## LL.B. VI Term

# JURISPRUDENCE-II

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**(For private use only in the course of instruction)**

**Semester – Sixth**
**Course Name - Jurisprudence-II**
**Course Code – LB 604**
**(Compulsory Paper)**

**Target Group:** Students of Law, Political Science, History, Sociology

**Course Objectives:**

This Course aims to introduce to students with the jurisprudential analysis of certain concepts in the field of Law. These concepts are basic and essential for the study of Law. By learning the Jurisprudential Analysis of basic concepts, the students shall gain the expertise in analyzing other concepts also used in the field of Law. Students will also learn how to use this expertise in filing and contesting the cases on strong grounds before the Courts of Law in India as well as in other countries. The philosophical understanding of the concepts will give them fundamental clarity in different arenas of law.

**Course Learning Outcomes:**

Upon successful completion of the course, students will be able to:

1. Have in depth knowledge of basic concepts in jurisprudence and to develop a critical approach in the field of law by integrating Indian Knowledge System with liberal democratic traditions.
2. Have a foundational understanding of Indian philosophy of law and ability to critically examine the historical, epistemological and social context of these philosophical ideas.
3. Identify the strengths and limitations of different theories and models in explaining the basics of Law and to develop the capacity to critically engage with the diverse civilizational perspectives in legal research.
4. Apply their knowledge, skills and creativity to get the solution of contemporary legal problems.
5. Differentiate properly among various concepts and perspectives and use them appropriately wherever required.

# Course Content

## Unit 1. Dharma and Rule of Law

- Concept and Sources of Dharma; Trivarga Theory
- Rule of Law and Rule of Dharma
- Satyamev Jayate (Motto of HC) and Yato Dharmasto Tato Jayah (Motto of SC)

***READINGS:***


1. Seema Singh and Vinayak Sharma, **"Exploring the Concept of Dharma in Bharatiya Jurisprudence: With special reference to Rule of Law"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 58-84 (2025)……1
2. Seema Singh, **"Sprituality: The Foundation of Law"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 21-30 (2025)……...28


## Unit 2. Concept of Rights & Duties

***READINGS:***


1. Pratibha Shastri, **"Duties and Rights of Citizens in the Dharmasutra"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 240-259 (2025)……38
2. R.W.M. Dias, **"Jural Relations"**, Jurisprudence, pp. 23-43 (1994) …….. 58
3. Chhatrapati Singh, **"The Inadequacy of Hohfeld's Scheme: Towards more Fundamental Analysis of Jural Relations"**, 27 JILI. 117 (1985) ……71
4. Upendra Baxi, **"Laches and the Rights to constitutional Remedies: Quis Custodiet Ipsos Custodes?"** in ***Constitutional Developments since Independence*** by Alice Jacob (ed.) (1975) ……..82
5. Bhikhu Parekh, **"The Modern Conception of Right and Marxist Critique"** in ***The Right to be Human*** by Upendra Baxi (ed.), pp. 1-22 (1987) ……87


## Unit 3. Person and Personality

***READINGS:***


1. Joel Feinberg, **"The Rights of Animals and Unborn Generations"** in ***Philosophy & Environmental Crisis*** by William T. Blackstone (ed.), pp. 43-68 (1974)……...98
2. R.W.M. Dias, **"Theories of the Nature of Legal Person in Jurisprudence"**, pp. 265- 270 (1994) ……108
3. Taniya Malik **"Spiritual and Cultural Linkages in the Recognition of River Personhood in Select Jurisprudence: A Critical Analysis"** in ***Law and Spirituality*** by Seema Singh and Raman Mittal (eds.), pp. 256-270 (2024) ……..113

4. **Cases**:
    - *Pramatha Nath Mullick v. Pradyumna Kumar Mullick,* (1925)27BOMLR1064……..120
    - *Rama Reddy v. Ranga Dasan And Ors.,* AIR 1926 MADRAS 769……..122
    - *Shriomani Gurudwara Prabandhak Committee, Amritsar* v. *Shri Som Nath Dass & Ors.,* AIR 2000 SC 1421……124
    - *Lalit Miglani vs State of Uttarakhand And Others*, WPPIL 140/2015, Uttarakhand High Court, 2017.

## Unit 4: Possession and Ownership

***READINGS:***

1. P.J. Fitzgerald, **"Possession"** in ***Salmond on Jurisprudence***, pp. 265-295 (1966) ……..…137
2. A.M. Honore, **"Ownership"** in ***Oxford Essays in Jurisprudence*** by A.G. Guest (ed.) (1961) ……156
3. Lallanji Gopal, **"Ownership of Agricultural Land in Ancient India"**, 4 ***Journal of the Economic and Social History of the Orient*** 240-263 (1961) ……...164

## Unit 5. Theories of Justice: Fairness, Impartiality, and Equitable Distribution

- Kautilya
- Fuller
- Rawls
- Nozick
- Amartya Sen: The Idea of Justice (Niti and Nyaya)

***READINGS:***

1. Balbir S. Sihag, **"Kautilya on Administration of Justice during the fourth century B.C.",** 29 ***Journal of the History of Economic Thought*** 359-377 (2007) ……...188
2. Robert C. L. Moffat, **"Searching for Substantive Justice: Lessons from Lon Fuller's Natural Law",** ***University of Florida Legal Studies*** *Research Paper No. 2009-30* (2009) …….207
3. Suri Ratnapala, "**Justice**" in ***Jurisprudence***, pp. 336-349 (2009) ……..226
4. Chidi Paul ORJI, **"Amartya Sen's Position on Social Justice: An Assessment of Social Injustice in Modern Society",** 10 ***Socialscientia Journal*** 87-98 (2025) ……240
5. Babita Singh Parasain, **"The Concept of Nyaya (Justice) in Indian Philosophical Tradition and Contemporary Theories (John Rawls & Amartya Sen)"** …….251

## Unit 6. Logic, Epistemology and Science of Interpretation in Indian Thought

- Nyāyaśāstra (Jurisprudence of Logic): Sixteen Categories of Nyaya, Nyaya Methods of Dialectic
- Science of Interpretation (Mimamsa)

- Buddhist Logic

***READINGS:***

1. Mohan Parsain, ***"Nyaya* in Legal Reasoning and Argumentation"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 99-117 (2025) ……...268
2. Brunda Karanam, "**Interpretation – An Exploration of Mimamsa & Its Contemporary Relevance"** ……287
3. Buddhist logico – epistemology……..301

# Exploring The Concept of *Dharma* in Bharatiya Jurisprudence: With Special Reference to Rule of Law*

In Bharatiya philosophy, the idea of Dharma was central. It provided a complete framework for life, as explained in the Dharmashastras. These texts dealt with three main areas: *Achara* (rules of daily routine), *Vyavahara* (legal proceeding), and *Prayaschita* (penance). However, with the Muslim invasion and British colonization in Bharat, the *Dharma*-based legal system started losing its significance and was modified, supplemented, and finally superseded by legislative enactments. The law, which was at one time revealed to have a divine origin being a part of *Dharma*, has now become "man-made" law and therefore has lost its divinity. Unfortunately, people began to view *Dharma* solely as a form of religion. Moreover, the Indian Constitution has ignored the "Rule of Law" principle already given in the Brihadaranyaka Upanishad around 750 BCE and adopted Sir Edward Coke's (1610) and Dicey's (1885) "Rule of Law." The Rule of Law/*Dharma* that existed in the ancient Bharatiya legal system was far more superior and inclusive than what India has envisaged in the modern Constitution. Hence, this chapter aims to explore the fundamental concept of Dharma, drawing on various slokas to offer nuanced interpretations and connect them with modern legal discourse. Also, this study symbolically relates *Dharma*, *Artha* and *Kama* with the golden triangle of Indian Constitution. Furthermore, this study seeks to interpret the modern principle of "Rule of Law" in light of the "Rule of *Dharma*" principle elucidated in ancient Bharatiya Jurisprudence.

## INTRODUCTION

The principle of Rule of Law is followed in every democratic state of the world. In simple terms, it means that the state is governed by the law and not

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* Seema Singh and Vinayak Sharma, **"Exploring the concept of Dharma in Bharatiya Jurisprudence: With special reference to Rule of Law"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 58-84 (2025).

by the ruler. The law is supreme. To understand the Rule of Law, we need to understand "Law" in its true sense first. Do we really understand it in its true sense? If so, why, despite the existence of thousands of legislations and international conventions, we are still unable to deliver justice to the majority of living beings on this earth? Why are conflicts rising globally? From the global to the local level, are laws truly able to fulfill the legitimate expectations of the people? Are they free from infirmities? All these questions are addressed later in this article.

Joseph Raz, in his work, *'The authority of law: Essays on law and morality*',[1] identifies several principles that are essential to a functioning Rule of Law system. These include: (1) All laws should be prospective, open, and clear. (2) Laws should be relatively stable. (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules. (4) The independence of the judiciary must be guaranteed. (5) The principles of natural justice must be observed. (6) The courts should have review powers over the implementation of the other principles. (7) The courts should be easily accessible. (8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.

Brian Tamanaha, in his work, '*A Concise Guide To The Rule Of Law',*[2] provides the modern definition of the Rule of Law. It means that both government officials and citizens must follow and act according to established laws. For this to work, certain key features are required: laws must be prospective in nature, made public, apply equally to everyone, be clear, stable, and consistent. There must be mechanisms or institutions that enforce the legal rules when they are breached.[3] Without these qualities, the Rule of Law cannot function properly.[4]

This is known as the 'formal' or 'thin' definition of the Rule of Law, which is a basic version focusing on how laws are made and applied. There are more comprehensive or 'thicker' definitions that also include concepts like human rights, democracy, and justice. The narrow definition is used here because it serves as a common starting point that different interpretations of the Rule of Law share, though many go further than this minimal version. This approach can work in a variety of societies and legal systems.[5]

1 Joseph Raz, *The Authority of Law: Essays on Law and Morality* 215 (Clarendon Press, 1979).
2 Brian Z Tamanaha, "A Concise Guide to the Rule of Law", in Neil Walker and Gianluigi Palombella (eds.), *Florence Workshop on the Rule of Law* 3, (Hart Publishing, 2007).
3 Brian Z Tamanaha, "The History and Elements of the Rule of Law" Singapore *Journal of Legal Studies* 232 (2012).
4 *Supra* note 2.
5 *Ibid.*

According to Upendra Baxi,[6] The Rule of Law has a long history, often viewed as an initial contribution to Euro American liberal political theory. It can be seen as a 'thin' notion involving procedural restraints on sovereign power and governmental conduct, or a 'thick' conception involving theories about the 'good', 'right', and 'just'. However, critical historians have shown that both versions have been consistent with violent social exclusion, domination by men over women, and persecution of minorities. The triumphalist celebration of Rule of Law as an "unqualified human good" reduces struggles against colonialism/imperialism to a 'whites-only' affair. The promotion of Rule of Law as a cultural export continues to perpetuate old contamination in today's globalized world.[7]

The concept of 'Rule of Law' has evolved significantly in contemporary discourse, moving from a bounded conception to a universalizing/globalizing notion. This shift is influenced by emerging global social policy and regulation, such as the war on terror and the paradigm of trade-related, market-friendly human rights. International financial institutions, such as the World Bank, now present themselves as global sovereigns, determining how the 'poor' is defined, measured, and redefined. This shift has led to a re-articulation of Rule of Law notions, with human rights and social activism practices contributing to the re-articulation of Rule of Law. The new Rule of Law discourse is untroubled by the bounded Rule of Law conceptions, which emphasized limited governance and concentration of powers. This contradiction between Rule of Law as a globalizing discourse celebrating various forms of 'free' market fundamentalisms and new forms that seek to universalize human rights fundamentalisms is at stake. This incommensurability defines the space for interpretive diversity and progress in measurement that standardizes new core meanings of the Rule of Law through human rights and development indicators.[8]

Generally, in the legal discourse, the Rule of Law owes its origin from ancient Greek law and was later developed ultimately by western jurisprudence, which all the modern democratic states envisaged in their constitutions. But the credit of origin and development of Rule of Law in the Bharatiya Jurisprudence cannot be ignored. All the sources whether Brihadaranyaka Upanishad, Manusmriti, Kautilya's Arthashastra, Rajtarangni etc. have been discussed later in this article. We also find the various instances in great epics, i.e., Ramayana and Mahabharata, where the Rule of Dharma was followed, whether it was Lord Rama's acceptance of exile, Bharata's refusal to rule, Lord Rama's decision to banish Goddess Sita, or the vow of Devavrata in Mahabharata to

6 Upendra Baxi, "The Rule of Law in India" 6 *SUR – International Journal on Human Rights* 7 (2007).

7 *Id.* at 7-8.

8 *Id.* at 9.

observe celibacy (*Brahmacharya*) throughout the life. We will discuss all these instances later in this article.

In Bharatiya Jurisprudence, the Rule of Law owes its origin in one of the oldest Upanishad i.e. *Brihadaranyaka Upanishad* around 7th - 6th century BCE.[9] In the *Brihadaranyaka Upanishad*, there is a sloka (*stated later in this article*) that emphasizes the importance of *Dharma*/Law which can be interpreted as an early form of the Rule of Law.

Dr. S. Radhakrishnan in his work, '*The Principal Upanishads'*[10] observes that "Even kings are subordinate to *Dharma*, to the Rule of Law." Here, Dr. S. Radhakrishnan interpreted Law into *Dharma* i.e. It was the Rule of *Dharma* and *Dharma* was supreme to all, unlike Austin's theory of command of sovereign where king/ruler is supreme.

In the context of Bharatiya Jurisprudence, to understand the Rule of *Dharma* before, it is necessary to understand *Dharma* first.

The Bharatiya Jurisprudence, known as the Vyavahara Dharmasastra, is intricately intertwined with the concept of *Dharma* as elucidated in the Vedas, Puranas, Smritis, and other relevant literary sources. The term *'Dharma'* holds significant meaning in the Sanskrit language, including a broad range of concepts and principles. There is no equivalent term in any other linguistic system. Attempting to provide a definition for the aforementioned term would prove to be fruitless. The phenomenon can only be elucidated. The term encompasses a diverse range of interpretations. Several of them might facilitate our comprehension of the breadth of that phenomenon. The term '*Dharma'* encompasses various meanings, including justice *(Nyaya)*, what is morally right in a specific situation, religious principles, righteous conduct, acts of kindness towards living beings, acts of charity or almsgiving, inherent qualities or attributes of living beings and objects, obligations or duties, legal norms and customary practices with legal validity, as well as a legitimate royal decree *(Rajashasana)*.[11]

As stated in the *Nirukta* Vedanga, the word **'धर्म'** *(Dharma)* is derived from the 'धृ' root, which means that which is to be held, to nourish, to uphold, to sustain, and to protect. The word **'धर्म'** acquires its grammatical form by adding the suffix **'मन्'** which comes from the root **'धृञ्-धारणे'** in the अतिस्तुसुहुसृधृक्षिक्षुभायोप दियक्षिनोभ्यो मन् ॥१-१२७॥[12]

9 Swami Madhavananda (ed.), *The Brihadaranyaka Upanishad: With the commentary of Shankaracharya* 1:4:14 (Advaita Ashrama, Almora, 3rd edn., 1950).

10 S Radhakrishnan, *The Principal Upanishads* 170 (George Allen and Unwin Ltd, 1953).

11 Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 3 (LexisNexis Publication, 1st edn., 2022).

12 TR Chintamani (ed.), *The Unadi Sutra with the vriti of svetavanavasin* 1:127 (University of Madras, 1992).

According to Max Muller, *Dharma* is the Indian manifestation of natural law. In ancient times, individuals embraced *Dharma* as a guiding principle for their conduct and self-governance. Throughout the period, there has been a correlation between *Dharma* and religion. The *Dharma*, as expressed in the Sanskrit language, represents the legal and moral principles of natural law. It is more obvious and perceptible than the constrained presentation of religious principles, which occasionally has limitations due to narrow-minded perspectives. Therefore, it is not imperative for *Dharma* to be exclusively associated with or seen solely as a religious concept. It extends beyond the present time and encompasses the fulfillment of responsibilities and the transmission of knowledge to future generations. The *Dharma* is primarily linked to its literal interpretation, which pertains to righteousness.[13]

The judgment of *Shri A.S. Narayana Deekshitulu* v. *State of Andhra Pradesh*[14] stands out as a significant instance in which the Apex Court of India extensively examined the idea of *'Dharma'*. Justice K. Ramaswamy established a correlation between a "higher" or "core" religion and the notion of Dharma. As per his assertion, the Constitution of Bharat safeguards *Dharma*, contrary to conventional religious practices.

He quoted:

> *Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for the welfare of all beings free from fear, desire, sense of brotherhood, unity, cherishing good feelings, and friendship for the integration of Bharat. This is the core religion to which the Constitution accords protection.*

He further added,

> *Religion is enriched by visionary methodology and theology, whereas Dharma blooms in the realm of direct experience. Religion contributes to the changing phases of a culture; Dharma enhances the beauty of spirituality. Religion may inspire one to build a fragile, mortal home for God; Dharma helps one to recognize the immortal shrine in the heart.*

It was stated that *Dharma* is distinct from religion.

Also, we find the reference in the constituent assembly debate where Shri H. V. Kamath[15] (C. P. & Berar: General) asserts "**That 'Dharma', Sir, must**

13 Rajpal Leepakshi and Mayank Vats, "Dharma and the Indian Constitution" *Christ University Law Journal* 63-64 (2016).

14 *Shri A.S. Narayana Deekshitulu* v. *State of Andhra Pradesh* (1996) 9 SCC 548.

15 Constituent Assembly Debates on December 06, 1948 *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

**be our 'Religion'. 'Dharma'** of which the poet has said: **Yenedam dharyate jagat** (that by which this world is supported.)"

