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PRACTITIONERS OF HINDU LAW: ANCIENT AND MODERN

*K.L. Seshagiri Rao**

Practice Dharma, not adharma
speak the truth, not untruth,
Look far ahead, not near
Look at what is the highest, not what is not highest.
Vasiṣṭa Dharma Sūtras, X 30

INTRODUCTION

THE practice of law is the pursuit of truth and justice in interpersonal relationships. Practitioners of law have a great responsibility to make sure that the laws are just and that they are administered fairly. In what follows, this theme is briefly addressed from the ancient Hindu perspective, and then it is compared with the modern situation in India. By looking to how ancient Hindu religious concepts helped form a dynamic and effective legal system, perhaps we will conclude that the inclusion of religious ideas can inform and improve the legal systems of today.

I. TRADITIONAL HINDU SOCIETY

A fundamental feature of the Hindu tradition is that there is no dividing line between the sacred and the secular. No contradiction is perceived between temporal ends and the eternal goal. There is no area of life, accordingly, which is alien to spiritual influence. In fact, according to the Hindu principle of “*dharma*,” secular and sacred concerns are inextricably interwoven; *dharma* espouses an integrated view of life and world. *Dharma* is the ordered behavior of human beings; it gives coherence to the different activities of life; it gives direction to the harmony of the whole person, helping him find the right way to adhere to the just law of living. A human being is a composite personality expressing physical, vital, mental, and spiritual dimensions of life. The harmonization of these aspects of life is the primary domain of *dharma*. One’s duty to one’s family, group, society, humanity, and to God are all part of *dharma*.

DHARMA

The word *dharma* is derived from the root *dhr*, which means to uphold, sustain, and nourish. “*Dharma*” is a comprehensive term, that encompasses notions of duty, morality, ritual, law, order, and justice.

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Dharma also refers to the structure of reality. It is cosmic law. It is the law of life and development; it is *sanātana*—eternal. It is the support of the whole universe. It holds together in a systematic manner the integrity and progression of life in the universe. It has physical, metaphysical, and moral aspects. At the human level, it involves self-regulation and social regulation. *Dharma* signifies universal principles for regulating interpersonal relations. The injunctions and prohibitions laid down for the purpose of regulating conduct are codified in the *Dharma Śāstras*; they are the records of legal knowledge and insights. Actions prohibited are those for which one has a strong inclination, but which are not conducive to the good of one's total personality and to the welfare of society.

The purpose of *dharma* is to maintain and conserve established social order as well as the general welfare of humankind. Social life implies adherence to common rules and regulations. The violation of laws is destructive of social life, hence there is a need to maintain law and order. The laws seek to restrain those who do not restrain themselves. They prescribe punishment for violation.

The establishment and maintenance of moral order in society necessitates a well-knit system of law which protects individuals against violation of, and encroachment upon, their rights. Not only the rights of individuals are to be protected, but the laws should also be conducive to social welfare and development. Laws are laid down to resolve the conflicts, if any, between the interests of the individuals and those of society. A system of law is essential to maintain social harmony.

SOURCES OF *DHARMA*

Traditionally, the sources of *dharma* are revealed texts (*śruti*, for example), tradition (*smṛti*), conduct of the wise in the community (*śiṣṭacāra*), and the satisfaction of one's enlightened conscience (*ātrmatuṣṭi*). The revealed texts, the *Vedas*, are a guide to conduct; they embody eternal truths. Empirical motives are informed by the light of knowledge of the ultimate reality. The learned and the wise trace the rules and laws, customs and traditions, to *Vedic* sources. They also relate them to the exigencies of time and conditions.

DHARMA AND *KARMA*

Actions leave their good or bad effects on the mind—the subtle body. The mind and its character endures the death of the gross (physical) body. The quality of actions performed in the present life conditions the future life; the conditions of the present life itself are the result of past actions. Thus one's psychological endowment and social status are the consequence of past deeds. Accordingly, there are four deeper springs of human personality: impulsion towards knowledge, power, harmony, and skill.

Ancient Hindu society was organized into four classes (*varṇa*) on the basis of occupation or mode of work; they are intellectual, warrior, trading and working classes, called *brahmanas*, *kṣatriyas*, *vaiśyas*, and *sūdras* respectively. Society was considered an organism, and the four classes its parts. The *Veda* declared all of them to be divine. Every socially useful function was considered valuable and necessary for the well-being of society.¹

PRACTITIONERS OF *DHARMA*

In a Hindu society, religious precepts and moral codes of conduct are an important force to counteract the individual's tendency to pursue ones' own self-interest and personal aggrandizement. These principles and teachings are codified in the *Dharma Śāstras* or Law Books. The function of the Hindu state is to enforce the observance of law. If the principles codified in the *Dharma Śāstras* are not upheld by the political ruler, disorder will ensue. If force is used to restore order, oppression will result. Hence, the use of power itself has to be governed by the higher principle of *dharma* which regulates conduct.

