

“Can Functionalism exist post Modernity? An Analysis of Laws from a Functionalist Perspective”

**Preet Kanwar Dhaliwal
Army Institute of Law
Mohali*

***Kashish Chopra
Army Institute of Law
Mohali*

INTRODUCTION

The various definitions of Sociology provided throughout history anatomise what we know of our immediate surroundings in an empirically entrenched fashion. The institutions of society or social mechanisms exemplify the pieces of a puzzle that work in tandem to complete the picture, here, society (Functionalist approach). Looking at a cross-section of our social world, thinkers have theorised sumptuously how we perceive society. The views expressed are criticised abound, but the apposition also sticks around. In this work, we shall attempt to deconstruct the classical theoretical supposition of various thinkers in context of the legal code that we are under. Namely this classical theory is, Structural Functionalism or Functionalism, the classification of theories by Randall Collins comes in handy¹.

This theory will be juxtaposed and read abreast with the Indian Penal Code primarily and few other statutes to prevent any grey areas of knowledge. The Sociological Theory professes to chart out the inherent complexities of society and its programmes or mechanisms which help forge an idea of moral from the immoral. This is what goes into legal theory and later crystallises into canon or codified law. Law is well known by all factions of society, at least in an amorphous manner. However, law is never understood in the vision of its creator and Indians especially, tend to look at anything legal with one eye. This myopic clarity hinders the growth of society as a whole and also structurally undermines the purpose of law. A microscopic study of society in a scientific manner can take the place of a barometer in assessing the role of codified law. For example, the crime of grievous hurt² given under Indian Penal Code provides a list of behaviours considered criminal and thus amounting to an offence, however, the nuances of epistemology at work in declaring it offensive do not consider the social ramifications of the offence and also the social bearing of the parties to the offence. This work endeavours to simplify this situation. We shall look into what goes into an offence/crime at the behest of the perpetrator and the resultant outcome of such an offence on society through the eyes of theory.

STRUCTURAL FUNCTIONALISM

The theory of Structural Functionalism has aged like wine throughout antiquity if not the genesis of mankind, up until waning into Modernity (Capitalist society emerged after the two

¹ Collins, Randall, ed. 1994. *Four Sociological Traditions: Selected Readings*. 1994. New York: Oxford University Press – via Internet Archive. ISBN 9780195087024. OCLC 782169682.

² Section 320 of the Indian Penal Code 1860; Act no 45 of 1860

great revolutions). Classical thinkers of the likes of Herbert Spencer, Max Weber and Emile Durkhiem laid the foundation which metamorphosed into a whole another dimension through, incontestably, the works of more contemporaneous thinkers. The father of Positivism, Auguste Comte transpired the term ‘Sociology’ and also highlighted the need for a unified society in the light of diminishing traditions³.

What is understood by Structural Functionalism can be deduced by drawing a parallel with a country like India. Basically, the theory provides that society is a complex system or a “bigger plan” which works in the end only through the functions of its constituents and only projects a macro-level examination. The proponents of this theory epitomise the working of a body with the symbiotic harmony of all the organs, to demonstrate their stance. Now interjecting this line of thought with a country like India in all its complexities can be a little tedious. Thus, scientific analogy comes into the picture.

First, India must be understood as a country in the most physical sense. A country in South-East Asia, earlier a colony of the British, part of the Commonwealth and the second most populous country in the world. It is completely natural that British influence would be heavy, in fact so heavy that a substantive law like the Indian Penal Code was drafted by an Englishman. The surrounding third-world makes for emergence of a copious number of regional cooperation entities, but which are stuck in their own woes.

Second, Religion. Not quoting Marx here would be tantamount to injustice to the entire process, so as is said “Religion is the Opium of the masses”⁴. Even Marx was tapping into his functionalist mindset to set forth this thought of religion and society. However, Religion must not always be looked at as a necessary evil as it does push the masses to act in the ways of God or the most high in abstaining from the wrong, in turn fulfilling the object of our theory here.

Lastly, Law must take the reins. The above two objectivities can impact the structure of the country in a profoundly insidious manner if law was to be forsaken. Law initiates everyday life and keeps the cycle running. Also, the whiffs of structural functionalism are nowhere stronger as they are around law. It collectivises individual effort/function and makes a legal code to ensure that life goes on with stability and candour. Law also houses a Sociological approach towards itself but that is a matter for another occasion as it overlaps our establishment of the theory of functionalism and employs law and justice as fundamental institutions of the basic structure of society⁵, but it mustn’t be completely dismissed either.