The meaning of *Dharma* is also expounded upon throughout the Mahabharata. When Yudhistira inquiries about the significance and extent of *Dharma*, Bhishma responds[16]:

***तादृशोऽयमनुप्रश्नो यत्र धर्मः सुदुर्लभः ।***
***दुष्करः प्रतिसंख्यातुं तत्केनात्र व्यवस्यति ॥ ९***

**Meaning:** *युधिष्ठिर ! तुम्हारा यह निश्चला प्रश्न भी ऐसा ही है। इसके अनुसार धर्म के स्वरूप का विवेचन करना या समझना बहुत कठिन है। इसीलिये उसका प्रतिपादन करना भी दुष्कर ही है। अतः धर्म के विषय में कोई किस प्रकार निश्चय करे।*

***प्रभवार्थाय भूतानां धर्मप्रवचनं कृतम् ।***
***यः स्यात्प्रभवसंयुक्तः स धर्म इति निश्चयः ॥ १०***

**Meaning:** *प्राणियों के अभ्युदय और कल्याण के लिये ही धर्म का प्रवचन किया गया है। अतः जो इस उद्देश्य से युक्त हो अर्थात् जिससे अभ्युदय और निःश्रेयस सिद्ध होते हो, वही धर्म है। ऐसा शास्त्रवेत्ताओं का निश्चय है।*

***धारणाद्धर्ममित्यादुर्धर्मेण विधृताः प्रजाः ।***
***यः स्याद्धारणसंयुक्तः स धर्म इति निश्चयः ॥ ११***

**Meaning**: *धर्म का नाम 'धर्म' इसलिये पड़ा है कि वह सबको धारण करता है- अधोगति में जाने से बचाता और जीवन की रक्षा करता है। धर्म ने ही सारी प्रजा को धारण कर रखा है; अतः जिससे धारण और पोषण सिद्ध होता हो, वही धर्म है। ऐसा धर्मवेत्ताओं का निश्चय है।*

Bhisma has rightly said that defining *Dharma* poses considerable challenges. It is difficult to define it in a single definition because of its wide variety of meanings. *Dharma* has been expounded for the welfare and upliftment of all beings. Hence, one could assert that which leads to the upliftment and ultimate good, is *Dharma*. It upholds everything—it protects from falling into degradation and preserves life. *Dharma* alone has sustained all beings; therefore, that which provides sustenance and support is *Dharma*.

## 1. A BASIC UNDERSTANDING OF *DHARMA*

### The Wide Variety of Meanings of Dharma

The various ancient Bharatiya sources define the term *Dharma* that encompasses a diverse range of meanings and prove how *Dharma* is not equivalent to any religion.

Mahanarayana Upanishad states:

16 *Mahabharata Shanti Parva* 109:9-11 (Geeta Press, Gorakhpur, 2013).

***धर्मो विश्वस्य जगतः प्रतिष्ठा लोके धर्मिष्ठ प्रजा***
***उपसर्पन्ति धर्मेण पापमपनुदति धर्मे सर्वं प्रतिष्ठितं***
***तस्माद्धर्मं परमं वदन्ति ॥ ७॥***[17]

**Meaning:** *धर्म सम्पूर्ण विश्व और जगत की प्रतिष्ठा है। संसार में धर्मनिष्ठ लोग धर्म के द्वारा ही उन्नति करते हैं, धर्म से पाप दूर होता है, और सब कुछ धर्म में ही प्रतिष्ठित है। इसलिए धर्म को ही सर्वोच्च कहा जाता है।*

"Dharma (righteousness) is the support of the whole universe. All people draw near a person who is fully devoted to Dharma. Through Dharma a person chases away sın. All are supported by Dharma. Therefore, they say that Dharma is the supreme means of liberation." [18]

The word *Dharma* (righteousness) is extolled here as the foundation of humanity for all living beings. When the strong oppress the weak, for the latter the only protection is an appeal to *Dharma*. In a society such an appeal becomes successful only when the *Dharma* of that society is guarded by a sovereign who is himself *Dharmistha.* Again *Dharma*, in the form of *prāyaścitta* or expiation, cleanses the transgressor of the moral law, and in the shape of *danda* or punishment, it purifies the guilty who violate the social law. So, *Dharma* is praised here as the support of all. Here *Dharma* comes close to justice.

Another *sloka* in Mahanarayana Upanishad states:

***धर्म इति धर्मेण सर्वमिदं परिगृहीतं ।***
***धर्मान्नातिदुश्चर तस्माद्धर्मे रंमन्ते ।।६।।*** [19]

**Meaning**: *कुछ लोग मानते हैं कि शास्त्रोक्त कर्तव्य ही मोक्ष का साधन है। शास्त्रों द्वारा निर्धारित कर्तव्यों के पालन से ही समस्त संसार को एक साथ बांधे रखा जाता है। शास्त्रों द्वारा निर्धारित कर्तव्यों का पालन करने से अधिक कठिन कुछ भी नहीं है। इसलिए, सर्वोच्च कल्याण के साधक शास्त्रोक्त कर्तव्य में आनंद पाते हैं।*

"Some consider that scriptural duty is the means of liberation. By the performance of scriptural duties all the world is held together. There is nothing more difficult to practice than the duties ordained by the scriptures. Therefore, seekers of the highest good find delight in the scriptural duty." [20]

Here, *Dharma* is defined in terms of Duty. By fulfilling one's own duties, the rights of all may be protected and hence the world is held together.

Jaimini in his Mimamsa Sutra states:

***चोदनालक्षणोऽर्थो धर्मः ॥*** [21]

17 Swami Vimalananda (ed.), *Mahanarayana Upanishad* 79:7 (Advaita Ashrama, 1968).
18 *Ibid.*
19 *Id.* at 78:6.
20 *Ibid.*
21 Ganganath Jha (ed.), *The Purva Mimamsa Sutra of Jaimini* 1:1:2 (The Panini office Bhuvaneswari

**Meaning:** धर्म वह है, जो वांछनीय होते हुए वैदिक आज्ञाओं द्वारा निर्देशित (या सिखाया) किया जाता है।

"Dharma or Duty is that which, being desirable, is indicated (or taught) by vedic injunction." [22]

The Purva-Paksa admits that *Dharma* can be defined as that desirable thing which is mentioned or laid down by Vedic Injunctions; that is to say, that which the Vedic injunction lays down as leading to a desirable end is *Dharma*; and from this it also follows that the Vedic Injunction is the sole means of knowing *Dharma*. Thus, then *Dharma* having been duly defined, and a valid and trustworthy means of knowing it being found available, it cannot be rejected as a nonentity.

In Mahabharata Karna Parva:

***धारणाद्धर्ममित्याहुः धर्मो धारयत प्रजाः।***
***यस्याद्धारणसंयुक्तं स धर्म इति निश्चयः॥*** [23]

**Meaning**: *धर्म प्रजाओं को धारण करता है, धारण करने के कारण उसे धर्म कहते हैं, जो धारण- प्राण रक्षा से युक्त हो वही धर्म कहलाता है। यही शास्त्रों का निश्चयपूर्वक कहना है।* [24]

Here, the essence of *Dharma* lies in upholding the beings; it is called *Dharma* because it sustains. That which is associated with the protection of life is called *Dharma*. *Dharma* ensures the protection of the rights of beings.

Manusmriti states:

***विद्वद्भिः सेवितः सद्भिर्नित्यमद्वेषरागिभिः ।***
***हृदयेनाभ्यनुज्ञातो यो धर्मस्तं निबोधत ॥***[25]

**Meaning**: *रागद्वेषरहित धार्मिक पण्डितों ने जिसको सदा सेवन किया और हृदय से मुख्य जाना, उस धर्म को तुम सुनो।*

"Learn that Dharma, which has been ever followed by, and sanctioned by the heart of, the learned and the good, who are free from love and hate."[26]

Here, this *sloka* implies that one should perform own *Dharma* which is independent of any emotional outcome. A duty has to be performed by being because it has to be performed. The obligation comes from within itself rather than any coercive means.

After having a comprehensive understanding of *Dharma* through various *sloka,* it can be well said that *Dharma* is not equivalent to religion. In the words

Asrama, 1916).

22 *Ibid.*

23 Damodar Satvalekar (ed.), *Mahabharata Karna Parva* 49:50 (Swadhyaya Mandal, 1973).

24 *Ibid.*

25 Ganganath Jha (ed.), *Manusmriti: With the 'Manubhasya' of Medhatithi* 2:1 (Motilal Banarsidass, 1920).

26 *Ibid.*

of Dr. Raghu Vira "*The fact is that Dharma never meant and can never mean religion. I think the word 'Panthe' may properly be translated as Religion but I do not think that Religion can ever be taken to connote Dharma. But the Englishmen made a deliberate use of this for their own ulterior purposes."* [27]

Therefore, *Dharma* can be embraced by any person belonging to any religion, whether Hindu, Muslim, Christian, Jew, Parsi, etc. *Dharma* is the whole basis of our social framework. *Dharma* is the law of social well-being.

### Origin and Sources of *Dharma*

The Veda, in its entirety, serves as the fundamental origin of *Dharma*.[28] Additionally, the conscientious remembrance *(Smriti)* of virtuous individuals who possess knowledge of the Veda, the conduct of morally upright and knowledgeable individuals *(Sadachara)*, and their inner conscience.[29]

***वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।***
***आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ॥*** [30]

**Meaning:** *संपूर्ण वेद धर्म का मूल है, और स्मृति व शील (आचरण) भी उसे जानने वालों के लिए धर्म का आधार हैं। साधुओं का आचरण और अपनी आत्मा की तुष्टि भी धर्म के अंग हैं।*

*Vedas*

The Vedas, specifically the Rigveda, the Yajurveda, the Samaveda, and the Atharvaveda, hold a preeminent position as the primary sources of *Dharma*.

***यः कश्चित् कस्य चिद् धर्मो मनुना परिकीर्तितः ।***
***स सर्वोऽभिहितो वेदे सर्वज्ञानमयो हि सः ॥*** [31]

**Meaning:** जो भी किसी का धर्म मनु द्वारा वर्णित किया गया है, वह सब वेद में कहा गया है, क्योंकि वेद सर्वज्ञानमय है।

***अर्थकामेष्वसक्तानां धर्मज्ञानं विधीयते ।***
***धर्मं जिज्ञासमानानां प्रमाणं परमं श्रुतिः ॥*** [32]

**Meaning:** *अर्थ और काम में आसक्त न होने वालों के लिए धर्म का ज्ञान स्थापित किया जाता है। जो धर्म को जानने की इच्छा रखते हैं, उनके लिए श्रुति सर्वोच्च प्रमाण है।*

The primary source of authority for acquiring knowledge of the *Dharma* is the revelation known as Sruti, specifically referring to the Vedas.

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27 Constituent Assembly Debates on November 19, 1949 *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

28 *Supra* note 25 at 2:6.

29 *Ibid.*

30 *Ibid.*

31 *Supra* note 25 at 2:7.

32 *Supra* note 25 at 2:13.

***Smritis:*** The *'Smritis'*, authored by learned scholars of the four Vedas, serves as a significant secondary foundation of *Dharma* due to its exceptional virtues.[33] The term *'Smriti'* is synonymous with *Dharmashastra*.

There is a total of eighteen primary *Smritis* or Dharmashastra.

***मन्वत्रिविष्णुहारीत याज्ञवल्क्योऽङ्गिराः।***
***यमापस्तम्बसम्वर्ताः कात्यायनबृहस्पती॥***
***पराशरव्यासशङ्खलिखिता दक्षगौतमो।***
***शातातपोवशिष्ठश्च धर्मशस्त्रयोजकाः॥*** [34]

The most significant texts are those authored by *Manu, Yajnavalkya, and Parasara*. The remaining fifteen individuals are identified as *Vishnu, Daksha, Samvarta, Vyasa, Harita, Satatapa, Vasishtha, Yama, Apastamba, Gautama, Devala, Sankha-Likhita, Usana, Atri,* and *Saunaka*.

Manu states:

***या वेदबाह्याः स्मृतयो याश्च काश्च कुदृष्टयः ।***
***सर्वास्ता निष्फलाः प्रेत्य तमोनिष्ठा हि ताः स्मृताः ॥*** [35]

**Meaning**: *जो स्मृति वेदमूलक नहीं हैं, जो वैदिक देव-यज्ञ आदि को झूठा बताने वाले ग्रन्थ हैं, उन सबको निष्फल और नरक गति देने वाले मानना चाहिए।*

The scriptures that are considered 'revealed' but are not part of the Veda, together with all the erroneous theories, are deemed to be futile, even if they are thoroughly developed, as they have been proclaimed to be based on ignorance.[36]

The authenticity of smritis is dependent upon their compatibility with the Vedas, a principle that also applies to the natural world. The Smritis that are in contradiction to the Vedas are considered to be invalid.

***Sadachara:*** *Sadachara* is identified as the third source of *Dharma*. The term pertains to the practices and traditions observed by individuals of moral excellence. Sadachara refers to the exemplary behavior exhibited by knowledgeable academics of the Vedas.

***सरस्वतीदृशद्वत्योर्देवनद्योर्यदन्तरम् ।***
***तं देवनिर्मितं देशं ब्रह्मावर्तं प्रचक्षते ॥*** [37]

**Meaning:** *सरस्वती और दृषद्वती इन देव नदियों के बीच जो देश है उस को 'ब्रह्मावर्त' कहते हैं।*

***तस्मिन् देशे य आचारः पारम्पर्यक्रमागतः ।***
***वर्णानां सान्तरालानां स सदाचार उच्यते ॥*** [38]

33 *Supra* note 30.
34 *Yajnavalkya Smriti* 1:4, 1:5 (Maharishi University of Management).
35 *Supra* note 25 at 12:95.
36 *Ibid.*
37 *Supra* note 25 at 2:17.
38 *Supra* note 25 at 2:18.

**Meaning:** *जिस देश में, परंपरा से, जो आचार चला आता है, वही वर्गों का और सङ्कीर्ण जातियों का 'सदाचार' कहा जाता है ॥*

*Brahmavarta*, as referred to by the sages, is the sacred territory situated amidst the divine rivers Sarasvati and Drishadvati, believed to have been bestowed by the gods. The practice that has been traditionally transmitted through generations among the four varnas and the mixed races of that region is referred to as the ethical behavior of individuals of high moral character (*Sadachara*).

***Inner Conscience:*** Finally, the fourth source of *Dharma* pertains to an individual's intrinsic sense of contentment. The inquiry emerges as to whether the pursuit of soul-satisfaction in one's work may be seen as *Dharma* for all individuals. The response is negative. *Dharma* refers to the work undertaken by scholars who possess virtuous and pure souls, adhering to the principles outlined in the Vedas. Such individuals engage in activities that align with their own soul's contentment, well-being, and affection.[39]

Manu through various *sloka* explained the fourth source of *Dharma.*

***विद्वद्भिः सेवितः सद्भिः - नित्यमद्वेषरागिभिः ।***
***हृदयेनाभ्यनुज्ञातो यो धर्मस्तं निबोधत ॥ [40]***

**Meaning:** *रागद्वेषरहित धार्मिक पण्डितों ने जिसको सदा सेवन किया और हृदय से मुख्य जाना, उस धर्म को तुम सुनो।*

"Learn that Dharma, which has been ever followed by, and sanctioned by the heart of, the learned and the good, who are free from love and hate." [41]

Here, this *sloka* implies that one should perform own *Dharma* which is independent of any emotional outcome. The inner conscience of being tells what is right and what is wrong. A duty has to be performed by being because it has to be performed. The obligation comes from within itself rather than any coercive means.

***एकोऽपि वेदविद् धर्मं यं व्यवस्येद् द्विजोत्तमः ।***
***स विज्ञेयः परो धर्मो नाज्ञानामुदितोऽयुतैः ॥ [42]***

**Meaning:** *जो द्विजोत्तम (श्रेष्ठ ब्राह्मण) वेदों को जानने वाला है, वह जिस धर्म का निर्णय करता है, वही परम धर्म समझा जाना चाहिए, न कि हजारों अज्ञानियों द्वारा कहा गया।*

The authoritative pronouncements of a knowledgeable Brahmana well-versed in the Veda should be regarded as the highest legal authority, but the proclamations made by numerous ignorant people hold no such legal force.[43]

39 *Supra* note 30.
40 *Supra* note 25 at 2:1.
41 *Ibid.*
42 *Supra* note 25 at 12:113.
43 *Ibid.*

***यत् सर्वेणेच्छति ज्ञातुं यन्न लज्जति चाचरन् ।***
***येन तुष्यति चात्मास्य तत् सत्त्वगुणलक्षणम् ॥*** [44]

**Meaning:** *जिससे ज्ञान प्राप्त करना चाहे, जिसको करने में लज्जा न आवे और जिस कर्म से मन प्रसन्न सन्तुष्ट रहे, उनको सत्त्वगुण का लक्षण मानना चाहिए ।*

When an individual desires to comprehend an action in its entirety, without experiencing any sense of shame and with a feeling of contentment within their heart, that action can be identified by the attribute of '*Sattva'*.[45]

***तमसो लक्षणं कामो रजसस्त्वर्थ उच्यते ।***
***सत्त्वस्य लक्षणं धर्मः श्रैष्ठ्यमेषां यथोत्तरम् ॥*** [46]

**Meaning:** *तम का काम, रज का अर्थ और सत्त्व का धर्म ये मुख्य लक्षण हैं। इनमें कम से अगला अगला श्रेष्ठ माना जाता है।*

The characteristic that sets *'Tamas'* apart is pleasure. The concept of wealth is associated with the quality of '*Rajas'*, while Spiritual Merit is identified as the defining characteristic of '*Sattva'*. It is crucial to acknowledge that each successive attribute is seen as superior to its preceding counterpart.[47]

The analysis provides evidence supporting the notion that only *'Sattva'* acts are capable of bringing bliss or contentment to the soul. Therefore, the presence of *Dharma* can be inferred.

### Factors Contributed to Evolution of Dharma

Manu asserts that No human action can be exempt from desire; every action undertaken by a person is driven by the impetus of desire.

***अकामस्य किया काचिद्दृश्यते नेह कर्हिचित् ।***
***यद्यद्धि कुरुते किञ्चित् तत्तत्कामस्य चेष्टितम् ॥*** [48]

**Meaning:** *संसार में कोई कर्म बिना इच्छा के होते नही देखा गया है।*

In the aforementioned *sloka*, Manu expounds upon the examination of the inherent human tendency, asserting that the impulse driving every action undertaken by an individual is rooted in his or her desire, commonly referred to as *Kama*. The inherent quality of any human being is an intrinsic characteristic. Then the next question is: What are the natural desires of man? The natural desire of individuals was discovered to be the pursuit of both sexual and emotional gratification, as well as material gain, commonly referred to as *Artha*. Vatsayana provides an elucidation of *Artha* as encompassing tangible

44 *Supra* note 25 at 12:37.
45 *Ibid.*
46 *Supra* note 25 at 12:38.
47 *Ibid.*
48 *Supra* note 25 at 2:4.

assets such as gold, livestock, and agricultural produce, as well as intangible resources like education and wisdom that facilitate the acquisition of prosperity. Therefore, the pursuit of *Kama* is thereafter followed by the pursuit of *Artha*.

Moreover, it has been discovered that the inclination *(kama)* of individuals can also be influenced by other innate emotions, such as anger *(krodha)*, passion *(moha)*, greed *(lobha)*, infatuation *(mada)*, and hostility *(matsarya)*. The six natural impulses, known as arishadvarga, were regarded as adversaries to human beings. If left unchecked, these impulses might incite individuals to harbor malicious thoughts in order to satisfy their personal ambitions, leading them to inflict harm on others. Manu elucidated the underlying factors contributing to all private and public harms resulting from the actions of one individual against another. The origin of all illicit activities perpetrated by individuals can be attributed to the natural instincts towards material gratification, commonly referred to as desire *(Kama)*. This pursuit of material pleasure *(Artha)* subsequently fosters a clash of interests among individuals, hence leading to conflicts.[49]

Ultimately, the *Dharma*, or ethical principles governing moral behavior, emerged as a resolution to the recurring dilemma resulting from innate human instincts.