The reign of *dharma* is more essential than the rule of a king. *Dharma* is the controller of the king. The Hindu king ensures the stability of society, not by strength and power of the state, but by the observance of *dharma*. Accordingly, he is concerned with making, declaring, and deciding the laws that should govern the conduct of people; the dispensation of justice is regarded as his sacred duty. If there is a miscarriage of justice, one quarter of the sin is debited to the ruler (king). In the administration of justice, the ruler of a Hindu society is assisted by the judges, village councils, guilds, and corporations.

The legislative and judicial duties of a Hindu society fall upon the *brahmanas*. They lay down fundamental laws and rules, and decide points of law in disputed cases. *Dharma* in the sense of established rules is there to direct the conduct of life in all its aspects.

The learned and the wise also play a big part in the evolution of laws in a Hindu society. They envisage change in terms of the actualization of moral and spiritual values. Since law is viewed as a means to promote and guard the moral fabric of society, it should not run counter to *dharma*. The principle of *dharma* is hidden and subtle. The best way to find *dharma* is to follow the moral leaders or *dharmis-tas*—great personalities of culture who follow truth in the conduct of life. Their character is guided by love and friendliness to all. They purify their lives and minds by pursuing *dharma*. Persons of *dharma*

1. The introduction of the principle of heredity in the system made the four-fold structure rigid. The distortion of the original vision has led to the unfortunate caste system of modern India. The caste system with its prohibition of inter-caste marriage and inter-caste-dining is a distortion of the *varṇa* system.

work constructively in society with wisdom and a spirit of non-violence.

LEGAL PROCESS

Laws in a Hindu society are enforced with diligence and sensibility in order to ensure justice and fair play for all. The primary rights of life and property of law-abiding citizens are protected. Law is invoked where there is a transgression of rights. Acts that tend to harm persons or cause them injury, as well as those that deprive humans of their rightful possessions, are condemned. The former sort come under civil law, and the latter under criminal law.

The lawgivers should be aware of the importance of reasoning in determining the truth in doubtful cases. The circumstances of a case will reveal the truth of the matter if they are subjected to proper reasoning. Truth is established by means of witnesses who are worthy, dutiful, and free from hatred or attachment. Witnesses are to testify under oath. Perjury results in punishment.

There is ample scope in determining the applicability of law to the facts of a case. Law is not divorced from reason and common sense. Law is examined in light of practical experience, which helps to determine the exact bearing of law to particular cases. A distinctive feature of the ancient legal system was that any person with appropriate learning and expertise could intervene and state his own view concerning a point of law bearing upon a case. Cases in ancient India were disposed of as quickly as possible; the law and legal procedure facilitated immediate trial of cases.

EVOLUTION OF LAWS

The laws can not be the same for all ages and for all times. They change with the social conditions and needs of the people. The moral progress of a people is reflected in the evolution of the laws. Laws require modification to suit the enlightened conscience of the times. When the laws do not embody the higher principle of reason and are against the principle of good motive, they are likely to be disobeyed. The necessity then arises to make suitable changes.

The legal framework laid down by the learned incorporates the local and regional rules, customs, and practices, assigning to them a central place in the scheme of judicial administration. The local self-governing socio-economic institutions of a Hindu society perform judicial functions also. They resolve disputes arising between their members. Only very difficult points of law are taken to the higher courts.

PUNISHMENT

Danda is the punishment prescribed by Hindu law to deter or restrain the individual from acting in evil ways, and to bring him to the path of justice. The principle purpose of punishment is retributive and reformative.

Punishment alone is not sufficient to redirect the deviant to the right path of *dharma*. A deeper awareness of the right path motivates right conduct. Only if this awareness is present can law be used for maintaining order, and be accepted as legitimate. Understood in this wider sense, law ensures effectiveness of government and prevents anarchy.

Even if people err in obeying the law, the law does not take too narrow a view of the breach. Human weaknesses are recognized. The intention of the law is to reform the evil-doer. It takes into account the motive and the nature of the offense, the antecedents and the character of the offender while awarding punishment. An individual is not condemned for the whole of life for committing an immoral or illegal act, but is rehabilitated and returned to society.

II. THE MODERN SITUATION IN INDIA

In 1948, following the achievement of freedom from British rule, in 1948 India adopted a constitution that guarantees social, economic, and political equality.² The avowed object of the modern state also includes the prosperity of the individual and welfare of the community. Because it was written for a secular state, however, the Indian Constitution does not address the spiritual, metaphysical, and ultimate concerns of the individual. Nor does it seek to achieve the goal of total fulfillment of the person in the spirit of *dharma* and in the atmosphere of non-violence.

