whether the freedom guaranteed by the State should be limited or not.** This table also reflects that **whether the grounds of limitations on the right to freedom are arbitrary or not.**

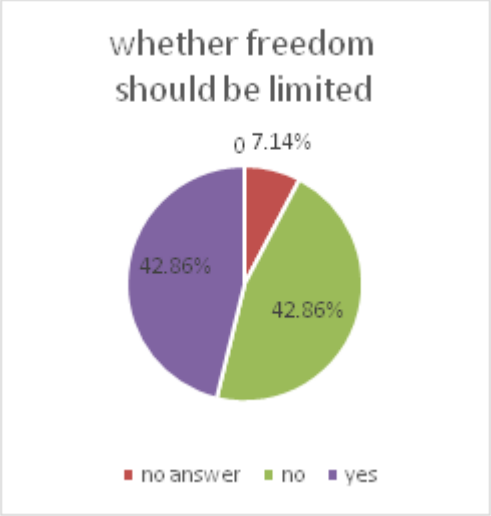


Chart no 1

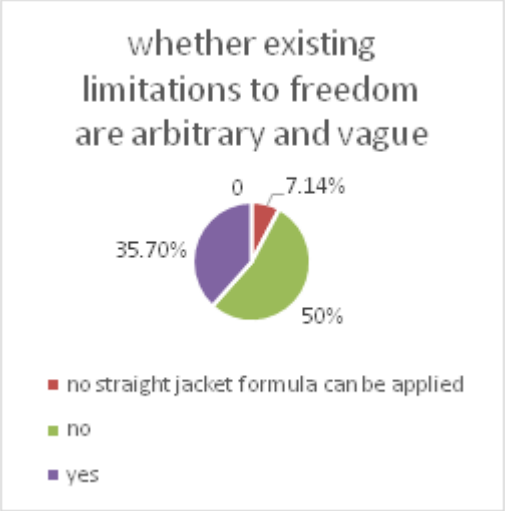


Chart no 2

The aforementioned chart no 1 shows that 6 (42.86%) lawyers think that right to freedom should not be limited. While other 6 (42.86%) lawyers hold the view that the right to freedom should be limited. However 2 (18.29%) lawyers have been found to hold slightly different views. Following are the views-

i. Unfettered freedom is not welcomed.

ii. Freedom should be given to such an extent that it should not detriment the interest of other individual in the society. At the mean time it should not be curtailed that it may deprive the citizen from exercising their basic fundamental rights.

The chart no 2 shows that 7 (50%) lawyers out of 14 are of the view that grounds of the limitations on the right to freedom are not vague. However 5 (35.71%) lawyers hold the view that the grounds of limitations are arbitrary.

One (7.14%) response has shown that the lawyer holds the view that there should be limitations. However, there is no response as to whether the grounds are arbitrary or not. Three responses are such where it show that right to freedom should be limited and the grounds of limitations are not arbitrary. Five responses show that there should be limitations. However they think that the grounds of limitations are arbitrary and need to be specific. Four responses show that there should not be limitations on the right to freedom, but they think that at present restrictions on the right to freedom are not arbitrary. One (7.14%) response shows that any straight jacket formula can not be applied while deciding whether the restrictions on the right to freedom are arbitrary or not.

The following Index will reflect the response of the question **whether the judiciary has become more progressive and sensitive while handling issues involved Right to Freedom.**

Sl. no.	respondent	Judiciary has become progressive while handling issues related to Right to freedom	Judiciary is not progressive and sensitive while handling issues related to Right to freedom	Both/ no answer
1	1	✓		
2	2		✓	
3	3	✓		
4	4	✓		
5	5	✓		
6	6	✓		
7	7			✓
8	8	✓		
9	9	✓		
10	10	✓		
11	11	✓		
12	12	✓		
13	13	✓		
14	14	✓		

This aforementioned Index shows that 12 (85.71%) out of 14 lawyers reflects that judiciary has become progressive while dealing with issues related to right to freedom. However, one (7.14%) sample shows the opposite. Another lawyer in one (7.14%) sample has preferred this issue to be debatable.

The next Index shows the response of question **whether lawyers are aware of the shift from positivism to sociological ideologies.**

Sl. no.	respondent	Aware of the shift	Not aware of the shift
1	1	✓	
2	2	✓	
3	3	✓	
4	4	✓	
5	5	✓	
6	6	✓	
7	7	✓	
8	8		✓
9	9	✓	
10	10	✓	
11	11	✓	
12	12	✓	
13	13	✓	
14	14	✓	

This abovementioned Index reflects that 13 (92.85%) lawyers amongst 14 interviewed lawyers know about the shift from one jurisprudential ideology to another. However, the responses show that some of them are not aware of any specific case that marks such shift.

The researcher has recorded in one of the responses that according to one lawyers the jurisprudential ideology followed by the judiciary at present is Historical school of law. One of the interviewed lawyers have pointed out that Justice P. N. Bhagwati has been the pioneer in introducing the concept of Public Interest Litigation in India. Another lawyer has also mentioned about Justice V. R. Krishna Iyer who has triggered the liberal interpretation of the constitutional provisions.

III. Conclusion

This pilot survey was done to understand the following things-

1. How much lawyers are conscious of the paradigm shift in the schools of jurisprudence. &

2. How consciously the Judiciary and lawyers are part of such shift.

It was found that all the respondents were of the view that a positive law must not devoid of morality. In this context Fuller has said that-

"*The analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply acting on the citizen - morally or immorally, justly or unjustly, as the case may be*."[2]

However, Hart has accepted the importance of morality in the existence of law by acknowledging the existence of primary rules which is nothing but morality. He has put a stress on the legal validity of these moral values. Therefore, these moral values are not binding unless these are posited. According to Hart moral values get binding when they receive the recognition of any legal system and come out to be as legislation after being legislated through required legal formalities.

This empirical study has disclosed that different schools of jurisprudence are followed by the Indian judiciary while delivering judgment. However, the practicing lawyers are not conscious of as to which school of thought is being followed in particular at present. Nonetheless, the survey reflects that lawyers and Indian judiciary both have very important role to play in shift from one school of thought to another in Indian legal system.

[2] Edwin W. Tucker, The Morality of Law, by Lon L. Fuller, 210-219, Vol- 40, Issue- 2, *Indian Law journal* (1965)