The Trivarga, comprising the three-fold principles of *Dharma*, *Artha*, and *Kama*, was established with the intention of promoting the well-being and contentment of individuals. Additionally, a fourth ideal known as *Moksha*, which encompasses the pursuit of everlasting bliss, was also prescribed. The rationale behind the establishment of the three-fold ideals was to emphasize that the pursuit of material pleasure *(Artha)* should only be indulged in accordance with *Dharma* rather than in any other manner. Moreover, if an individual holds Moksha as an ideal, it would also exert an influence on their adherence to *Dharma* within the context of their worldly existence.

Based on extensive research and contemplation, the esteemed seers have proclaimed that the regulation of desire (referred to as *Kama*) for all worldly and material pleasures (known as *Artha*), as well as desires stemming from anger, greed, passion, infatuation, and enmity, must be governed by established principles rather than relying solely on the personal fortitude or frailty of individuals. Failure to do so will inevitably result in perpetual conflict, chaos, and the subsequent deprivation of happiness, tranquility, and even the very material pleasures sought after. The expansion of the rules of *Dharma* was undertaken with the intention of including all facets of human existence. Therefore, the whole set of regulations that delineated appropriate desires to be

49 *Supra* note 11 at 5.

entertained, as well as the suitable methods and strategies for attaining desired material pleasures, became collectively referred to as *Dharma*.[50]

### Attributes of Dharma

*Dharma* is difficult to explain. Many Bharatiya scholars defined the *Dharma* in their own way. However, we find different definitions depending on the context in which they are used. Scholars provide some basic attributes of *Dharma* for people's convenience. Adoption of these attributes makes the person ideal and hence called *Dharmic*. He becomes righteous in his actions. Some of the attributes that are mentioned in ancient literature include:

***धृतिः क्षमा दमोस्तेयं शौचमिन्द्रियनिग्रहः ।***
***धीर्विद्या सत्यमक्रोधो दशकं धर्मलक्षणम् ॥*** [51]

**Meaning:** *धैर्य, क्षमा, आत्म-संयम, चोरी न करना, शुद्धता, इंद्रियों पर नियंत्रण, बुद्धि, ज्ञान, सत्य, और अक्रोध — ये दस धर्म के लक्षण हैं।*

(1) Contentment, (2) Forgiveness, (3) Self-control, (4) Abstention from unrighteous appropriation, (5) Purity, (6) Control of the Sense-organs, (7) Wisdom, (8) Knowledge, (9) Truthfulness, and (10) Abstention of anger—these are the ten-fold forms of duty/Dharma.[52]

Generally, these attributes should be observed by all the citizens of this country. But particularly, all these attributes must be observed by Judicial officers and State officials in order to establish Nyaya/Justice/Dharma.

***अहिंसा सत्यमस्तेयं शौचमिन्द्रियनिग्रहः ।***
***एतं सामासिकं धर्मं चातुर्वर्ण्येऽब्रवीन्मनुः ॥*** [53]

**Meaning:** *अहिंसा, सत्य, चोरी न करना, शुद्धता, और इंद्रियों पर नियंत्रण — मनु ने इनको चारों वर्णों के लिए संक्षिप्त रूप से धर्म बताया है।*

"Ahimsa (non-violence), Satya (truthfulness), Asteya (not coveting the property of others), Shoucham (purity), and Indriyanigraha (control of the senses) are, in brief, the common Dharma for all the varnas." [54]

This *sloka* implies that it is common for every citizen of this country irrespective of caste, religion, race, sex etc. to observe these attributes (*Mahavrat*) in their daily life routine to abide by *Dharma.*

***अक्रोधः सत्यवचनं संविभागः क्षमा तथा ।***
***प्रजनः स्वेषु दारेषु शौचमद्रोह एव च ॥ ७ ॥*** [55]

50 *Ibid*.
51 *Supra* note 25 at 6:92.
52 *Ibid.*
53 *Supra* note 25 at 10:63.
54 *Ibid.*
55 *Mahabharata Shanti Parva*, 60:7 (Geeta Press, Gorakhpur, 2013).

*आर्जवं भृत्यभरणं नवैते सार्ववर्णिकाः ।*
*ब्राह्मणस्य तु यो धर्मस्तं ते वक्ष्यामि केवलम् ॥ ८ ॥* [56]

**Meaning:** *किसीपर क्रोध न करना, सत्य बोलना, धनको बाँटकर भोगना, क्षमाभाव रखना, अपनी ही पत्नी के गर्भ से संतान पैदा करना, बाहर-भीतर से पवित्र रहना, किसी से द्रोह न करना, सरल भाव रखना और भरण-पोषण के योग्य व्यक्तियों का पालन करना-ये नौ सभी वर्णों के लिये उपयोगी धर्म है। ॥ ७-८ ॥* [57]

"Being free from anger, Truthfulness, sharing one's wealth with others, forgiveness, procreation of children from one's wife alone (i.e maintain fidelity) Purity, Absence of enmity, Maintaining Simplicity, and take care of those who are worthy of being nourished, are the nine Dharmas of persons belonging to all the varnas."

This *sloka* also implies that these attributes are common for everyone for communal harmony.

*वेदाभ्यासस्तपो ज्ञानमिन्द्रियाणां च संयमः ।*
*अहिंसा गुरुसेवा च निःश्रेयसकरं परम् ॥ ८३ ॥* [58]

**Meaning:** *वेदों का अध्ययन, तप, आत्मज्ञान, इंद्रियों का संयम, अहिंसा, और गुरु सेवा, — ये सभी परम सर्वोत्तम मोक्षकारक (कल्याणकारी) हैं।*

Vedic Study, Austerity, Knowledge, Control of the Senses, Harmlessness, and Service of Elders—are the best means of attaining the highest good i.e. Dharma.[59]

Just as the Indian Constitution has fundamental duties for every citizen of this nation, these are the *Mahavrat* that must be observed in their daily-life routine so that the citizens do not deviate from the path of *Dharma*. Ultimately, the Rule of *Dharma* would prevail in society.

## 2. ARTHA AND KAMA SUBJECT TO *DHARMA*: TRIVARGA THEORY

The proponents of *Dharma* recognized the significance of fulfilling human desires as a fundamental component of existence. However, they held the belief that without the regulation of desires by legal means, unwanted consequences were likely to arise. Hence, it was universally agreed upon by proponents of *Dharma* that in order to establish a well-structured society and ensure the well-being and contentment of its members, the pursuit of material enjoyment *(Kama)* and wealth *(Artha)* must constantly align with and adhere to the principles of *Dharma* (Law), without any contradictions.[60]

56 *Id.* at 60:8.
57 *Id.* at 60:7, 60:8.
58 *Supra* note 25 at 12:83.
59 *Ibid.*
60 *Supra* note 11 at 5.

***तस्माच्छास्त्रं प्रमाणं ते कार्याकार्यव्यवस्थितौ ।***
***ज्ञात्वा शास्त्रविधानोक्तं कर्म कर्तुमिहार्हसि ।।*** [61]

**Meaning:** *इसलिए, शास्त्र ही प्रमाण है कार्य और अकार्य के निर्धारण में। शास्त्र के अनुसार निर्धारित कर्म को जानकर तुम्हें उसे करना चाहिए।*

"Let the shastras be your authority in deciding what you should do and what you should desist from doing."[62]

It is imperative to adhere to the teachings of the shastras and subsequently align one's actions properly.

In the same way, citizens of this country adhere to the principles given in the Bharatiya Constitution. The constitution is the *shastra* here.

Some individuals argue that the pursuit of *Dharma* and *Artha* can lead to the attainment of well-being and contentment. Alternative viewpoints argue that *Artha* and *Kama* possess superior qualities. Alternatively, some individuals assert that *Dharma* is the most superior. There are individuals who assert that the attainment of *Artha* is the exclusive means of achieving bliss.[63]

However, it is argued that the combination of *Dharma, Artha,* and *Kama* (referred to as *Trivarga*) collectively contributes to the attainment of well-being and contentment.[64]

Similarly, The Golden Triangle of the Indian Constitution established in the Maneka Gandhi case[65]—comprising Article 14 (Right to Equality), Article 19 (Right to Freedom), and Article 21 (Right to Life and Personal Liberty) — can be related symbolically to *Dharma, Artha,* and *Kama.*

Article 14 embodies the principle of *Dharma* by ensuring equality before the law and equal protection of the laws. It prohibits arbitrary state actions and ensures that every individual is treated justly, upholding the moral and ethical foundation of society. Article 19 guarantees freedom of speech, expression, movement, profession, and association, allowing individuals to pursue their *Artha* or material goals. Article 19(1)(g) allows the citizen to practice any profession, or to carry on any occupation, trade or business. This clearly shows the pursuance of *Artha.* This freedom provides individuals the space to achieve economic and social prosperity within the framework of a democratic society. Article 21, which guarantees the right to life and personal liberty, ensures that individuals have the right to live with dignity, pursue personal happiness, and enjoy the *Kama* aspect of life, provided it is in accordance with the law. It safeguards the individual's personal freedoms and protects their ability to lead

61 Swami Mukundananda (ed.), *Bhagavad Gita* 16:24 (Westland, 2021).
62 *Ibid.*
63 *Supra* note 11 at 6-7.
64 *Ibid.*
65 *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.

a fulfilling and meaningful life. (*Authors' own interpretation*).

Just as *Dharma*, *Artha*, and *Kama* together aim to balance different aspects of human existence, the Golden Triangle of the Constitution ensures a balance between individual freedoms, equality, and justice.

To have a deep understanding, let's have a look at what our ancient sources stated.

Manu states:

***धर्मार्थावुच्यते श्रेयः कामार्थौ धर्म एव च ।***
***अर्थ एवैह वा श्रेयस्त्रिवर्ग इति तु स्थितिः ॥ २२४ ॥*** [66]

**Meaning:** *कोई अर्थ और धर्म को, कोई काम, अर्थ को, कोई अर्थ को, कोई धर्म को ही अच्छा मानते हैं। पर धर्म, अर्थ और काम इन तीनों का आचरण करने से भला होता है-यह धर्मशास्त्र की आज्ञा है।*

***परित्यजेदर्थकामौ यौ स्यातां धर्मवर्जितौ ।***
***धर्मं चाप्यसुखोदर्कं लोकसङ्कुष्टमेव च ॥ १७६ ॥*** [67]

**Meaning:** *धर्म विहीन अर्थ और काम को त्याग देना चाहिए। जिस धर्म के आचरण से लोक में निंदा हो, उसे भी त्यागना चाहिए।*

Nevertheless, it is imperative to renounce the pursuit of desire *(Kama)* and material gain *(Artha)* when such pursuits are in conflict with the principles of *Dharma*.

In *Vatsayana's Kamasutra*, the author proceeds to elucidate the significance of *Dharma, Artha,* and *Kama.*

***एषां समवाये पूर्वः पूर्वो गरीयान् ॥ १४ ॥*** [68]

**Meaning:** *धर्म, अर्थ और काम के समुदाय में उत्तर से पूर्व पूर्व श्रेष्ठ है, अर्थात् काम से अर्थ श्रेष्ठ है और अर्थ से धर्म श्रेष्ठ है ॥ १४ ॥*

Out of *Dharma*, *Artha*, and *Kama*, each preceding one is superior to the following. [69]

This suggests that it is essential for the appropriate methods of attaining Artha, which refers to worldly prosperity and pleasures, to take precedence over the desire for such pursuits *(Kama)*. Additionally, *Dharma* should regulate both the desire for pleasure *(Kama)* and the methods employed to acquire material wealth *(Artha)*. Consequently, all the literary compositions concerning *Dharma* encompassed a set of mandated principles governing moral behavior, the adherence to which was seen as essential for the well-being of both the individual and society.

66 *Supra* note 25 at 2:224.
67 *Supra* note 25 at 4:176.
68 Dr. Ramananda Sharma (ed.), *Kamasutra* 1:2:14 (KrishnaDas Academy, Varanasi, 2001).
69 *Ibid.*

In short, the successful completion of the *Dharma* test was a prerequisite for *Artha* and *Kama*. The Trivarga doctrine governed ancient Bharatiya society. Significance was attributed to the concept of *Dharma*, also known as duty, and it was voluntarily assumed by both individuals and society. As a result, individuals were adhering to the principles of *Dharma*, rendering any external authority to enforce compliance with laws unnecessary. Members of the society were obligated to demonstrate mutual respect for one another's vested rights.

The Golden Triangle forms the constitutional bedrock for the Rule of Law, just as *Dharma*, *Artha*, and *Kama* provide a philosophical framework for a balanced and harmonious life in Bharatiya thought.

In this sense, both the Golden Triangle and the Trivarga of *Dharma*, *Artha*, and *Kama* seek to create a society where justice, freedom, and well-being are in harmony.

## 3. RULE OF LAW AND RULE OF DHARMA

After having a broad understanding of *Dharma* throughout this paper, now it is meaningful to discuss the Rule of Law developed by Western Jurisprudence and Rule of Law (*Dharma*) developed by Bharatiya Jurisprudence.

First, let's discuss what Greek thought and western jurisprudence contributed to the Rule of Law.

Around 350 BCE, Aristotle, the famous Greek philosopher, in his work *'Politics'* [70] asserted that laws should govern the state, rather than the whims of individual rulers. He also stressed that the law should be applied universally to all citizens, ensuring fairness and equality.

In 1215, King John of England signed the Magna Carta, which limits royal authority and establishes the principle that the monarch is subject to the law. This was an early recognition of the rule of law in Western Jurisprudence.[71]

During the 17th century, Sir Edward Coke, an influential English jurist, is generally credited with developing the modern concept of the rule of law. In the case of *Prohibitions del Roy* [72] (1607), he declared even the King was subject to the law. Furthermore, in 1610, In *Dr. Bonham's Case,* [73] Coke suggests that

70 Aristotle, *Politics* (Heinemann, 1932).

71 Jesus Fernandez Villaverde, "Magna Carta, the rule of law, and the limits on government" 47 *International Review of Law and Economics* 22-28 (2016).

72 *Prohibitions del Roy* (1607) 12 Co Rep 63.

Facts of the case: The case arose during the reign of King James I, focusing on the limits of royal power in judicial matters. A property dispute was brought before the Court of Star Chamber, which the King sought to prohibit by issuing a royal prohibition. Sir Edward Coke, Chief Justice of the King's Bench, opposed the King's intervention, arguing for judicial independence and the supremacy of the law. The court ruled in favor of Coke, stating that the King could not interfere with the jurisdiction of the common law courts.

73 *Dr. Bonham's Case* (1610) 8 Co Rep 113b.
Facts of the case: The case involved Dr. Thomas Bonham, a physician who was fined by the College of

common law can void parliamentary statutes that are unjust or unreasonable, an early expression of judicial review and the supremacy of law over governmental authority. This idea laid the foundation for constitutionalism in England.

And finally, in 1885, A.V. Dicey, a British constitutional theorist, in his work *'Introduction to the Study of the Law of the Constitution'* [74], identified three key principles of the rule of law: *Supremacy of Law, Equality before the Law,* and *Predominance of Legal Spirit.* This principle became foundational to the understanding of constitutional law in Britain and had significant influence on the development of constitutional systems in democratic countries.

This is how the Rule of Law was developed and adopted by most of the modern democratic States in their constitution.

In contrast, In the Bharatiya Jurisprudence, it is the Rule of *Dharma* rather than the Rule of Law developed by Western Jurisprudence. This principle owes its origin in one of the oldest Upanishad i.e. Brihadaranyaka Upanishad around 7th - 6th century BCE. In the Brihadaranyaka Upanishad, there is a *sloka* that emphasizes the importance of *Dharma*/Law which can be interpreted as an early form of the Rule of Law. The Upanishad states:

***स नैव व्यभवत्तच्छ्रेयोरूपमत्यसृजत धर्म तदेतत्क्षत्रस्य क्षत्रं यद्धर्म- स्तस्माद्धर्मात्परं नास्त्यथो अवलीयान्वलीयांसमाशंसते धर्मेण यथा राज्ञेवं यो वै स धर्मः सत्यं वै तत्तस्मात्सत्यं बदन्तमाहुर्धर्म वदतीति धर्म वा बदन्तं सत्यं वदतीत्येतद्धयेवैतदुभयं भवति ।।*** [75]

**Meaning**: *वह (धर्म) कभी क्षीण नहीं हुआ और उसने उस उत्तम स्वरूप को उत्पन्न किया जो श्रेयस्कर है। यह क्षत्रिय का धर्म ही उसका क्षत्रियत्व है, इसलिए धर्म से बढ़कर कुछ नहीं है। यहाँ तक कि कमजोर व्यक्ति भी धर्म के द्वारा बलवान से जीतने की इच्छा रखता है। जो धर्म है, वही सत्य है। इसलिए सत्य बोलने वाले को कहा जाता है कि वह धर्म बोलता है, और धर्म बोलने वाले को कहा जाता है कि वह सत्य बोलता है। यह दोनों (धर्म और सत्य) एक ही हैं।*

"Yet he did not flourish. He especially projected that excellent form, righteousness (Dharma). This righteousness is the controller of the Ksatriya. Therefore, there is nothing higher than that. (So) even a weak man hopes (to defeat) a stronger man through righteousness, as (one contending) with the king. That righteousness is verily truth. Therefore, they say about a person speaking of truth, 'He speaks of righteousness,' or about a person speaking of righteousness, 'He speaks of truth,' for both these are but righteousness." [76]

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Physicians for practicing medicine without a license. Bonham challenged the legality of the fine imposed by the College, arguing that the College was acting beyond its authority and that the punishment was unjust. The Court of Common Pleas, led by Chief Justice Sir Edward Coke, heard the case. The court ruled in favor of Bonham, asserting that the College's power to impose fines was excessive.

74 A V Dicey, *Introduction to the Study of the Law of the Constitution* 120-121 (Macmillan, London, 8th edn., 1915).

75 *Supra* note 9.

76 *Ibid.*

Interpreting the above *sloka*, The Law holds a position of utmost authority; No entity surpasses the supremacy of law; The law enforced by the king's authority facilitates the triumph of the vulnerable over the powerful.

Commenting on the above provision. Dr. S. Radhakrishnan observes "Even kings are subordinate to *Dharma*, to the Rule of Law." [77]

Furthermore, Justice Markandey Katju quoted the illustration[78] of Kalhana's Rajatarangini, a historical chronicle of the kings of Kashmir in 12th Century, where we find an incident about the eviction of cobbler, a perfect illustration of arbitrary state action to conform to the Rule of Law.