³ Macionis, John (1944-2011). *Sociology*. Gerber, Linda Marie (7th ed.). Toronto, Canada: Pearson Prentice Hall. ISBN 9780137001613. OCLC 652430995

⁴ Marx, K. 1976. Introduction to *A Contribution to the Critique of Hegel’s Philosophy of Right*. *Collected Works*, v. 3. New York.

⁵ Scuro 2010: 64

The Sociological concepts laid above provide a hale and hearty connotation of what the work ventures to establish, so we move onto the legal aspect of things. The following offences shall be examined in context of the theory of Structural Functionalism:

SEDITION

J. Fitzgerald in the case of *Reg v. Alexander Martin*⁶ observed that Sedition is a crime against society whether by word or writing and which disturbs the tranquillity of the State. The law relating to the offence of sedition was first introduced in colonial India through Clause 113 of the Draft Indian Penal Code proposed by Thomas Babington Macaulay in 1837⁷. Looking back at the British Raj in India, the offence of sedition was promulgated to silence the voice of dissent and heterodoxy. If the British viewpoint were to prevail, sedition was something in contempt of the functions of the individuals or actors⁸. The Indians were conforming to the subjugation at the hands of the British and when they revolted, that meant change in the social order thus inviting punishment. A conflict arises here in the interpretation of the idea of functionalism in relation to the pre-independence India. Staying true to theory, Functionalism calls for stability and harmony among the members of the society to function properly, also one of its criticisms, it foregoes to attribute social change as a necessity for the society to transform and grow if not develop. On paper, it would augur subjugation of India as a 'safe-structure' and not eccentric, thus justifying colonialism and its evils.

Transitioning into present, this colonial law is still pumping blood under the ages of Indian Penal Code⁹. It is a cognisable, non-bailable and non-compoundable offence that can be tried by a Court of Sessions¹⁰. Punishment can go upto seven years if found guilty¹¹. The decision of the Supreme Court in *Kedar Nath v. Union of India*¹² upheld the constitutionality of the offence as it had come under fire for being in violation of Art 19, and laid the interpretation of the law of sedition as it is understood today¹³.

In popular opinion among the more inspired individuals, the law of sedition is viewed as an effective channel to silence dissent, particularly by labelling as 'anti-national' or 'urban naxal'. It can be opined that the functionalist view of the offence would warrant upholding it, but a holistic sociological approach accounting for criticism and shortcomings would suggest amends in no small way. The conflict with Art 19 of the Constitution still needs to be better

⁶ (1868) 11 CCLC 44

⁷ Arvind Ganachari, *Evolution of the Law of "Sedition" in the Context of the Indian Freedom Struggle in Nationalism and Social Reform in a Colonial Situation* 54 (2005).

⁸ Talcott Parsons, *The Structure of Social Action*. The Free Press, 1968 (1937).

⁹ The Indian Penal Code, 1860, Sec 124A.

¹⁰ The Code of Criminal Procedure, 1973, Schedule 1

¹¹ The Indian Penal Code, 1898, Sec 124-A

¹² AIR 1962 SC 955

¹³ Nivedita Saksena and Siddhartha Srivastava. *An Analysis of the Modern Offence of Sedition*. 7 NUJS Law Review 121 (2014)

expounded and brought to light as the decision¹⁴ of the Supreme Court orbited a very specific dimension of the law, and also, the definition must be revamped to accommodate present-day exigencies.

LAWS RELATING TO WOMEN'S SAFETY

The inability of this theory of functionalism has been well highlighted in the previous section covering the offence of Sedition. In the present section, we shall look into the changes brought into law for the safety of women and how functionalism suits our case. The 2012 Delhi gang rape case is still remembered for the brutal savagery inflicted upon a young woman and is also considered as one of the most heinous crimes committed against a woman. The gravity of the offence was of such a degree that the Indian Government had to rethink its rape laws. The Criminal Law (Amendment) Act, 2013¹⁵ was passed by the parliament and came into force on 3rd April 2013. Originally promulgated as an ordinance by the President¹⁶, it amended the very definition of statutory rape and also added a slew of new offences against women, in a way salvaging years of development in rape laws like in the Mathura rape case¹⁷ and the resultant Criminal Law (Second Amendment) Act, 1983¹⁸. The seminal change brought to the fore by this Act was the amendment in the Definition of rape¹⁹, it was tweaked to include the following:

- a. It was extended to include acts in addition to vaginal penetration
- b. It was worded with acts like penetration of penis into the vagina, urethra, anus or mouth, or any object or any part of the body to any extent, into the vagina, urethra or anus of another woman or making another person to do so.
- c. The lack of physical resistance was made immaterial for constituting an offence.
- d. Punishment was also be not less than seven years which may extend to imprisonment for life.

Now the functionalism aspect of the society provides for a stable social order where the social structures execute their functions. However, the theories of crime posit that crime is inevitable in human society and thus functionalism cannot completely comprehend society. It works around this fiasco of idealism where everybody knows what is expected of them and work exactly in that direction, but that is far from reality. Sometimes, such aberrations become so compelling that we are mandated to overhaul our entire structure which is what happened in the aftermath of the Delhi gang rape case. The Amendment²⁰ in the Indian Penal Code was brought in the backdrop of such a radical shift from expected behaviour and to prevent such further occurrences.

¹⁴ See 12

¹⁵ Act No. 13 of 2013.

¹⁶ "Prez Pranab Mukherjee promulgates ordinance on crime against women". Indian Express. 3 February 2013. Retrieved 4 February 2013.

¹⁷ Tuka Ram and Anr v. State of Maharashtra, AIR 1979 SC 185 (Mathura Case).

¹⁸ Criminal Law (Amendment) Act, 1983. Act No. X of 1983

¹⁹ The Indian Penal Code, Section 375.

²⁰ See 15

The demeanour of law in respect of the perpetrators of sexual offences earlier was airy and the prosecution had to build up its case but the Amendment in the Evidence Act²¹ rectified the situation, this was the outcome of the emergence of the various feminist movements world over and a spirited upliftment of women and their rights. So, it is clear that social change must be portended with the changing social dynamic, the functionalist aspect must not be observed in a congregational manner but rather in a malleable semblance. It can be said that functionalism has to make way for large scale change in society and in a way it can be compared with the servicing of a mechanical instrument which must be lubricated to function properly. So, it can be said that re-defining behaviours (functions) through law with respect to protection of women is actually a manifestation of the theory living amongst ourselves.

The current lockdown imposed due to the onset of the coronavirus pandemic has brought forward the elevation in the number of domestic violence cases reported. During the first four phases of the COVID-19 related lockdown, Indian women filed more domestic violence complaints than recorded in a similar period in the last 10 years (March to May)²². Despite the safeguards afforded to women under the Indian Penal Code²³ and the Protection of Women from Domestic Violence Act²⁴, this nefarious social evil is a truism and still daunts India in all its glory, never mind the reputation for being one of the most dangerous countries in the world for women²⁵. Laws in place are comprehensive but it is impossible to draft a magnum opus which is replete with accommodation for future contingencies and thus certain changes, administratively, must be brought to check the soaring numbers. Functionalist view of the situation calls for a wider awakening of the society in terms of their functions, so that laws would not require such amendment.

CONCLUSION

“Man is a moral being, only because he lives in society. Let all social life disappear and morality will disappear with it”, Emile Durkhiem said once. Moral is what society demands as a function so that the structures do not collapse on themselves. Functionalism can be chastised for having a macro level understanding of the social processes but being a classical theory it was the dominant influence on the prospective works. Ideal society is far from substance but functions can at least make it ostensible from a far. And in India even today, functionalism can be said to be thriving even though social change can be attributed to as early as 19th century. The development of modern complex theories did abate functionalist tendencies but the idea of a grand structure can never ebb, so it would be prejudicial and inimical to say that the theory has heeded to its days gone.

²¹ See 18

²² Data. Domestic violence complaints at a 10 year high during COVID-19 lockdown. The Hindu, 22 June 2020, available at <https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19-lockdown/article31885001.ece>

²³ Sec 498A of the Indian Penal Code

²⁴ Act No. 43 of 2005

²⁵ Foundation, Thomson Reuters. “The world’s five most dangerous countries for women 2018” available at poll2018.trust.org