The modern Indian legal system is very centralized. It presents a picture of justice administered from outside. Litigation is expensive and overbearing for the common people. Justice has become very dear. People increasingly feel that justice has become something that is arbitrarily granted by the state and that it is subject to manipulation. Justice has lost its humanity and has become impersonal. This could be remedied if we recapture the holistic and synthetic view of society and restore the self-regulatory character of the socio-economic institutions of society. We need to impart to the present system the spirit of ancient law, which laid a great deal of emphasis on the dispensation of justice at the micro levels.

2. See India Const. (visited Feb. 25, 1998) <<http://alfa.nic.in/const/preamble.html>>.

III. HOW MODERN LEGAL SYSTEMS CAN LEARN FROM THE HINDU TRADITION

It is common experience that leaders in any walk of life become successful and achieve enduring success only when they practice what they preach. In the absence of effective leadership, however, it is the common man who becomes the victim. The Hindu legal practitioner has a great responsibility to uphold the laws of society. His ideals should be truth, justice, and the welfare of society. He should be free from fear and should cultivate a life of honor. He should maintain the ideal of high courage, straight-forwardness, helpfulness to people, self-control, and self-confidence, unflinching resistance to injustice and oppression.

It is only when we make the common people fearless by providing the right guidance and example that we can break the vicious cycle of corruption, oppression, and injustice. "For whatever a great person does, that very thing other persons also do; whatever standard he sets up, the generality of humans follow the same."³

IDEAL LAWYER

The lawyer must be at once a person of knowledge and of action. Common honesty and industry are required of him. He should give paramount importance to facts. He should realize that the aim of law is the welfare of the people. He should be in direct touch with people who seek his advice and aid.

The responsibility of the lawyer is to work in such a way that justice will reign supreme in society. He should ensure that the law of the land reflects the highest ideals of people. The oppressed and the weak should receive due consideration and help to rise above their disabilities and deprivations.

A good lawyer is a good fighter for the cause of the right and the just. He is also a peacemaker and ensures better understanding between conflicting parties so as to arrive at adjustment, cooperation, and harmony.

A good lawyer is a good jurist and strives to systematize the knowledge of the law; he studies the causes of dissatisfaction and revolt in society and seeks to find their real remedies by influencing reforms in the law and in the system of its administration.

3. *Bhavadgita* II:21. The *Fordham Law Review* relies on Dr. Rao's expertise and translation of Hindu sources.

MAHATMA GANDHI'S EXAMPLE⁴

Mahatma Gandhi was the most important political and moral leader of twentieth-century India. He was firmly rooted in the Hindu tradition. He considered religion as the foundation of the life of a human being. To him a life without religion was a life without principle; because he felt principle was necessary to guide human conduct, he thought a life without religion would lack focus.

Gandhi studied law and was trained as an attorney in Britain. He used his legal skills to bring about radical changes in the legal systems of South Africa and India. He began his career as a simple barrister-at-law. Soon thereafter, he saw unending possibilities to overcome the ills of an unjust society. This process began in South Africa where he was summoned to assist a senior lawyer in settling a dispute between two Indian merchants, Sheth Abdullah and Sheth Tyabji. Instead of raking up points of law in support of his own client Abdullah, he endeavored to befriend both of the parties and strained his every nerve to bring about a compromise. He made them submit to arbitration, and the case was settled out of court. Further, he persuaded his client not to press for immediate payment of the huge sum of damages awarded, but to accept it in installments to save his rival from bankruptcy. He writes, "I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder."⁵ Frequently, a lawyer is considered as a privileged person belonging to an elite professional group. Gandhi believed in the dignity of labor. All of the socially useful professions are to be honored. After reading John Ruskin's book *Unto this Last*,⁶ Gandhi drew an important lesson that "a lawyer's work has the same value as the barber's inasmuch as all have the same right of earning their livelihood from their work."⁷

In London, Gandhi had heard the saying that a "Lawyer's profession was a liar's profession." He did not agree with that view. Neither did he hold that a lawyer needs to resort to untruth in his profession. He warned his clients that they should not expect him to take a false case or to coach witnesses to tell lies in order to win a case. To him, the practice of law was the practice of truth.

On a particular occasion, when Gandhi was conducting a case before a magistrate in Johannesburg, he detected that one of his cli-

4. All of the information in this section is available in Mohandas K. Gandhi, *An Autobiography: The Story of My Experiments With Truth* (Mahadev Desai, trans., Beacon Press 1957) [hereinafter Gandhi, *An Autobiography*].

5. *Id.* at 134.