Lord Tribhuvanaswamy Temple was supposed to be built on the site of cobbler. The king's officials ordered the cobbler to evict the site. When Chandrapida, a King of Kashmir, came to know about the fact, protected a charmakar (cobbler) against his own officials. The king says:

***नियम्यताम् विनिर्माणं यद् अन्यत्र विधीयताम् पर्भूमि अपहृण*** सुकृतं कः ***कलंकेत ये द्रष्टारः सदसताम् ते धर्मे विनुगणा क्रियाः वयमेव विदधमश्चत यॉर्तु न्यायेण को अघ्वना।*** [79]

**Meaning**: "Stop the construction, or build the temple elsewhere. Who would tarnish such a pious act by illegally depriving a man of his land? If we, who are the judges of what is right and what is not, act unlawfully, who would then abide by the law?"

The cobbler said:

"Just as the palace is to Your Majesty, so is the hut to me. I could not bear its demolition. However, if Your Majesty asks for it, I shall give it up, seeing your just behavior."

Then, King purchased it after paying a satisfactory price.

The cobbler said:

***राजधर्म अनुरोधेन पर्वत्ता तयोचिता, स्वस्ति तुभ्यं चिरं स्थेया धर्म्या वृत्तांत पद्धति दर्शयन् ईदृशीह श्रद्धा श्रद्धेया धर्मचारिणाम।*** [80]

**Meaning**: "Yielding to another, however low, adhering to the Rajdharma, is the appropriate course for a King. I wish you well. May you live long, upholding the supremacy of the law."

In this way, this incident about the eviction of cobbler in the Kalhana's Rajatarangini is the perfect illustration of arbitrary state action to conform to the Rule of Law.

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77 *Supra* note 10.

78 Markandey Katju, Facebook post 26 April 2021, *available at:* https://www.facebook.com/share/p/c15EBvvZ8nDiWBX2/?mibextid=oFDknk (last visited on September 05, 2024),
Prof. (Dr.) Anurag Deep, 'Ancient Indian Wisdom, Rule of Law and Supreme Court' YouTube Lecture 31 August 2024, *available at:* https://youtu.be/9Vh82T8KmVY?feature=shared (last visited on September 05, 2024).

79 M.A. Stein (ed.), *Kalhana's Rajatarangini* 59-60 (Motilal Banarsidass, 2017).

80 *Id*. at 75-77.

In Mahabharata (the ancient era), we find the illustration[81] of the vow of lifelong celibacy (*Brahmacharya*) of King Shantanu's son, Dev Vrata. King Shantanu wanted to marry Satyavati, the daughter of a fisherman, but the condition of her father was that his grandson would succeed to the throne. The king couldn't decide what to do. After seeing his father's grief, Dev Vrata made the vow of celibacy and would never ascend the throne. By this illustration, we find that despite being the king, he couldn't compel her father to give his daughter without the condition. Even the sovereign was not above the law. During that time, people adhered to the Rule of Law.

The Ramayana, a Hindu epic, is a powerful example of the rule of law, highlighting the importance of adherence to Dharma (law, duty, and righteousness) over personal desires or emotions whether it was Lord Rama's acceptance of exile, Bharat's refusal to rule, or Lord Rama's decision to banish Sita. The story revolves around King Dasharatha's vow, which he fulfilled to his queen Kaikeyi, who demanded Rama be made king instead of him. Despite personal motives, Dasharatha was bound by the principle of fulfilling a vow.

Rama's acceptance of exile is a testament to the rule of law in action, where personal emotions and desires are secondary to the larger principle of maintaining the sanctity of promises and upholding Dharma.

*एवम् अस्तु गमिष्यामि वनम् वस्तुम् अहम् तु अतः |*
*जटा चीर धरः राज्ञः प्रतिज्ञाम् अनुपालयन् || २-१९-२* [82]

**Meaning:** "Let it be, as you said it. I shall fulfill the king's promise, go to the forest from here to reside there, wearing braided hair and covered with a hide."

His decision to go into exile was rooted in his belief in Raja Dharma, which dictates that a king or future king must always set an example by upholding the law, fairness, and justice. This action reinforces the concept that no one, not even a king or prince, is above the law.

Bharata's refusal to rule, despite being made king by Kaikeyi's manipulations, further solidifies the rule of law. Bharata, despite being made king by Kaikeyi's manipulations, regarded Rama as the rightful ruler and placed Rama's sandals on the throne as a symbol of his rule.

*ततः शिरसि कृत्वा तु पादुके भरतः तदा |*
*आरुरोह रथम् हृष्टः शत्रुघ्नेन समन्वितः || २-११३-१* [83]

81 Kisari Mohan Ganguly, *The Mahabharata (English)* Section C (Wisdom Library) *available at:* https://www.wisdomlib.org/hinduism/book/the-mahabharata-mohan/d/doc4093.html (last visited on September 05, 2024).

82 K.M.K. Murthy (tr), *Valmiki Ramayana*, Book II: Ayodhya Kanda, Chapter 19 (Sanskrit Documents) *available at :* https://sanskritdocuments.org/sites/valmikiramayan/ayodhya/sarga19/ayodhya_19_frame.htm (last visited on September 05, 2024).

83 K.M.K. Murthy (tr), *Valmiki Ramayana,* Book II: Ayodhya Kanda, Chapter 113 (Sanskrit Documents)

**Meaning:** Thereafter, keeping the sandals on his head, Bharata delightfully ascended his chariot along with Shatrughna.

This act further solidifies the concept that rightful authority cannot be usurped, even by royal decree.

Despite Sita's purity and trials, rumors and doubts began to circulate among the citizens about her time in Ravana's captivity. This public sentiment posed a significant problem for Rama, who was duty-bound to uphold the moral integrity of the kingdom and its values. Rama was bound by Raja Dharma, which required him to prioritize the welfare, trust, and perception of his subjects over his personal feelings. He believed that a ruler must ensure the faith of the people in their king's actions and decisions, and that the trust of his subjects in the moral uprightness of the royal family was crucial for the stability and reputation of the kingdom. In one of the most difficult decisions of his life, Rama ordered Sita to be exiled to the forest despite her innocence. This action reflects the harsh reality of the rule of law in ancient times, where the ruler's personal relationships and feelings were secondary to the expectations of the kingdom. Rama's painful adherence to Dharma demonstrated that the rule of law, as interpreted through the lens of public morality and duty, had to take precedence over his personal life. Ultimately, Rama's decision to banish Sita serves as a profound example of the application of the rule of law in the Ramayana, illustrating the concept of Raja Dharma, where a ruler must prioritize the welfare, reputation, and trust of the people over personal feelings, even when it results in personal tragedy.

In conclusion, the Ramayana highlights the importance of the rule of law in ancient Bharatiya society, emphasizing the importance of adherence to Dharma, justice, and fairness.

In the classical era, Kautilya, a distinguished Bharatiya scholar and thinker, highlights the importance of *Dharma* and emphasizes the ethical foundations essential for establishing the rule. These ethical principles serve as the core mechanism to safeguard the true essence of the law.

Chanakya mentions the Rule of Law in his work 'Arthashastra':

*प्रजासुखे सुखं राज्ञः प्रजानाञ्च हिते हितम् ।*
*नात्मप्रियं हितं राज्ञः प्रजानान्तु प्रियं हितम् ।*
*तस्मान्नित्योत्थितो राजा कुर्यादर्थानुशासनम् ॥* [84]

**Meaning**: *प्रजा के सुख में राजा का सुख, प्रजा के कल्याण में उसका कल्याण निहित है। राजा को*

*available at :* https://sanskritdocuments.org/sites/valmikiramayan/ayodhya/sarga113/ayodhya_113_frame.htm (last visited on September 05, 2024).

84 R P Kangle, *The Kautilya Arthashastra* Book 1, Chapter 19, Verses 34-35 (Motilal Banarsidass, 2nd edn.,1972).

*केवल उसी को अच्छा नहीं मानना चाहिए जो उसे प्रसन्न रखता है लाभ पहुंचाता है। राजा को प्रजा के फायदे के अनुरूप व्यवहार करना चाहिए।*

"In the happiness of his subjects lies the king's happiness, in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever pleases his subjects." [85]

This sloka underscores that the ruler is duty-bound to uphold justice and the law, reinforcing the principle of *Dharma* as the foundation of governance. Chanakya advocated that a king is not above the law and must be just and fair, ensuring that the legal system is followed by both rulers and subjects alike, establishing the early notions of the Rule of Law.

Along with this, we find similar illustrations in ancient Bharatiya texts such as Mahabharata, Ramayan, Smrits, Puranas, Upanishads establishing the notions of the Rule of Law (*Dharma*).

Furthermore, it is necessary to understand the term 'Law' in the Rule of Law and how this 'Law' is different from '*Dharma'*.

Let's first try to understand "Law," not through a purely jurisprudential lens, but in a popular sense. 'Law' is something codified or made by a competent body. For example, in the United Nations (UN) system, all individuals, institutions, and entities, both public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated.

In Western philosophy, from the United Nations to individual nations, and from jurists to laypeople, 'Law' primarily refers to "Man-Made Law." This "Man" could be a king, a parliament, a dictator, a democratically elected government, a president, or another authority figure. A key question is how this powerful "Man" is created. The main creator of this so-called "Man" is the "Contractarian theory," which describes a contract between the sovereign and the individual, with mutual considerations. For the king, the consideration is the acceptance of his supremacy; for the citizen, it is the security provided by the sovereign. The provider is always powerful, and thus the sovereign holds significant power. In most countries, except for a few like Bhutan, the sovereign (be it the State, Government, King, dictator, army chief, etc.) is the provider of everything, and thus, his commands matter. In Austin's words, "The command of the sovereign is the law."[86]

In contrast, the Bharatiya concept of sovereign and justice differs from that of the West. Here, the parties to the contract in the "Contractarian theory" are *Dharma* (Divine) and the individual. The consideration is simple: you

85 *Ibid.*

86 Dr. Seema Singh, "Judiciary: Rule of Dharma and Rule of Law" 45 *Manthan Journal of Social and Academic Activism* 5-10 (2024).

save *Dharma*, and *Dharma* will save you and thus the *Dharma* is sovereign here, unlike in the western thought where the king is sovereign. Here, the king is merely a representative of *Dharma*, bound by the command of *Dharma*, which is popularly known as the *Dharma* of the King. In the words of S. Radhakrishnan:

"Much has been said about the sovereignty of the people. We have held that the ultimate sovereignty rests with the moral law, with the conscience of humanity. People as well as kings are subordinate to that. Dharma, righteousness, is the king of kings." [87]

Manu's writings strongly emphasize the imperative nature of diligently adhering to the principles of *Dharma*. The *Dharma* serves as a safeguard for individuals who uphold and defend its principles. The *Dharma* provides protection to individuals who uphold and safeguard its principles. Individuals who engage in the act of dismantling or undermining the principles and teachings of *Dharma* are themselves subjected to a process of destruction or downfall. Hence, it is imperative to preserve *Dharma* in order to avoid the ensuing destruction that may befall us.[88]

***धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः ।***
***तस्माद्धों न हन्तव्यो मा नो धर्मो हतोऽबधीत् ॥*** [89]

**Meaning**: *धर्म का लोप कर देने से वह उस पुरुष को नष्ट कर देता है और धर्म की रक्षा करने से वह भी रक्षा करता है। इसलिए धर्म का नाश न करना चाहिए जिससे नष्ट धर्म हमारा नाश न करे।*

The notion articulated in this sloka holds great value and significance. The aforementioned concise statement encompasses the fundamental principle of the Rule of Law. The conveyed meaning posits that the setting up of a well-organized society is contingent upon individuals adhering to the principles of *Dharma*, thus safeguarding *Dharma* itself. Consequently, this orderly society, embodying the essence of *Dharma*, reciprocally upholds the rights of its constituents. The purpose of the Rules of *Dharma* was to establish guidelines for individual behavior with the aim of limiting an individual's rights, freedoms, interests, and desires to foster the well-being of other individuals within society. Simultaneously, these rules imposed an obligation on society to ensure the well-being and protection of individuals through their social and political institutions. In brief, *Dharma* served as a regulatory framework for the reciprocal commitments between individuals and society. Hence, it was emphasized that safeguarding *Dharma* was advantageous for both the individual and the broader society. Manu cautions against the destruction of

87 Constituent Assembly Debates on January 20, 1947 *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).

88 *Supra* note 25 at 8:15.

89 *Ibid.*

*Dharma*, emphasizing that such actions may lead to one's own demise. The maintenance of a 'State of *Dharma'* is crucial for the promotion of peaceful coexistence and prosperity.[90]

Therefore, the purpose of man-made law is to ensure the protection of *Dharma*. This is why "Yato Dharmastato Jayaḥ" was chosen as the motto of the Supreme Court.

The phrase यतो धर्मस्ततो जयः is a recurring expression found in the Mahabharata on fifteen occasions. It conveys the idea, "*Where there is Dharma, there will be victory*."

In Mahabharata - Udyoga Parva, Dhritarashtra to Sanjay:

***सर्वं त्वमायतीयुक्तं भाषसे प्राज्ञसंमतम्।***
***न चोत्सहे सुतं त्यक्तुं यतो धर्मस्ततो जयः।।*** [91]

**Meaning:** *धृतराष्ट्र संजय से कह रहे हैं कि जो कुछ तुम कह रहे हो, वह विद्वानों द्वारा मान्य है और ज्ञान से परिपूर्ण है। लेकिन मैं अपने पुत्र दुर्योधन को छोड़ने में असमर्थ हूँ, यद्यपि मैं जानता हूँ कि जहाँ धर्म है, वहीं विजय होती है।*

"Dhritarashtra is replying to Sanjaya saying that whatever you say is recognized by scholars and is full of wisdom. But I am unable to leave my son Duryodhana, even though I know that where there is Dharma, that's where victory lies."

In Mahabharata - Anushasan Parva, Bhishma told Duryodhana:

***उक्तवानस्मि दुर्बुद्धिं मन्दं दुर्योधनं पुरा।***
***यतः कृष्णस्ततो धर्मो यतो धर्मस्ततो जयः।।*** [92]

**Meaning**: *मैंने पहले ही उस दुर्बुद्धि और मंदबुद्धि दुर्योधन से कहा था, जहाँ कृष्ण हैं, वहाँ धर्म है, और जहाँ धर्म है, वहीं विजय है।*

"Where there is Krishna, there is Dharma; where there is Dharma, there is victory."

This *sloka* implies the supremacy of *Dharma* over anyone. Here, Krishna in the Mahabharata has been symbolized with *Dharma*. To understand *Dharma,* it is necessary to read Krishna's principles and character first.

Recently, individuals ranging from Supreme Court judges to prominent academicians have questioned the relevance of the Supreme Court's motto, demanding its removal on the grounds that it is religious in nature. Such interpretations are deplorable and stem from a lack of understanding of our own Indic philosophy and an excessive reliance on Western philosophy. Similarly,

90 *Supra* note 11 at 8.

91 *Mahabharata Udyoga Parva*, 5:39:7 (Geeta Press, Gorakhpur, 2013).

92 *Mahabharata Anushasan Parva*, 13:153:39 (Geeta Press, Gorakhpur, 2013).

Brian Tamanaha, in his work, '*A Concise Guide To The Rule Of Law*'[93], elaborated his concern about the potential for the Rule of Law to turn into Rule by judges or lawyers. Judges in many systems have become more assertive in their decisions, sometimes stepping into political matters, particularly when interpreting broad laws like those involving human rights. This can make judges a target for political attacks, leading to a politicized judiciary, which reduces the independence of the courts and weakens the Rule of Law. Judges need to maintain a careful balance, applying the law while recognizing the limited role that courts should play in the larger political system.[94]

To understand this conflict of law and *Dharma*, we need to turn the pages of European history, where the tension between church and king was evident and escalating, ultimately leading to the division of Christianity into Catholicism and Protestantism. When crimes were committed, disputes often arose over whether the perpetrator should be tried under the secular law of the state or under religious canon law. The thirst for power exacerbated the conflict. Eventually, roles were divided: In medieval Europe, laws made by secular authorities, such as kings or rulers, were considered secular law. These laws governed the affairs of the state and its subjects. Conversely, laws made by the church, particularly the Catholic Church, were known as canon law, dealing with matters concerning the church, clergy, and religious practices[95].

Canon law is still applicable within the Catholic Church and its institutions worldwide, including Vatican City, where it serves as the legal system for church governance and matters related to faith and doctrine.[96] This separation made the king the most powerful sovereign, and his words became the rule of law. In a democracy, the king was replaced by a democratically elected government, and laws passed by the legislature became the rule of law. However, this raises a crucial question: In a modern democratic system, where numbers matter for a particular party to form the government, and most political parties are involved in appeasement to consolidate their vote bank, does the elected government truly represent the collective will of the people? Brian Tamanaha had a concern that the Rule of Law is that, by itself, it doesn't guarantee democracy, respect for human rights, or just laws. Just because a legal system follows the Rule of Law doesn't mean that the laws are good or deserving of obedience. In situations where the law supports an authoritarian regime, imposes unwanted values on the people, or is used by one group to oppress another, the Rule of Law can actually reinforce that oppression. So, while the Rule of Law is

93 *Supra* note 2.
94 *Ibid.*
95 *Supra* note 86.
96 *Ibid.*

necessary for a fair legal system, it's not enough by itself.[97] Perhaps this is what compelled Rawls to imagine a 'Veil of Ignorance,' behind which lawmakers create laws that are good for all.[98] However, we all know this is a hypothetical situation and not actually possible. This is why many new legislations, instead of resolving conflicts, create more litigation. If laws themselves are not free from the infirmities of biasness, how can they establish a true Rule of Law? Brian Tamanaha was cautious about how the Rule of Law is used in rhetoric. Many abuses have been committed by governments that claim to uphold the rule of law but don't actually follow it. The rule of law is a powerful ideal that can be used by political leaders to justify their actions, even when they are violating the very principles they claim to support. This undermines trust in the rule of law, and the only solution is to hold leaders accountable to legal standards and not be deceived by empty promises.[99] The crux of the matter is, if the Rule of Law is based absolutely on man-made laws, then actually it can never be truly achieved. Rather, the Rule of Law must be based on *Dharma* which is deeply rooted in the ancient Bharatiya society.

## CONCLUSION

The prevailing judiciary, along with certain intellectuals and possibly even Dicey, often emphasizes the superiority of human intellect. However, human intellect has its limitations. In contrast, it is the intellect of nature that holds ultimate supremacy. This is why courts worldwide turn to natural law to address the shortcomings of man-made laws. Concepts such as natural law, due process, and the law of good conscience are essentially various forms of *Dharma*. The Indian Supreme Court's motto, "*Yato Dharmastato Jayaḥ*," reflects this principle, and the powers granted under Articles 32, 136, and 142 are designed to uphold it. In essence, *Dharma* forms the foundation of the basic structure of any Constitution.

In Bharatiya philosophy, *Dharma* extends the role of the sovereign beyond mere written laws, assigning duties to protect not only land, animals, birds, rivers, forests, and the environment but also the entire universe. *Dharma* plays a crucial role in shaping various branches of jurisprudence, including environmental jurisprudence, restorative jurisprudence, compensatory jurisprudence, and animal rights jurisprudence, among others. Therefore, *Dharma* represents the ultimate goal, with the judiciary serving as a mechanism to realize it through the framework of laws.

97 *Supra* note 2.
98 *Supra* note 86.
99 *Supra* note 2.

# Spirituality: The Foundation of Law*

The chapter "Spirituality: The Foundation of Law" examines the integration of spiritual principles into jurisprudence, focusing on the foundational concepts of *Satya* (truth) and *Dharma* (righteousness) as guiding principles of justice. It emphasizes the judiciary's duty to uphold these principles, as reflected in the mottos "Yato Dharmastato Jayah" and "Satyameva Jayate," which underscore the relationship between truth and justice. Drawing on Bharatiya philosophical traditions, the chapter highlights the six systems of Bharatiya philosophy (*Shaḍ Darshanas*) and their role in shaping the metaphysical and ethical understanding of law. It critiques the modern legal system for its limited engagement with the spiritual and philosophical dimensions of Dharma, advocating for their integration into legal education and practice to ensure a holistic approach to justice. The chapter further underscores the constitutional mandate under Article 142, which empowers the judiciary to deliver "complete justice," aligning legal interpretation with the principles of fairness, morality, and righteousness. It calls for bridging the gap between law and spirituality to enhance public confidence in the judiciary and to uphold justice as a reflection of universal order and ethical governance.

## INTRODUCTION

The Supreme Court's motto, "*Yato Dharmastato Jayah*" (Sanskrit: यतो धर्मस्ततो जयः), originates from the Mahabharata, a Hindu epic, and carries a profound message: "Where there is Dharma, there will be Victory." This motto embodies the conviction that justice and righteousness will ultimately succeed and bring about triumph. It stands as a guiding principle, emphasizing the importance of maintaining moral and ethical values within both the legal system and society as a whole.

The significance of the motto "*Satyameva Jayate*" (Sanskrit: सत्यमेव जयते), meaning "Truth alone triumphs," is rooted in its origin from a mantra in the

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* Seema Singh, **"Sprituality: The foundation of Law"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 21-30 (2025).

Hindu scripture *Mundaka Upanishad*. On 26 January 1950, coinciding with the day India became a republic, this mantra was adopted as the national motto. When examining both the slogans "*Satyameva Jayate*" and "*Yato Dharmastato Jayah*," it becomes clear that they are interconnected expressions of the same fundamental principle.

Certainly, these two mottos underscore the symbiotic connection between truth and righteousness. "*Satyameva Jayate*" underscores the fundamental importance of truth, emphasizing that honesty should be the guiding principle in every facet of life. Simultaneously, "*Yato Dharmastato Jayah*" emphasizes the notion that victory and success are achievable only when one adheres to and follows the path of righteousness, or Dharma.

These two mottos complement each other, illustrating that the victory of dharma is intricately tied to the prevalence of truth. The establishment of truth and the embrace of righteousness lay the foundations for justice and triumph. Therefore, these mottos act as perpetual reminders of the significance of truth, morality, and justice in both personal and societal contexts.

The mottos "*Satyameva Jayate*" and "*Yato Dharmastato Jayah*" declare that the Supreme Court holds the responsibility of upholding dharma by protecting satya (truth). This legal philosophy centers on the pursuit of truth to establish righteousness. Unfortunately, it is often lamentable that the process of determining the meaning of "Satya" to establish "Dharma" is seldom addressed in the field of legal jurisprudence.

While the mottos underscore the significance of truth and righteousness, they don't explicitly explore the methodologies used to ascertain truth within the legal system. Deciphering the meaning of "Satya" and its implementation in establishing "Dharma" is an intricate and multi-dimensional undertaking.[1]

## 1. LEGAL JURISPRUDENCE & QUEST FOR TRUTH

Legal jurisprudence must indeed, delve into the inquiry of determining the significance of "Satya" in the pursuit of justice. This requires a comprehensive investigation into evidence, legal precedents, factual accuracy, logical reasoning, and adherence to principles of fairness. The court's responsibility is to scrutinize facts, analyze arguments, assess testimonies, and gauge the overall credibility and reliability of the information presented.

Determining "Satya" demands a thorough and unbiased approach that takes into account the various perspectives and intricacies involved. This may encompass cross-examination, expert testimony, forensic evidence, and other

1 Dr. Eknath Mundhe (ed.), *The wisdom of Bharat: An exploration of the Indian knowledge system* (Dr. Eknath Mundhe S. M. Joshi College, Hadapsar Pune-28 Maharashtra India, 2023).

investigative methods, all geared toward unveiling the truth and upholding justice.

In the pursuit of establishing "Dharma," the legal system must consistently strive to enhance its methods of determining truth, incorporating advancements in technology, research, and legal scholarship. By fostering open dialogue and rigorous analysis, legal jurisprudence can more effectively address the crucial question of how to ascertain the meaning of "Satya" to establish "Dharma."

To grasp the meanings of "Satya" and "Dharma," we can explore the philosophical traditions of both Greek and Hindu cultures. While these belief systems share some aspects, they also exhibit fundamental differences. Greek philosophy was rooted in humanism, focusing on the tangible world and what was perceptible to the senses. In contrast, the Bharatiya (Indian) system was grounded in spiritualism, acknowledging the existence of a metaphysical realm beyond the physical world.[2]

The Greeks placed significant emphasis on the tangible and observable aspects of life, seeking to comprehend the world through rational inquiry and logical reasoning. Philosophical frameworks developed by figures like Socrates, Plato, and Aristotle centered on ethics, politics, and the pursuit of knowledge through observation and analysis of the material world.[3]

In contrast, the Bharatiya (Indian) philosophical tradition, deeply rooted in spiritualism, acknowledged the existence of a higher plane beyond the physical realm. Concepts like "Satya" (truth) and "Dharma" (righteousness) in Hindu philosophy are intricately linked to this metaphysical understanding. The pursuit of truth and the establishment of righteousness in the Bharatiya system encompass not only the material world but also the spiritual and moral dimensions of existence.

While the Greek and Bharatiya systems diverge in their philosophical foundations, they both aim to grapple with questions of ethics, morality, and the pursuit of truth.[4] Examining these varied perspectives can offer valuable insights into the meaning and significance of "Satya" and "Dharma" within their respective cultural contexts. Bharatiya (Indian) metaphysics doesn't adhere to a single doctrine but encompasses a rich diversity of perspectives on the nature of "Being." This diversity is evident in the broad spectrum of ideas found in ancient texts like the Vedas, as well as in the classical systems of Hinduism, Buddhism, and Jainism.

The Vedas, an ancient collection of scriptures, contain profound insights and

2 *available at:* https://iep.utm.edu/ancientgreek-philosophy/ (last visited on November 20, 2024).

3 *available at:* https://wisdomcenter.uchicago.edu/news/wisdom-news/whatdid-socrates-plato-andaristotle-think-about-wisdom (last visited on November 20, 2024).

4 *available at https://iep.utm.edu/modernmorality-ancient-ethics/* (last visited on November 20, 2024).

reflections on the nature of reality, the self, and the cosmos. Within Hinduism, various philosophical systems such as Advaita Vedanta, Vishishtadvaita, and Dvaita provide distinct perspectives on metaphysical questions, exploring concepts like Brahman, Atman, and the relationship between the individual and the universal.[5]

Similarly, Buddhism and Jainism, emerging as distinct traditions within the broader Indian cultural context, also present their unique metaphysical frameworks. These systems delve into notions such as the impermanence of phenomena, the nature of suffering, the concept of non-self, and the interconnectedness of all beings.

The diversity in Bharatiya metaphysics reflects the richness and complexity of Indian philosophical thought, recognizing the existence of multiple ways to understand and relate to the nature of "Being." Through critical inquiry, dialogue, and the exploration of these diverse ideas, one can develop a deeper appreciation for the multifaceted nature of Bharatiya metaphysics and its significance within various philosophical traditions.

## 2. SANATAN DARSHAN & SATYA

Hindu philosophers primarily delved into metaphysical questions, epistemology, philosophy of language, and moral philosophy. They established various schools of thought, each distinguished by its unique approach to understanding reality. However, a common thread among these schools was their acknowledgment of the Vedas as authoritative scriptures. Additionally, they shared a belief in the existence of a permanent individual self-known as *ātman*, considered an integral part of a broader reality known as Brahman.

The Hindu philosophical tradition encompassed diverse perspectives on metaphysics. Various schools, including Advaita Vedanta, Vishishtadvaita, and Dvaita, presented unique interpretations of the nature of reality and the connection between the individual self and the broader cosmic order.

In the realm of epistemology, another significant area of inquiry, Hindu philosophers explored questions related to knowledge, perception, and the methods of acquiring valid understanding. They formulated a range of theories of knowledge, such as *pramāṇas* (means of valid cognition), laying the foundation for understanding the nature of truth and the validity of knowledge claims.

The philosophy of language played a pivotal role in clarifying the dynamics of communication, meaning, and the correlation between language and reality within the Hindu philosophical tradition. Philosophers delved into the intricate aspects of language, examining its capacity to convey truth, while

5 *available at:* https://www.britannica.com/topic/Vedanta (last visited on November 20, 2024).

also recognizing its limitations and challenges.

Moral philosophy in the Hindu tradition centered on comprehending ethical principles, moral duties (dharma), and the pursuit of moral excellence. The teachings of Hindu philosophers offered guidance on ethical conduct, social responsibilities, and the cultivation of virtues.

Throughout these philosophical explorations, the concept of *ātman* held a central position. In Hindu metaphysics, *ātman* was acknowledged as an eternal, individual self intricately linked to the ultimate reality of Brahman. The understanding of the relationship between *ātman* and Brahman varied among different schools of thought, with some emphasizing their identity and others underscoring their distinction while maintaining a profound interconnectedness.

The diverse nature of Hindu philosophy encompasses a broad spectrum of metaphysical, epistemological, linguistic, and ethical considerations. These investigations into the nature of reality and the self-remain a fertile ground for philosophical exploration and contemplation.

## 3. SHAḌ DARSHAN, INQUIRY & VALIDATION

Given the diversity of philosophical perspectives within Hinduism, there arose a need to rigorously establish and validate these views through inquiry. Consequently, logical and epistemological tools were developed, customized to the specific requirements and beliefs of individual philosophers. Although more than a dozen schools of thought existed, they are commonly grouped into six major schools, with this approach often combining several distinct schools together. These six schools can be organized into three pairs: Sāṅkhya–Yoga, Vedānta–Mīmāṃsā, and Nyāya–Vaiśeṣika.

The Sāṅkhya and Yoga schools of thought are considered one pair. Sāṅkhya focuses on the analysis and comprehension of the components of existence, while Yoga emphasizes the practical application of methods to achieve spiritual realization and union.[6]

Vedānta and Mīmāṃsā form another pair within the six major schools of thought. Vedānta delves into the study of the Upanishads, interpreting them as revealing the ultimate truth of reality and emphasizing the oneness of the individual self (ātman) and the supreme reality (Brahman). In contrast, Mīmāṃsā focuses on ritualistic practices and the interpretation of Vedic texts, particularly concerning religious duties and rituals.[7]

The final pair comprises Nyāya and Vaiśeṣika. Nyāya is concerned

6 *available at:* https://egyankosh.ac.in/bitstream/123456789/81060/1/Block-5.pdf (last visited on November 20, 2024).

7 *available at:* https://www.britannica.com/topic/Indian-philosophy/Earlysystem-building (last visited on November 20, 2024).

with logical reasoning and epistemology, offering a systematic approach to the acquisition of knowledge and valid cognition. Vaiśeṣika explores the metaphysics of the universe, analyzing the nature of reality through the categorization and classification of different types of substances.[8]

Although these six schools of thought are frequently highlighted, it's crucial to acknowledge that they constitute only a segment of the diverse philosophical panorama within Hinduism. Each school crafted its distinct perspectives, methodologies, and insights, adding to the intricate tapestry of the Hindu philosophical tradition.

In addition to their philosophical frameworks, numerous darshana (schools of thought) within Hindu philosophy have formulated comprehensive methods and practices designed to facilitate individual liberation. At the core of these darshana is the theory of consciousness. Yoga, in particular, stands as a valuable tool for elevating one's level of consciousness and establishing a connection with the supreme divine.

## 4. SPIRITUALITY & LAW

The diverse darshana within Hindu philosophy all prioritize spiritual life, devotion, introspection, and meditation on the ultimate reality. These practices are deemed crucial for spiritual evolution, self-discovery, and achieving liberation (moksha).

Yoga, blending physical and spiritual disciplines, presents a methodical way to cleanse the body and mind, foster inner awareness, and surpass the confines of everyday consciousness. Practices like asanas (physical postures), pranayama (breath regulation), concentration, and meditation aim to reach elevated states of consciousness, facilitating a profound comprehension of oneself and the divine.

In Hindu philosophy, devotion (bhakti) holds immense significance as a potent channel to commune with the divine. It entails profound love, surrender, and veneration of the ultimate reality through rituals, prayers, and introspection. Bhakti practices nurture a profound spiritual bond and a feeling of oneness with the divine.

Additionally, the darshana encourage directing the mind inward through self-reflection, self-inquiry, and introspection. This practice entails scrutinizing one's thoughts, desires, and attachments, culminating in self-awareness and the recognition of the authentic nature of the self.

The practice of focusing the mind through meditation, be it through

8 Analytic Philosophy in Early Modern India, *available at:* https://plato.stanford.edu/entries/earlymodern-india/ (last visited on November 20, 2024).

concentration or contemplation, holds a key position in the quest for spiritual understanding. By quieting the mind, individuals strive to move beyond everyday awareness and directly encounter the divine essence.

Together, the practices and philosophies within Hindu darshana offer a complete structure for spiritual growth. They seek to elevate consciousness, nurture devotion, and guide seekers on their path toward self-discovery and merging with the ultimate reality. Within the framework of Sanatana Dharma (Eternal Truth), humans are perceived beyond mere physical forms. This philosophy views individuals as embodiments of the entire universe and as beings of pure consciousness. They traverse multiple existences across diverse realms within the expansive cosmos, with their core.

The consciousness innate in every person establishes a deep link with the supreme divine. Through it, one comprehends the dynamic relationship between Satya (truth) and the essence of Dharma (righteousness). Within Sanatana Dharma, Dharma is acknowledged as the guiding force that sustains communities and preserves balance in the universe.

Recognizing the vastness of consciousness and its inherent link to the divine, individuals attain profound insights into the core truths of existence. They grasp that their essence transcends the confines of their bodies, belonging instead to a larger cosmic harmony.

In this philosophical structure, the quest for Dharma takes precedence. Dharma includes not just individual moral obligations but also the wider duty to preserve virtue and foster societal concord. When individuals synchronize their actions with Dharma's principles, they actively nurture societal welfare and play a role in upholding cosmic equilibrium.

Sanatana Dharma underscores the unity among all beings and the innate divinity within each person. It promotes a comprehensive perception of human life, surpassing physical limitations and acknowledging the everlasting essence of consciousness. By adhering to Dharma's principles and fostering this bond with the supreme divine, individuals aspire to discover their authentic selves and play a role in the broader harmony of the universe.

Within Hindu philosophy, the role of law is to establish Dharma, which occupies a pivotal role in individuals' lives. Hindus acknowledge four primary aims or Purushartha: Dharma, Artha, Kama, and Moksha. Among these, Dharma is seen as fundamental and paramount. The ultimate objective for Hindus is to pursue the path of Dharma to achieve Moksha, signifying Salvation.

Dharma acts as a guiding principle for Hindus, offering a moral and ethical structure for righteous living. It highlights the significance of adhering to moral and societal responsibilities, fostering harmony and fairness within the community. Adhering to Dharma enables individuals to synchronize their

actions with elevated spiritual truths.

The other Purushartha, like Kama (desire) and Artha (wealth), hold acknowledgment but must be pursued within Dharma's constraints. Hindu spirituality instructs that desires or wealth accumulation sought outside Dharma's scope are deemed sinful. This principle extends to modern legal interpretations where actions conflicting with Dharma, such as sexual offenses or other transgressions against individuals, are seen as unethical and subject to legal consequences.

Likewise, accumulating wealth without upholding Dharma is considered sinful and is addressed as an offense under different legislations, including the Prevention of Corruption Act or laws related to property offenses.

Dharma acts as a moral compass, directing individuals to align their actions with elevated principles and ethical values. Upholding Dharma in their decisions and conduct allows individuals to live virtuously and move closer to the ultimate goal of Moksha.

Comprehending Dharma enables individuals to grasp both codified and unspoken laws, while the fundamental goal of the justice system remains the preservation and defense of this Dharma. Article 142 of the Indian Constitution echoes this by conferring upon the Hon'ble Supreme Court the jurisdiction to issue any directive essential for safeguarding Dharma, signifying absolute justice. The Supreme Court's unique authority, coupled with the discretionary and intrinsic powers of other courts, collectively serves the overarching objective of upholding Dharma.

This perspective can similarly extend to understanding the philosophies of "Natural Law of Justice" and "Due process of law." These concepts advocate that all laws and processes must be rooted in principles of justice, fairness, and rationality. Through adherence to these principles, the legal system strives to guarantee that the established laws and procedures are equitable, fair, and reasonable for all individuals concerned.

Ultimately, comprehending Dharma offers a complete structure for grasping and maintaining the law. It steers the interpretation and implementation of legal principles, ensuring that the justice system fulfils its core objective of safeguarding and advancing justice, fairness, and righteousness within society.

The conversation underscores that Dharma, deemed the highest law, merits protection by the judiciary despite its lack of a precise definition. Grasping Dharma can be attained by employing the six systems of Indian philosophy (Shad Darshana) and delving into spiritual exploration.

Spirituality entails recognizing a belief in something beyond individual existence, surpassing mere sensory encounters. It involves acknowledging that the collective whole, of which we're a part, holds a cosmic or divine

essence. Yet, delving into profound spirituality isn't readily accessible to all and demands a committed process to unravel the enigma of Dharma.

Some Hindu texts outline three avenues for uncovering Dharma. The initial source involves acquiring wisdom from a Guru, attained through studying diverse philosophical Sanskrit texts. The second source lies in observing the conduct of noble and virtuous individuals, serving as a guiding example. The third source stems from personal experiences, as individuals navigate their own lives and glean lessons from the repercussions of their actions.

Together, these three sources enrich the comprehension and application of Dharma in life. Through studying philosophical texts, emulating virtuous role models, and reflecting on personal experiences, individuals cultivate a profound understanding of Dharma and its significance in their lives.

To unravel the enigma of Dharma, one must delve into spirituality, utilizing the tools offered by the six systems of Indian philosophy. This exploration involves integrating wisdom from mentors, observing virtuous conduct, and learning from personal experiences. Through these avenues, individuals gradually gain insight into the supreme law of Dharma and its practical application in their lives.