6. *Id.* at 299 (discussing how his life was "transformed" after reading John Ruskin, *Unto this Last: The Political Economy of Art; Essays on Political Economy* (J.M. Dent & Sons LTD 1968) (1862)).

7. Gandhi, *An Autobiography*, *supra* note 4, at 299.

ents had deceived him, and completely broke down in the witness box. Gandhi immediately asked the magistrate to dismiss the case and decide against his client. He rebuked the client for having brought a false case to him.

Gandhi's first year in South Africa brought a drastic change in his life. It provides a modern-day example of practicing *dharma* in life and society. He fought against the unjust laws and for human dignity in South Africa, where color prejudice had been institutionalized and embodied in law. Once, he was thrown out from the first class railway compartment for which he had purchased a ticket; his baggage was dumped on the platform. A white passenger had him removed from the railway carriage because of the color of his skin. From that moment on, Gandhi vowed to combat discriminatory laws. Gandhi used to remind his colleagues that "[t]he symbol of a Court of justice is a pair of scales held evenly by an impartial and blind but sagacious woman. Fate has purposely made her blind, in order that she may not judge a person from his exterior but from his intrinsic worth."⁸

In 1907, an act was passed requiring all Indians in South Africa to submit to registration and finger-printing or face fines, imprisonment, or deportation. It put severe restrictions on their freedom. Under the leadership of Gandhi, a majority of Indians refused to comply with the law, which in their eyes was a "Black Act." They were jailed for defying the law. He taught them to resist racial discrimination by purely constitutional means—education, petitions, and lawsuits. His technique of non-violent resistance to unjust laws was in keeping with the spiritual traditions of India. After a protracted non-violent struggle, the "Black Act" was repealed in 1914, and the basic human rights of Indians were restored. This struggle changed not only his personal life but the legal system in South Africa, and later in India and in several parts of the world.

In India, Gandhi's efforts were directed at remedying structural injustices as well as individual injustices.⁹ He saw British imperialism as structural injustice. He wanted to win freedom and dignity for the people of India. In March, 1919, the Imperial Legislative Council passed the Rowlatt Acts and further curtailed the freedom of movement and expression of Indians. Gandhi led a non-violent national struggle for the independence of India, which lasted nearly twenty-seven years. His efforts finally succeeded in August 1947, when the British transferred power to Indian leaders.

Similarly, Gandhi opposed the many so-called religious practices that fell short of the norms of social justice, although he found the essential values of Hinduism sound and adequate. Gandhi sought to

8. *Id.* at 145.

9. Structural injustices are imposed on the society as a whole and individual injustices affect personal rights.

live by principle, and strove to assure equality for those who had long been oppressed.

For example, Gandhi saw "untouchability" as a corroding poison, though it had long been a part of Hindu society. Antiquity, however, is no measure of truth. Gandhi held that untouchability is a crime against man and God. He directed his energies towards its total elimination. For example he strove for the right for untouchables to use public water, roads, schools, housing, public facilities, and of course, to enter temples. He wanted for them improved social status and better living and economic conditions. Thanks to his efforts, untouchability is forbidden by Article Seventeen of the Indian Constitution. Gandhi's goal was more than merely establishing favorable legislation—which can only bring about change in the external behavior. He believed that real and enduring change comes from within. In his lifetime, Gandhi transformed the untouchables into a fearless, progressive, and vital element of the Indian nation. But his work needs to be continued and completed.

Another example of Gandhi's remarkable work is his efforts to remove the disabilities to which women were subjected. He cried out against child marriages, enforced widowhood, the dowry system, etc. He worked for the welfare of women and the restoration of their rights in Hindu society. Since Gandhi, many bills and acts have been passed in India in favor of the cause of women. The new constitution of India guarantees to all, irrespective of sex, "justice, social, economic and political; . . . and equality of status and opportunity."¹⁰ The Hindu Marriage Act of 1955 allows for divorce and forbids child marriages. The Hindu Succession Act of 1956 allows for equal inheritance for men and women (which was formerly denied to the female). The Dowry Prohibition Act of 1961 makes it unlawful to give or demand dowry. These are astounding advances and they were initiated and fought for non-violently by Mahatma Gandhi.

CONCLUSION

Ancient Hindu law practitioners were imaginative and stressed the dynamics of law. They provided for the changing needs of society by adopting the ancient law to the progressive conditions. Their objective was to ensure a flexible legal order that allowed for stability as well as for the evolution of law in accordance with the development of society.

The need for this sort of flexibility within the law is apparent in today's world. Perhaps modern societies can learn from the ancient Hindu tradition, and, following Gandhi's example, develop new ways to improve our legal systems.

10. India Const. preamble (visited Feb. 25, 1998) <<http://alfa.nic.in/const/preamble.html>>.

Notes & Observations