Although personal experience might not be universally accessible, the other two avenues—studying Hindu philosophy and observing noble behaviour—remain potent means of gaining insight into Dharma. However, it's unfortunate that the modern legal system overlooks these aspects of Hindu philosophy and Sanskrit texts in our legal studies. Consequently, there's a dearth of effective knowledge systems within legal education to instruct us about the processes and philosophies essential for comprehending Dharma.

## 5. JUDICIAL RULING & PRINCIPLES OF DHARMA

This knowledge gap is evident in specific judicial rulings that consistently neglect the principles of Dharma while prioritizing individual choice and liberty. It's regrettable that without a proper mechanism to grasp the essence of Dharma, our judicial system proceeds to dispense justice. This inherent flaw in the system reflects in the declining confidence of the public in the judiciary. Due to the lack of a holistic grasp of Dharma within legal education, there exists a disconnection between the principles of justice and the spiritual and philosophical underpinnings guiding Dharma. This disconnection may lead to a sense of injustice and diminish public trust in the judiciary. Rectifying this deficiency necessitates re-evaluating the legal education system to encompass a wider viewpoint that integrates the philosophical and spiritual dimensions of Dharma. By integrating Dharma's principles into legal studies, aspiring legal practitioners can cultivate a more comprehensive comprehension of justice, thus bridging the divide between the legal system and the spiritual

underpinnings of Dharma.

## CONCLUSION

It's clear that embracing a path of spirituality is crucial for safeguarding Dharma. Yet, since India gained independence, there has been limited advancement in forging a robust connection between law and spirituality. Explorations at the crossroads of law and spirituality have been notably few. The integration of spiritual principles and philosophical teachings into legal education and practice has not garnered adequate attention. Consequently, there exists a deficiency in the comprehensive understanding and integration of spiritual values within the legal system. Closing this gap requires initiatives that cultivate a stronger link between law and spirituality. This might entail integrating aspects of spiritual teachings, drawn from Hindu philosophy and other spiritual traditions, into legal education and professional development initiatives. Moreover, establishing forums for dialogue and exploration of the spiritual facets of law can significantly augment the comprehension of Dharma and its applicability to legal practice. Advocating for a more extensive integration of spirituality and law allows for a holistic approach to justice, in accordance with the core principles of Dharma. Achieving these demands dedicated efforts to narrow the divide between law and spirituality, nurturing a profound comprehension and recognition of the spiritual elements inherent in the pursuit of justice.

# Duties and Rights of Citizens in the *Dharmasutra**

The author focuses on the duties and rights of citizens as outlined in the Dharmasutra of the Vedic era. The chapter explains how Vedic culture placed greater emphasis on duties than on rights. The Dharmasutra extensively defined social conduct, state governance, justice, and civic duties. Civic duties were categorized as political, social, and economic. Political duties included the mutual responsibilities of the king and the citizens. The primary duty of the king was to ensure justice and security, while the duty of the citizens was to pay taxes and abide by social rules. Social duties established codes of conduct for various sections of society. Special attention was given to the rights of women, students, and animals. Women were granted rights to protection, education, and participation in religious rituals. Students had the right to receive education and gain knowledge from their gurus. Economic duties covered the tax system, trade, and property rights. The king had the right to collect taxes, but it was mandatory for these to be used for the welfare of the people. The chapter also highlights that the Dharmasutra placed particular emphasis on environmental conservation and morality. Citizens were entrusted with the responsibility of maintaining the purity of natural elements such as trees, rivers, and air. Thus, this chapter seeks to explain the balance of rights and duties in Bharatiya culture through the lens of the Dharmasutra.

## INTRODUCTION

From the Vedic era itself, the seeds of Dharmashastra began to emerge. To understand the meaning of Vedic mantras, the Vedangas were developed. Among the Vedangas, which serve as auxiliaries to the Vedas, the Kalpa literature holds significant importance. This literature was presented in the form of sutras, which made it comprehensible. Moreover, due to the importance of its subject matter, it holds eternal significance even today. It has been a part of our cultural tradition.

In Sutra literature, Dharmasutra represent Dharmashastra. These served as substitutes for the Vedas in the holistic social conduct of life, incorporating the Vedic foundation along with the traditions, practices, ethics, and moral values of that era. No topic was left untouched in them. In the Dharmashastra, there was a synthesis of practice and ideals. Humans, with the consent of enlightened

* Pratibha Shastri, **"Duties and Rights of Citizens in the Dharmasutra"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 240-259 (2025).

citizens, established a system of daily conduct for the governance of society, which is referred to as a human-made system or *Samaya* (temporal dharma). Explaining these was the main subject of the Dharmasutra.[1] The commentator Haradatta has identified three types of *Samaya*: *Vidhi* (prescription), *Niyama* (rule), and *Pratishedha* (prohibition). These encompass all types of actions.

From this social system and its development, the concept of the state emerged, along with the notions of justice and security. With their progressive evolution, the duties of each individual were defined. The sages compiled various *Dharma* (rules) based on how each person should behave with others in society and what contribution this behaviour would make to societal progress. This was referred to as the *Code of Conduct* (Āchār Sanhita). Although the learned (enlightened citizens) were considered the authority in this system, ordinary individuals were not expected to blindly follow duties. This was because humans possess inherent weaknesses. Regarding actions, one should rely on one's own discretion. This principle was given by the Sutrakara Āpastamba.[2]

This was the constitution of society, created by enlightened citizens (*Dharmagyas*), and it represented a legitimate system of social governance. Its foundation was not the state but the contemporary social norms, values, and traditions. The state did not create these norms; rather, it operated and regulated this system. Over extensive periods, the rules of elements such as country, caste, lineage, class, and local associations became established as conduct (*āchār*). Society is composed of numerous elements, which evolve over time and display diversity on various grounds. Therefore, a diverse set of codes was necessary. If rules were made considering only one group, there was a possibility of violating the dignity and rights of others, thereby leading to social injustice. For this reason, the Dharmasutrakars included every aspect of life in their compilations of laws and regulations. The matured form of this tradition can be found in the subsequent texts of the Dharmashastra tradition.

By observing the Dharma Sutras obtained from various time periods, it can be estimated that the era of the Dharma Sutras lasted approximately one thousand years (from 800 BCE to the first century CE). The principal Dharma Sutras include those of Gautama, Apastamba, Baudhayana, Vashistha, Vishnu, and Harita, among others.

In Bharatiya culture, greater emphasis has been placed on duties rather than rights. The discussion of duties is found since the Vedic period. In the Vedic

1 अथातस्सामयाचारिकान् धर्मान् व्याख्यास्यामः । *आप. धर्म.* १.१.१

2 दृष्टो धर्मव्यतिक्रमस्साहसं च पूर्वेषाम् । तेषां तेजोविशेषेण प्रत्यवायो न विद्यते । तदन्वीक्ष्य प्रयुञ्जानस्सीदत्यवरः । *आप. धर्म.* २.१३.७-९

period, the concept of *Rita* (cosmic order) in the context of duties is significant, wherein duties were prescribed for all beings in the universe. This system was eternal and unchangeable. Varuna, the deity, was considered its protector, who kept everyone engaged in their respective actions. There was a provision for punishment for not adhering to it. It is mentioned in the Rigveda that the force through which everyone remains engaged in their respective duties is the power of *Rita*, which forms the foundation of the entire universe, society, individuals, living beings, and divine powers.[3] *Rita* became synonymous with truth and Dharma while embodying the essence of duty. In essence, it was a code of laws, not created by any supreme power but being the supreme power itself. Through it, the heavens, sky, and space were governed and controlled.[4] It ensured the existence of protection between the weak and the strong, preventing violations of anyone's rights.[5] It was a moral code of conduct that remained universally active, even in the absence of a king.

## 1. CITIZENS' DUTIES

In the Dharma sutras, the duties of citizens are divided into various forms. These can be categorized as political, social, and economic.

### (a) Political Duties

The political duties are related to governance. Governance ensures the protection of individuals, living beings, social institutions, and their duties and rights. In every system of governance, religion is integrated, which is synonymous with duty. The political duties of individuals include the duties of the king and the responsibilities of citizens towards governance. The duties of the king encompass the rights of the citizens.

The king's primary duties were the administration of society, the establishment of happiness, peace, and fearlessness in the community, the protection of citizens' rights, and ensuring justice. The duty of protecting the subjects was considered so important that the king identified himself with the happiness and sorrow of the subjects.[6] According to Gautama, the king's duties include protecting all living beings, preserving the Varna and Ashrama systems, and inspiring fallen individuals to follow the righteous path.[7] He

3 ऋतेन ऋतं धरूणं धारयन्त यज्ञस्य शाके परमे व्योमन्।
दिवो धर्मन्धरुणे सेदुषो नृञ्जातैरजाताँ अभि ये ननक्षुः ॥ ऋ. ५.१५.२

4 यतश्चोदेति सूर्योऽस्तं यत्र च गच्छतीति प्राणाद्वा एष उदेति प्राणेऽस्तमेति तं दिवाश्चक्रिरे धर्म स एव अद्य स उ श्व इति।
बृह. उप. १.५.२३

5 अथोऽबलीयान् बलीयासमाशंसन्ते धर्मेण यथा राज्ञैव। बृह. उप. १.४.१४

6 प्रजासुखे सुखी राजा तदुःखे यश्च दुखितः।
स कीर्तियुक्तो लोकेस्मिन्प्रेत्य स्वर्गे महीयते ॥ *विष्णु धर्मसूत्र*, ३.९८

7 राज्ञोऽधिकं रक्षणं सर्वभूतानाम्। न्यायदण्डत्वम्। *गौ. धर्म.* २.१.७-८

was responsible not only for protecting humans but also for safeguarding all living beings and nature (*Sarvabhutanam*). Kautilya also believed that the king should protect the conduct of all four Varnas and Ashramas and restore the decaying Dharma (to guide those deviating from their duties back to their responsibilities).[1] He even wrote that if ascetics who have taken vows of renunciation behave deceitfully, the king should punish them and guide them back to the path of duty. The establishment of a welfare state required the establishment of the Varna and Ashrama system.[2]

In fact, as the head of society, the king was exemplary for the citizens to emulate. The entire state was governed by him. According to Gautama, the lives of people belonging to the four Varnas, trees that grow or decline, immovable entities with dormant consciousness, animals and other living beings, flying birds, and slithering snakes were dependent on the king:

***तयोश्चतुर्विधस्य मनुष्यजातस्यान्तःसंज्ञानां चलनपतनसर्पणानामायत्तं जीवनम्॥*** [3]

It is the king's duty to protect them. The responsibility of protecting society rested on two types of citizens: 1. The king and 2. Learned Brahmins.[4] These were the ones who appointed other citizens to their respective duties. Here, "Brahmin" refers to enlightened citizens because the author of the Sutras has used the adjective "learned." This indicates that a great task like protection was entrusted only to educated, enlightened, and responsible individuals. During the period of the Sutras, their qualifications were determined. Gautama has enumerated three duties for both of them: growth, protection, and protection from transgressions of duties.[5] By "growth," it means advancement, removing all obstacles to the progress of the state.

The king should protect the people from the fear of enemies.[6] Achieving victory in war and ensuring the security of the kingdom were important tasks. However, one should not engage in injustice during war. Keeping in mind human emotions and moral values, Boudhayan has directed that the king should not fight with the fearful, the intoxicated, the insane, the unconscious, those without armour or weapons, women, children, the elderly, and Brahmins:

***भीतमत्तोन्मत्तप्रमत्तविसन्नाहस्त्रीबालवृद्धब्राह्मणैर्न युध्येताऽन्यत्राऽऽततायिनः ।***[7]

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तथा वर्णाश्रमांश्च न्यायतोऽभिरक्षेत् । चलतश्चैतान्स्वधर्मे स्थापयेत् । *गौ. धर्म.* २.२.९-१०

1 चतुर्वर्णाश्रमस्यायं लोकस्याचाररक्षणात् ।
नश्यतां सर्वधर्माणां राजधर्मप्रवर्तकः ॥ *अर्थशास्त्र,* ३.१

2 प्रव्रज्यासु वृथाचारान् राजा दण्डेन वारयेत् । वही, ३.१६

3 *गौत्तम धर्मसूत्र*, १.८.२

4 द्वौ लोके धृतव्रतौ राजा ब्राह्मणश्च बहुश्रुतः । *गौ. धर्म.* १.८.१

5 प्रसूती रक्षणमसंकरो धर्मः । *गौ. धर्म.* १.८.३

6 भये विशेषेण । *गौ. धर्म.* २.१.१४

7 *बौ. धर्म.* १.१०.१८.११

Such thoughts have also been expressed by Āpastamba, who stated that the king should not kill those who have surrendered their weapons, those who, with disheveled hair and folded hands, beg for mercy, or those who are fleeing the battlefield.[8] Baudhāyana has mentioned that one should not strike the enemy with barbed weapons or poisoned weapons.[9] In the present times, ignoring morality, there is indiscriminate use of nuclear and chemical weapons in the world. In such a scenario, this teaching is practical.

Another important duty of the king was to establish justice and a system of punishment. This system protected the rights of citizens. In fact, when rights are violated, justice is the only safeguard. "As long as the king of the nation or state does not ensure that every individual, irrespective of their status—big or small, learned or unlearned, rich or poor, respected or unrespected—will receive justice according to the code of conduct in case of doubt or dispute, internal security remains unreal."[10] It is the king's duty to administer punishment justly.[11] Justice prevents the criminal from committing further crimes, and punishment absolves the sinner of their sins.[12] Along with this, an impartial assessment of the offense is also essential for the redress of the victim.[13] If the king does not impartially dispense justice, he himself becomes a participant in sin.[14] Out of the fear of sin, this was made an obligatory duty of the king. It is mentioned in the Mahābhārata that when the policy of punishment becomes lifeless, the three Vedas drown, and all religions, i.e., the foundation of culture, regardless of how ancient they are, are completely destroyed. When ancient statecraft is abandoned, all the foundations of personal duties in the stages of life are destroyed.[15] Clearly, social stability can only exist by adhering to statecraft or political duties.

### (b) Social Duties

In ancient Bharat, the entire social structure was constructed and organized on the basis of the varna and ashrama systems. Although this system was not created by the state, the state acted as its regulator and administrator. The

8 न्यस्तायुधप्रकीर्णकेशप्राञ्जलिपराङावृत्तानामार्या वधं परिचक्षते। *आप. धर्म.* २.५.१०.१२

9 न कर्णिभिर्न दिग्धैः प्रहरेत्। *बौ. धर्म.* १.१०.१८.१०

10 *धर्मसूत्रों में राजधर्म एवं न्याय व्यवस्था*, सुधा शर्मा, पृ. ८१

11 न्याय्यदण्डत्वम्। *गौ. धर्म.* २.१.८
स्वराष्ट्रे न्यायदण्डः स्यात्। *वि. धर्म.* ३.९६

12 राजभिर्धृतदण्डास्तु कृत्वा पापानि मानवाः।
निर्मलाः स्वर्गमायान्ति सन्तः सुकृतिनो यथा॥ *वसि. धर्म.* १९.३०

13 वैरनिर्यातनाम्। *बौधा. धर्म.* १.१०.१९.१

14 प्राप्तनिमित्ते दण्डाकर्मणि राजानमेनः स्पृशति। *हि. धर्म.* २७.६.१३

15 मज्जेत्रयी दंडनीतौ हतायां सर्वे धर्माः प्रक्षयेयुर्विवृद्धाः।
सर्वे धर्माश्चाश्रमाणां हताः स्युः क्षात्रे त्यक्ते राजधर्मे पुराणे॥ *महाभारत,* शान्ति पर्व, ६३.२८

Āpastamba Dharmasūtra explicitly states that any individual who violates the rules or regulations of the varna and ashrama system or engages in prohibited conduct should be imprisoned by the king and kept in custody until they agree to adhere to the rules and abstain from prohibited actions. If even then no improvement is seen, the person should be exiled from the state.[16] In society, the householder held the utmost importance because all other types of citizens depended on the householder for their sustenance. The householder fulfilled their social duties through the five great sacrifices (pañca mahāyajña), the three debts (ṛṇa-traya), hospitality towards guests, and responsibilities towards other ashramas. The five great sacrifices are Bhūta Yajña, Manuṣya Yajña, Pitṛ Yajña, Deva Yajña, and Brahma Yajña.[17] The three types of debts are Ṛṣi Ṛṇa (debt to sages), Deva Ṛṇa (debt to gods), and Pitṛ Ṛṇa (debt to ancestors).

All citizens were expected to strive for the protection of women. According to Āpastamba, if a woman is encountered in the forest, one must initiate conversation with her.[18] In the harsh conditions of the forest, upon seeing a woman, one should approach and start a conversation because, due to her natural disposition, she may not take the initiative to communicate about her distress. In today's world, the security of women is not satisfactory, and consequently, extensive efforts are being made in this regard. This duty, established in ancient times, remains relevant even today. The commentator has also clarified this point:

***सम्भाषणं च मातृवद्भगिनीवाच्च – 'भगिनि किं ते करवाणि न भेतव्यम्' इति ।*** [19]

The Dharmasutrakaras were aware of duties toward nature. Considering trees, mountains, rivers, etc., as sentient beings, they regarded them as citizens of the state. A person's duties toward them were considered their rights. Hence, the Dharmasutra, in stern words, prohibited actions that harmed them. Nature, since ancient times, has consistently performed its duties. It is only humans who falter in their duties, which is why the provision of duties toward nature is meant for humans.

Gautama emphasized the necessity of keeping natural elements like air and water pure and instructed that one should not defecate, urinate, spit, or throw leftover food facing air, fire, Brahmins, the sun, water, deities, or cows.[20] Āpastamba shared a similar view.[21] The significance of purity was such that one

16 नियमातिक्रमणमन्यं वा रहसि बन्धयेत् । आ समापत्तेः । असमापतौ नाश्यः । *आप. धर्म.* २.१०.२७.१८-२०

17 पञ्चैव महायज्ञाः । तान्येव महासत्राणि भूतयज्ञो मनुष्ययज्ञः पितृयज्ञो ब्रह्मयज्ञ इति । *शतपथ ब्राह्मण*, ११.५.६.७

18 अरण्ये च स्त्रियम् । *आप. धर्म.* १.४.१४.२८

19 *आप. धर्म.* १.४.१४.२८ पर टीका ।

20 न वाय्वग्निविप्रादित्यापो देवता गाश्च प्रति पश्यन्वा मूत्रपुरीषामेध्यान्व्युदस्येत् । *गौ. धर्म.* १.९.१३

21 अग्निमादित्यमपो ब्राह्मणं गां देवताश्चाऽभिमुखो मूत्रपुरीषोः कर्म वर्जयेत् । *आप. धर्म.* १.११.३०.२३

was advised not even to stretch their feet toward these elements.[22] This rule did not merely imply physical duties but also prescribed mental responsibilities, as one was instructed not to even think of polluting these elements. According to Āpastamba, even while performing *achaman* (sipping water ritually), one should not pollute the water. While being inside a river or water reservoir, one should not perform *achaman*.[23] Instead, water should be taken separately for the ritual. Baudhāyana also stated that some believe one should not enter cremation grounds, water bodies, temples, or cowsheds without washing their feet.[24] Cleaning the body, washing clothes by rubbing them by hand, or performing *achaman* while in the water was prohibited.[25] These rules were for all citizens but were particularly emphasized for students. Spitting or defecating in water was strictly prohibited.[26] Vasiṣṭha further stated that humans should not pollute rivers, public roads, sown fields, pastures, etc.[27]

### (c) Economic Duties

The Dharmasutra prescribed economic duties and rights for all social classes. These economic duties regulated society. Everyone contributed to the economy. By this time, economic activities were well-developed, such as lending and borrowing, rules for buying and selling under state control, various types of agriculture, different crafts and artisanship, import-export, and the system of exchange.

The concept of black money as the most harmful element to the economy was also developed during this period. The Vishnu Dharmasutra classified wealth into three categories: *shukla* (white), *shabla* (mixed), and *asita* (black). Wealth earned by following prescribed rules of one's own profession was termed *shukla dhan* (white wealth). Wealth earned by adopting the profession of the subsequent class in the hierarchical order was termed *shabla dhan* (mixed wealth). Wealth earned by adopting the profession of classes beyond this order was termed *asita dhan* or black wealth.[28] Essentially, the profession-based *varna* system ensured efficiency in all fields, and there was no encroachment on each other's domains. The wealth earned by violating these rules was considered black money.

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22 अग्निमादित्यमपो ब्राह्मणं गां देवताद्वारं प्रति पादं च शक्तिविषये नाऽभिप्रसारयीत। *आप. धर्म.* १.११.३०.२५

23 नाप्सु सतः प्रयमणं विद्यते। *आप. धर्म.* १.५.१५.१०

24 अथ हैके ब्रुवते- श्मशानमापो देवगृहं गोष्ठं यत्र च ब्राह्मणा अप्रक्षाल्य पादौ तन्न प्रवेष्टव्यमिति। *बौ. धर्म.* २.५.८.२

25 नाप्सु सतः प्रयमणं विद्यते न वासः पल्पूलनं नोपस्पर्शनम्। *बौ. धर्म.* २.५.८.८

26 अप्सु च। तथाष्ठेवनमैथुनयोः कर्माऽप्सु वर्जयेत्। *आप. धर्म.* १.११.३०.२१-२२

27 न नद्यां मेहनं कुर्यान् न पथि न च भस्मनि।
न गोमये न वा कृष्टे नोप्ते क्षेत्रे न शाद्वले॥ *वसि. धर्म.* ६.१२

28 अथ गृहाश्रमिणस्त्रिविधोऽर्थो भवति। शुक्लः शबलोऽसितश्च।...स्ववृत्त्युपार्जितं सर्वेषां शुक्लम्। अनन्तरवृत्त्युपात्तं शबलम्। एकान्तरवृत्त्युपात्तं च कृष्णम्। *वि. धर्म.* ५८.१-२, ६-८

Artisan classes, primarily from the *shudra* class, contributed the most to the economy.[29] The barter system was prevalent in society, but it was primarily an exchange of goods rather than currency. The currency system was not robust. The Dharmasutra prescribed that traders should ensure that the goods exchanged were of equivalent value and, as far as possible, of the same type so that no one suffered a loss or had their rights exploited. According to Gautama, juices were to be exchanged with juices, animals with animals, and mangoes or sesame seeds with an equivalent amount of cooked food.[30] Āpastamba mentioned the term "*vinimay*"[31] and prescribed that grains should be exchanged with grains, slaves with slaves, juices with juices, scents with scents, and knowledge with knowledge.[32]

The king also had economic duties toward the country. He was instructed to avoid unnecessary luxury,[33] as it would result in a non-productive economic burden. The Vishnu Dharmasutra cautioned the king against spending the state treasury on undeserving individuals for the economic welfare of the country.[34] The state managed the economic system. Without a king, chaos could ensue, which is why Vasiṣṭha advised that during the interim period between the death of the old king and the coronation of the new one, no interest or profit should be added to wealth.[35] In the absence of a king, moneylenders or economic officers could charge arbitrary interest, leading to anarchy.

## 2. CITIZENS' RIGHTS

Rights are essential necessities of human social life, without which one can neither develop oneself nor perform useful work for society. It is unimaginable to conceive human life without rights. The supreme goal of a nation is the complete development of an individual's personality, for which the nation provides certain facilities to individuals. These facilities and the rules that make life favorable are referred to as rights.

Rights imply respecting each other's life. For this, the concept of duties for oneself is defined. The word "adhikar" (rights) is derived from the prefix "adhi" and the root "kri," with the suffix "ghañ," meaning to take care of, duty,

29 शिल्पवृत्तिश्च । *गौ. धर्म.* २.१.६२

30 नियमस्तु । रसानां रसैः । पशुनां च । लवणकृतान्नयोः । तिलानां च । समेनाऽऽमेन तु पक्वस्य संप्रत्यर्थे । *गौ. धर्म.* १.७.१६-२१

31 अविहितश्चैतेषां मिथो विनिमयः । *आप. धर्म.* १.७.२०.१४

32 अन्नेन चाऽन्नस्य मनुष्याणां च मनुष्यै रसानां च रसैर्गन्धानां च गन्धैर्विद्यया च विद्यानाम् । *आप. धर्म.* १.७.२०.१५

33 गुरूनमात्याँश्च नातिजीवेत् । *आप. धर्म.* २.१०.२५.१०

34 नापात्रवर्षी स्यात् । *वि. धर्म.* ३.५४

35 राजा तु मृतभावेन द्रव्यवृद्धिं विनाशयेत् ।
पुना राजाभिषेकेण द्रव्यमूलं च वर्धते ॥ *वसि. धर्म.* २.४९

responsibility, authority, sovereignty, and position, among other meanings.[36]

Rights and duties are complementary to each other. The scope of rights is society, and the religious scriptures represent this social order. Although they emphasize duties, these duties were not imposed arbitrarily or at the cost of someone's rights. The religious scriptures reflect a clear sense of the protection of rights. The concept of punishment for the violation of rights had fully developed. These rights were integrated with citizens and the state.

### (a) Political Rights

***Rights of the King*:** As a ruler and due to his responsibility for governance, the king required certain rights. To fulfill the need for resources in governance and in exchange for the service of protecting the citizens, the king had the right to levy taxes on them. In essence, protection and taxation were interconnected as duty and right. From the king's perspective, protecting the citizens was his duty, while taxation was his right. From the citizens' perspective, receiving protection and justice was their right, and paying taxes was their fundamental duty. According to Baudhayana, the king protected all four varnas (social classes), and thus, he received one-sixth of their income.[37] Similarly, Gautama stated that in exchange for protecting the people, the king had the right to take a share of agriculture, trade, etc. Whatever the king received from this was considered his livelihood.[38] Baudhayana granted the king the right to make new tax laws, but the king was only allowed to levy taxes to the extent that the taxpayer and their profession would not be harmed (referred to by the term *'anupahatya'*).[39]

Along with this right, there was also an associated duty. The wealth received through taxes was not the personal property of the king. According to the Vasishtha Dharmasutra, just as children bring wealth to their mother, and she uses it for their benefit, the king was obligated to use the wealth collected from the people for their welfare.[40]

The king also had rights over abandoned or ownerless property and hidden treasures within the kingdom. The king would acquire such property and use it solely for the welfare of the state. If the state did not claim ownerless property, there was a higher likelihood of disputes and plundering among the citizens. The Dharmasutra state that if someone finds a lost item whose owner

36 वामन शिवराम आप्टे, *संस्कृत-हिन्दी शब्दकोश*, पृष्ठ-३०

37 षड्भागभृतो राजा रक्षेत्प्रजाम्॥ *बौधायन धर्मसूत्र*, १.१०.१८.१

38 तद्रक्षणधर्मित्वात्। अधिकेन वृत्तिः। *गौ. धर्म.* २.१.२८, ३०

39 अन्येषामपि सारानुरूप्येणाऽनुपहत्य धर्मं प्रकल्पयेत्। *बौ. धर्म.* १.१०.१८.१५

40 एतेन मातृवृत्तिर्व्याख्याता। *वसि. धर्म.* १९.१९, हितमासां कुर्वीत। *गौ. धर्म.* २.२.६
प्रजानामेव भूत्यर्थं स ताभ्यो बलिमग्रहीत्।
सहस्रगुणमुत्स्रष्टुमादत्ते हि रसं रविः॥ *रघुवंश*, १.१८

is unknown, it should be reported to the king. The king was then required to safeguard the item for one year; after that, one-fourth of the item could be given to the finder, and the remainder retained by the king.[41] Gautama declared the king's right over hidden treasures (buried wealth whose owner is unknown).[42] Vishnu also stated that if the king discovers hidden wealth, he should distribute half of it to Brahmins and deposit the remaining half in the state treasury.[43] All mines within the state's jurisdiction were naturally considered to belong to the state.[44]

The king also had the inherent right to punish individuals to protect the social order, ensure citizens performed their duties, and uphold social justice.[45] For this reason, the king's title was *'Dandadhara'* (bearer of punishment). According to Gautama, the king alone had the right to punish criminals. Vishnu stated that no person who failed in their duties was beyond the king's authority to punish; this right was natural to the king.[46] However, the king was required to exercise this right without personal bias or prejudice and administer punishment according to the Dharmashastra and the nature of the crime.[47] Therefore, he did not have the right to misuse his authority.

Extensive rights were granted to the king for governance. To prevent the misuse of these rights, the Dharmasutra established certain provisions. Firstly, the king was bound by the limits of dharma (righteousness). Any violation of these boundaries was declared sinful, leading to the fear of hell. The behaviour of the king was emulated by the common citizens.[48] The determination of dharma was not made by the state but derived from the Vedas and other scriptures. Thus, *'the power of Dharma'* was a living force that established effective control over the power of the king. The king could determine his decisions only according to the rules of the Vedas, Dharmashastra, Vedangas, Puranas, traditions, customs, and the codes of conduct of farmers, merchants, traders, and guilds.[49] In addition to these social representatives, it was necessary for the king to seek knowledge from elderly experts in Dharmashastra when making decisions.[50]

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41 प्रनष्टमस्वामिकमधिगम्य राज्ञे प्रब्रूयुः । विख्याप्य संवत्सरं राज्ञा रक्ष्यम् । ऊर्ध्वमधिगन्तुश्चतुर्थं राज्ञः शेषः । वही, २.१.३६-३८

42 निध्यधिगमो राजधनम् । वही, २.१.४३

43 निधिं लब्ध्वा तदर्धं ब्राह्मणेभ्यो दध्यात् । द्वितीयमर्धं कोशे प्रवेशयेत् । *वि. धर्म.* ३.५६-५७

44 आकरेभ्यः सर्वमादद्यात् । *वि. धर्म.* ३.५५

45 राज्ञोऽधिकं रक्षणं सर्वभूतानाम् । न्याय्यदण्डत्वम् । *गौ. धर्म.* २.१.७-८

46 स्वधर्ममपालयन्नादण्ड्यो नामास्ति राज्ञः । *वि. धर्म.* ३.९४

47 अपराधानुरूपं च दण्डं दण्डेषु दापयेत् । सम्यग्दण्डप्रणयनं कुर्यात् । *वि. धर्म.* ३.९१-९२

48 यथा हि कुरुते राजा प्रजां तमनुवर्तते । *वाल्मीकि रामायण*, ७.४२,१९

49 तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणम् । देशजातिकुलधर्माश्चाऽऽम्नायैरविरुद्धाः प्रमाणम् । कर्षक-वणिक्पशुपालकुसीदिकारवः स्वे स्वे वर्गे । *गौ. धर्म.* २.२.१९-२१

50 विप्रतिपत्तौ त्रैविद्यवृद्धेभ्यः प्रत्यवहृत्य निष्ठां गमयेत् ।*गौ. धर्म.* २.२.२५

### (b) Social Rights

***Husband-Wife:*** Husband and wife are the units of the institution called family. The wife had the right to participate in sacrificial rituals. According to the etymology of the word '*patni*', she is the one who can take part in sacrificial rituals with her husband.[51] No religious ceremonies could be completed without the wife. The husband and wife participated equally in all activities. According to Apastamba, after marriage, the husband and wife performed religious rites together, shared in the fruits of good deeds, and had equal ownership of wealth and property.[52] In the absence of her husband, the wife had the right to offer gifts and donations when necessary. According to Apastamba, this could not be considered theft because it was the wife's right.[53]

***Rights of Animals:*** In the Dharamsutra, animals were considered citizens, and because of human morality, they were granted rights. Humans did not have the right to violate the rights of animals. It was the responsibility of citizens to protect their rights. All Dharmasutrakaras (lawgivers) instructed that one should not discuss a cow that is nursing its calf with its owner, nor should one separate the cow from its calf.[54] Apastamba and Baudhayana also echoed this view.[55] If the owner was informed, he might separate them, causing distress to both the cow and the calf. The cow had the right to feed its calf. This had economic significance as well because fulfilling this right ensured the growth of livestock, which remains relevant to animal husbandry and economic contributions even today.

***Rights of Students:*** A student was the foundation of society. A student had the right to education. The prevalent system at that time was the Gurukul system, where education was imparted under the guidance of a teacher. Under this system, a student could request education from the teacher of his choice, and the teacher could not refuse to teach him.[56] He had the right to receive education as per his desire. According to Apastamba, if a student felt that he was not receiving adequate education from one teacher, he could go to another teacher.[57] He was not bound by strict regulations in the field of education. He had the right to pursue an education according to his interests and for a sufficient duration. Teachers treated all students equally, as their own sons,

51 पत्युर्नो यज्ञसंयोगे। *अष्टाध्यायी*, ४.१.३३

52 जायापत्योर्न विभागो विद्यते। पाणिग्रहणाद्धि सहत्वं कर्मसु। तथा पुण्यफलेषु। द्रव्यपरिग्रहेषु च। *आपस्तम्ब धर्म.* २.६.१४.१६-१८

53 न हि भर्तुविप्रवासे नैमित्तिके दाने स्तेयमुपदिशन्ति। *आप. धर्म.* २.६.१४.२०

54 गां धयन्तीं परस्मै नाऽऽचक्षीत। न चैनां वारयेत्। *गौ. धर्म.* १.९.२४-२५

55 संसृष्टां च वत्सेनाऽनिमित्ते। *आप. धर्म.* १.११.३१.१०। गां धयन्तीं न परस्मै प्रब्रूयात्। *बौ. धर्म.* २.३.६.१७

56 अध्ययनार्थेन यं चोदयेन्न चैनं प्रत्याचक्षीत। *आप. धर्म.* १.४.१४.२

57 अन्तेवास्यनन्तेवासी भवति विनिहितात्मा गुरावनैपुणमापद्यमानः। *आप. धर्म.* १.२.८.२७

without any discrimination based on caste or economic status.[58]

Apastamba also granted the right to education to women and Shudras. According to him, the knowledge possessed by women and Shudras was the ultimate limit of knowledge, and only upon attaining this knowledge could one claim to have acquired complete learning.[59]

It is mentioned that a graduate (snataka) had the right to seek employment from the king. After completing education, a graduate should approach the king to seek employment. It was the king's duty to provide employment to a graduate after his education.[60]

***Right to Self-Defense:*** While living in society, a person had the full right to protect themselves. They should take appropriate measures for this. Gautama stated that in life-threatening situations, even a Brahmin could bear arms.[61] Apastamba, quoting the Puranas, stated that if a person kills an attacker to prevent violence, the anger of the attacker is absorbed by the defender. Thus, the person defending themselves is not considered guilty.[62] Baudhayana expressed the same views. He also instructed that a teacher or a high-born person could be killed if it was necessary for self-defense.[63] According to Vasistha, there was no sin in killing a tyrant.[64] Gautama and Vishnu also held that if a strong person assaulted a weaker one, and if another strong person was present and failed to protect the weak, the bystander would be as guilty as the assailant.[65]

**Right to Pardon from Punishment:** There was also a right to pardon from punishment. The Dharamsutra reveal a corrective tendency in the form of penance (prayaschitta). Through this, a person could attempt to free themselves from punishment and bring about lasting moral reform within themselves. After performing penance, a person could regain their lost rights.[66] Society initially gave an individual the opportunity to reform themselves through penance. By performing penance, one could be freed from punishment.[67] It was a personal act in which an individual, guided by their moral conscience, recognized their

58 पुत्रमिवैनमनुकाङ्क्षन् सर्वधर्मेष्वनपच्छादयमानः सुयुक्तो विद्यां ग्राहयेत् । आप. धर्म. १.२.८.२५

59 सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र*, २.११.२९.११

60 योगक्षेमार्थमीश्वरमधिगच्छेत्॥ *गौत्तम धर्मसूत्र*, १.९.६३

61 प्राणसंशये ब्राह्मणोऽपि शस्त्रमाददीत । *गौ. धर्म.* १.७.२५

62 यो हिंसार्थमभिक्रान्तं हन्ति मन्युरेव मन्युं स्पृशति न तस्मिन् दोष इति पुराणे । *आप. धर्म.* १.१०.२९.७

63 अध्यापकं कुले जातं यो हन्यादाततायिनम् ।
न तेन भ्रूणहा भवति मन्युस्तं मन्युमृच्छतीति ॥ *बौ. धर्म.* १.१०.१८.१२

64 आततायिनं हत्वा नात्र प्राणच्छेत्तुः किंचित्किल्विषमाहुः । *वसि. धर्म.* ३.१६

65 दुर्बलहिंसायां च विमोचने शक्तश्चेत् । *गौ. धर्म.* ३.३.१९, उत्क्रोशन्तमनभिधावतां तत्समीपवर्तिनां संसरतां च । *वि. धर्म.* ५.७४

66 चरितनिर्वेशं सवनीयं कुर्युः । *बौ. धर्म.* २.१.१.३७

67 द्वादशवर्षाणि चरित्वा सिद्धः सद्भिस्सम्प्रयोगः । *आप. धर्म.* १.९.२४.२०

misconduct and corrected it through prayer and austerities.[68] However, over time, the concept of penance was taken over by royal justice, as social and judicial order could not solely depend on individual goodwill.

### (c) Women's Rights

The status of women has changed across different periods. Although the Dharamsutra do not extensively discuss the broad rights of women, they repeatedly emphasize their importance. Some duties have been prescribed for them, and certain rights have been granted. There are differences of opinion among the Dharmasutrakaras regarding women's rights. Some scholars consider women and their actions sacred.[69] According to Vasistha, the actions of women and children are always pure. Furthermore, he states that the mouth of a goat and a horse, the back of a cow, and the back of a Brahmin are pure, but a woman is entirely pure.[70]

***Right to Protection:*** The Dharamsutra state that women have the right to protection. Society is responsible for ensuring their protection in every circumstance. According to Baudhayana, for men of all varnas (castes), their wives are to be protected even more carefully than wealth.[71] Manu also declared that it is a husband's duty to protect his wife, stating that by safeguarding his wife, a man protects his character, lineage, soul, and Dharma.[72] Only when a woman is protected can she contribute to the progress of the nation. Additionally, it is not only a right but also a duty of a woman to protect herself, as only then can she become a responsible citizen of the country. Manu wrote that even in the homes of trustworthy and obedient men, women remain unprotected if they do not take responsibility for their own safety due to a lack of righteous intellect. On the other hand, women who protect themselves with a righteous intellect remain safe.[73]

***Right to Education:*** Although references to women's education during the Sutra period are limited, they are sufficient to clarify the state of education at that time. The Vedic period explicitly mentions women's right to education, but by the Sutra period, their rights had been restricted. The reason for this

68 अथ कर्मभिरात्मकृतैर्गुरुमिवाऽऽत्मानं मन्येताऽऽत्मार्थे प्रसृतयावकं श्रपयेदुदितेषु नक्षत्रेषु। *बौ. धर्म.* ३.६.६.१

69 श्वहताश्च मृगा वन्याः पातितं च खगैः फलम्।
बालैरनुपरिक्रान्तं स्त्रीभिराचरितं च यत्॥ *वसि. धर्म.* ३.४५

70 अजाश्वा मुखतो मेध्याः गावो मेध्यास्तु पृष्टतः।
ब्राह्मणाः पादतो मेध्याः स्त्रियो मेध्यास्तु सर्वत्रः॥ वही, २८.९

71 सर्वेषामेव वर्णानां दारा रक्ष्यतमा धनात्। *बौ. धर्म.* २.२.४.२

72 देवदत्तां पतिर्भार्यां विन्दते नेच्छयात्मनः।
तां साध्वीं बिभृयान्नित्यं देवानां प्रियमाचरन्॥ *मनु.* ९.९५

73 अरक्षिता गृहे रुद्धाः पुरुषैराप्तकारिभिः।
आत्मानमात्मना यास्तु रक्षेयुस्ताः सुरक्षिताः॥ *मनु.* ९.१२

was possibly the sense of insecurity. Women began receiving education at home from family members. Apastamba discusses the mature knowledge and scholarship of learned women.[74] He even stated that all other knowledge should be obtained from women, as they represent the ultimate limit of knowledge.[75] Maharishi Patanjali, using the terms *Upadhyayi* or *Upadhyaya*, indicated the presence of female teachers.[76] However, Manu granted them the right to initiation (upanayana) but diminished its significance by prohibiting them from reciting Vedic mantras.[77]

Thus, by this time, the formal right to education and initiation had become more symbolic than substantive.

***Right to Marriage:*** This right was granted by parents. It was the mandatory duty of parents to arrange the marriage of their daughter at the appropriate time. Otherwise, a girl had the right to choose a groom and marry him on her own. However, in such cases, she had to return the clothes and jewellery received from her family.[78] According to Baudhayana, a girl should wait for three years, after which she could choose a suitable groom for herself.[79] While inter-caste marriages were permitted, it was also stated that if no groom of the same caste and merit was available, a girl could marry a man of lower merit.[80]

Women were also allowed to remarry. Gautama mentions *Paunarbhava* (the son of a remarried woman), implying that a woman had the right to leave one husband and marry another.[81] This right also applied to widows. According to Kautilya, if a woman was abandoned due to family ruin, loss of wealthy relatives, or misfortune, or if her husband had gone abroad (*Proshitapatika*), she could remarry for survival.[82]

***Right to Perform Sacrificial Rituals (Yajna):*** Women had the right to perform religious rituals alongside their husbands. Panini, while discussing the etymology of the word "*patni*," wrote that a wife is one who has the right to perform sacrifices and share in the fruits of the sacrifice.[83] No religious ceremonies could be completed without a wife. Husband and wife participated

74 आर्थवणस्य वेदस्य शेष इत्युपदिशन्ति। स्त्रीभ्यस्सर्ववर्णेभ्यश्च धर्मशेषान्प्रतीयादित्येक इत्येके।*आप. धर्म.*२.११.२९.१२,१६

75 सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र*, २.११.२९.११

76 उपेत्याधीयते तस्या उपाध्यायी उपाध्याया। *पतञ्जलिमहाभाष्य*, ३.३.२१

77 अमन्त्रिका तु कार्येयं स्त्रीणामावृदशेषतः।
संस्कारार्थे शरीरस्य यथाकालं यथाक्रमम्॥ *मनु*. २.६६

78 त्रीन्कुमार्यृतूनतीत्य स्वयं युज्येतानिन्दितेनोत्सृज्य पित्र्यानलंकारान्।*गौ. धर्म*. २.९.२०

79 त्रीणि वर्षाण्यृतुमती कांक्षेत पितृशासनम्।
ततश्चतुर्थे वर्षे तु विन्देत सदृशं पतिम्।*बौ. धर्म*, ४.१.१०.१५

80 अविद्यमाने सदृशे गुणहीनमपि श्रयेत्।*बौ. धर्म.*४.१.१०.१६

81 कानीनसहोढपौनर्भवपुत्रिकापुत्रस्वयंदत्तक्रीता गोत्रभाजः। *गौ. धर्म.*३.१०.३१

82 कुटुम्बर्द्धिलोपे वा सुखावस्थैर्विमुक्ता यथेष्टं विन्देत जीवितार्थमापद्गता वा।*अर्थशास्त्र*. ३.४

83 पत्युर्नो यज्ञसंयोगे। *अष्टाध्यायी*, ४.१.३३

equally in all religious and economic matters. According to Apastamba, after marriage, a husband and wife performed religious rites together, shared in the fruits of good deeds, and had equal ownership of wealth and property. [84]

In society, *Anuloma* (hypogamous) marriages were common. In such cases, only a wife of the same caste was granted the right to participate in sacrifices with her husband, as men had multiple wives. It was stated that if a wife of the same caste was unavailable, then a lower-caste wife could also have the right to perform sacrifices. However, a Shudra wife was denied this right.[85]

***Right to Property:*** In Bharatiya culture, women were granted property rights. In contemporary civilizations, women were treated as commodities that could be bought and sold. However, in the legal framework of Dharmashastra, no one, including a husband, father, son, or king, had the right to sell a woman. Although some exceptions are found, such practices were condemned. According to Apastamba, the husband and wife had equal rights over the family's property, and family members should act according to their directives.[86] A wife could donate from family wealth in the absence of her husband. In cases of division of property, her share was completed by including her jewellery (*Stridhana*).[87]

According to Yajnavalkya, a woman did not have the right to demand a share of family wealth. However, if a father divided his property among his sons while alive, the wife would receive an equal share, but only if she had not received *Stridhana*.[88]

Gautama recognized a widow's right to her husband's property,[89] whereas Apastamba[90] and Vasistha[91] did not acknowledge this right. Most Dharmasutrakaras, including Gautama and Baudhayana,[92] denied a daughter the right to inherit family property. However, Apastamba granted daughters this right, though they were listed as the last heirs.[93] Kautilya explicitly supported

84 जायापत्योर्न विभागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु । तथा पुण्यफलेषु । द्रव्यपरिग्रहेषु च ।
*आपस्तम्ब धर्म.* २.६.१४.१६-१८

85 नाग्निं चित्वा रामामुपेयात्।*वसि. धर्म.* १८.१७
मिश्रासु च कनिष्ठयापि समानवर्णया। समानवर्णाया अभावे त्वनन्तरयैवापदि च। न त्वेव द्विजः शूद्रया। *वि. धर्म.*

86 कुटुम्बिनौ धनस्येशाते । तयोरनुमतेऽन्येऽपितद्धितेषु वर्तेरन् । *आप. धर्म.* २.११.२९.३-४

87 अलंकारो भार्यायाः ज्ञातिधनं चेत्येके । *आप. धर्म.* २.६.१४.९

88 यदि कुर्यात्समानंशान् पत्न्यः कार्याः समांशिकाः ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा ॥ *याज्ञ.*२.१५

89 पिण्डगोत्रर्षिसम्बन्धा रिक्थं भजेरन्स्त्री वाऽनपत्यस्य । *गौ. धर्म.* ३.१०.१९

90 पुत्राभावे यः प्रत्यासन्नः सपिण्डः। *आप. धर्म.*२.६.१४.२

91 यस्य पूर्वेषां षण्णां न कश्चिद्दायादः स्यात्सपिण्डाः पुत्रस्थानीया वा तस्य धनं विभजेरन्। तेषामलाभ आचार्यान्तेवासिनौ हरेयाताम्।...*वसि. धर्म.*१७.८१-८२

92 असत्स्वन्येषु तद्गामी ह्यर्थो भवति। सपिण्डाभावे सकुल्यः। तदभावे पिताऽऽचार्योऽन्तेवास्यृत्विग्वा हरेत्।*बौ. धर्म.*१.५.११.९-११

93 पुत्राभावे यः प्रत्यासन्नः सपिण्डः। दुहिता वा। *आप. धर्म.* २.६.१४.२,४

daughters' property rights. He stated that if a childless man died, his property should go to his cohabiting brothers and daughters.[94] If a man had children, then both sons and daughters from legitimate marriages were entitled to inherit his wealth.

Denying women direct inheritance rights was balanced by the concept of *Stridhana*, which a woman could use freely.

***Stridhana (Women's Wealth):*** Only a few Dharmasutrakaras have discussed *Stridhana*. This was the wealth over which a woman had full ownership. It included clothes, jewellery, and money received at marriage and other significant occasions from her parents, brothers, relatives, and husband.[95] According to Vishnu, *Stridhana* included wealth given to a woman by her parents, sons, and brothers, money granted in front of the sacred marriage fire by her father, wealth given by a husband upon marrying another wife, and gifts received from relatives and the groom's family.[96]

Yajnavalkya stated that wealth given by a father, mother, husband, or brother, money received near the sacred fire at marriage, and money granted when the husband married another woman were considered *Stridhana*.[97] Manu listed six types of *Stridhana*, including gifts given in front of the marriage fire, departure gifts, love gifts from the husband, and various gifts from parents and siblings.[98]

Thus, it is evident that a well-developed concept of *Stridhana* had emerged, making it a recognized right of women. Dr. Kane noted that wealth earned by a woman through her labour or received from external sources after marriage was not considered *Stridhana*.[99] According to Apastamba, a woman's clothes, jewellery, and other property received from relatives, father, or husband were her rightful possessions.[100] Ownership of *Stridhana* depended on three factors: (1) the source of the property, (2) the woman's status at the time of acquisition (whether unmarried, married, widowed, etc.), and (3) the legal traditions governing her community.[101] In times of crisis, a husband had the

94 द्रव्ययपुत्रस्य सोदर्या भ्रातरः सहजीविनो वा हरेयुः कन्याश्च ।
रिक्थं पुत्रवतः पुत्रा दुहितरो वा धर्मिष्ठेषु विवाहेषु जायाः तद्भावे पिता धरमाणः ॥ *अर्थ.* ३.१५

95 भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः। *गौ. धर्म.* ३.१०.२३

96 पितृमातृसुतभ्रातृदत्तमध्यग्न्युपागतमाधिवेदनिकं बन्धुदत्तं शुल्कमन्वाधेयकमिति स्त्रीधनम्।*वि. धर्म.* १७.१८

97 पितृमातृपतिभ्रातृदत्तमध्यग्न्युपागतम् ।
आधिवेदनिकाद्यं च स्त्रीधनं परिकीर्तितम् ॥
बन्धुदत्तं तथा शुल्कमन्वाधेयकमेव च ॥ याज्ञवल्क्य स्मृति, २.१४३-१४४अ

98 अध्यग्न्यध्यावाहनिकंदत्तंचप्रीति-कर्मणि।
भ्रातृमातृपितृ प्राप्तं षड्विधं स्त्रीधनं स्मृतम्॥*मनु.* ९.१९४

99 *धर्मशास्त्रकाइतिहास*, पी.वी. काणे, भाग-२, पृ. ९४०

100 अलङ्कारो भार्यायाः ज्ञातिधनं चेत्येके। *आप. धर्म.*२.६.१४.९

101 *धर्मशास्त्र का इतिहास*, पी.वी. काणे, भाग-२, पृ. ९४२

right to use *Stridhana* for necessities such as famine, illness, imprisonment, or religious duties.[102] According to Yajnavalkya, if a husband used this wealth in emergencies, he was not required to return it.[103] However, misuse of *Stridhana* was restricted. If a woman spoke against the king, engaged in intoxication or gambling, or committed adultery, she lost her claim to *Stridhana*.[104] In the context of inheritance of Stridhan, generally, a daughter was given preference over a son. Among the Sutrakars, Gautama was the first to support this and also mentioned the term Stridhan. According to him, women's affection is generally towards their daughters; hence, the heirs of wealth are also their daughters. Among daughters, the first right belongs to unmarried daughters, but in their absence, impoverished married daughters receive this wealth.[105] According to Baudhayana and Vasistha, daughters inherit the gifts received by their mother through tradition.[106] Vishnu also considered the first right to belong to the daughter.[107] According to Kane, by this time, Stridhan had expanded significantly, and people did not like the idea of women receiving more property.[108] Hence, over time, sons also began to claim rights over it. Manu instructed that upon the mother's death, the wealth should be divided among all brothers and sisters.[109] If a woman died childless, her wealth passed to her paternal family if the marriage was performed by the Asura rite.[110] Here, the husband did not have the right to seize the Stridhan. It was the husband's moral obligation to return the wealth that had come with the woman. Vishnu stated that if a woman died childless and her marriage was conducted in a recognized category (Brahma, Arsha, Daiva, Prajapatya), then the wealth would go to the husband; otherwise, it would pass to her paternal family.[111]

In conclusion, the rules, inheritance, and historical development of Stridhan stand as a glaring example of the generosity and judicial fairness of Indian culture towards women.

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102 प्रतिरोधकव्याधिदुर्भिक्षभयप्रतीकारे धर्मकार्ये व पत्युः। *अर्थ.* ३.२

103 दुर्भिक्षे धर्मकार्ये च व्याधौ संप्रतिरोधके।
गृहीतम्स्त्रीधनं भर्ता न स्त्रयै दातुमर्हति॥*याज्ञ.* २.१४७

104 राजद्विष्टातिचाराभ्यामात्मापक्रमणेन च।
स्त्रीधनानीतशुल्कानामस्वान्यं जायते स्त्रियः॥ *अर्थ.*३.३

105 स्त्रीधनं दुहितृणाम प्रत्तानामप्रतिष्ठितानां च।*गौ. धर्म.* ३.१०.२२

106 मातुरलङ्कारं दुहितरस्साम्प्रदायिकं लभेरन्नन्यद्वा। *बौ. धर्म.*२.२.३.४४
मातुः पारिणेयं स्त्रियो विभजेरन्। *वसि. धर्म.* १७.४६

107 सर्वेष्वेव प्रसूतायां यद्धनं तद्दुहितृगामि। *वि. धर्म.* १७.२१

108 *धर्मशास्त्र का इतिहास*, पी.वी. काणे, भाग-२, पृ. ९४३

109 जनन्यां संस्थितायां तु समं सर्वे सहोदराः।
भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः॥*मनु.* ९.१९२

110 भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः।*गौ. धर्म.* ३.१०.२३

111 ब्राह्मादिषु चतुर्षु विवाहेष्वप्रजायामतीतायां तद्भर्तुः। शेषेषु च पिता हरेत्।*वि. धर्म.*१७.१९-२०

### (d) Economic Rights

Individual ownership of land was recognized. This fell under the right to private property, which allowed individuals to buy, sell, donate, or mortgage land. There are references to farmers leasing land. According to Apastamba, if a person takes another's land on lease and does not cultivate it, the king should make that person compensate for the loss.[112] This is because the failure to cultivate results in the loss of potential produce, causing harm not only to the landowner but also indirectly to the country's economy. In reality, agriculture was, and still is, of great importance. Agriculture remains the primary sector upon which the country's economy depends. This also highlights the right to lease land. Additionally, abandoning agricultural work midway was not permitted; otherwise, according to Apastamba, such a person was liable to be punished physically.[113]

Animal husbandry was also a primary occupation alongside agriculture. The state made provisions such as grazing lands for the welfare of livestock. However, livestock owners did not have the right to cause damage to others. If an animal destroyed a crop, the livestock owner was held responsible.[114] If the entire produce was destroyed due to an animal, the king would ensure that the landowner was compensated fully by the offender.[115] However, animals were not to be subjected to excessive suffering.[116]

The king had the economic right to impose heavy taxes on items that were harmful to the nation or were useless and merely for luxury.[117] Luxury goods were considered detrimental to the country's economy. Citizens did not have the right to divide essential resources such as water.[118] Today, disputes over water rights occur between different nations and states, with water being treated as private property. The Dharamsutra did not support the division of water resources but instead emphasized its collective and proper utilization.

***Rights of Laborers:*** The labor force plays an unparalleled role in the economy. To ensure artisans' right to livelihood, they were declared exempt from the rules of purity and impurity, as practical considerations were essential for their broad occupational roles and to fulfill societal needs. According to Baudhayana, the hands of an artisan (*Karuka*) are always pure, and items

112 क्षेत्रं परिगृह्योत्थानाभावात्फलाभावे यस्समृद्धस्स भावि तदपहार्यः। *आप. धर्म.* २.११.२८.१

113 अवाशिनः कीनाशस्य कर्मन्यासो दण्डताडनम्। *आप. धर्म.* २.११.२८.२

114 पशुपीडिते स्वामिदोषः। *गौ. धर्म.* २.३.१६

115 सर्वविनाशे शदः। *गौ. धर्म.* २.३.२३

116 नाऽतिपातयेत्। *आप. धर्म.* २.११.२८.६

117 राष्ट्रपीडाकरं भाण्डमुच्छिन्द्यादफलं च यत्।
महोपकारमुच्छुल्कं कुर्याद्बीजं तु दुर्लभम्॥ *अर्थशास्त्र*, २.२१

118 उदकयोगक्षेमकृतान्नेश्वविभागः। *गौ. धर्म.* ३.१०.४

displayed for sale in the market are also always pure.[119] If strict purity rules were applied to market goods, it would have been impractical for the general public. Thus, these regulations were formulated according to time and place to remain relevant and to promote the economic well-being of the general population.

***Economic Crimes:*** No one had the right to possess stolen wealth in society. According to Gautama, a person who knowingly accepts stolen wealth is as punishable as the thief.[120] However, a person who unknowingly purchases stolen goods at a fair price is innocent; but if the truth is later discovered, they must return the goods to the rightful owner. If someone knowingly buys stolen goods at a price lower than their actual value, both the buyer and the seller are punishable by the state.[121] According to Apastamba, one does not have the right to enjoy material comforts acquired through unrighteous means. Even if one gains benefits through such means, they must renounce them, declaring, *"I will not associate with unrighteousness."* [122] This teaching remains relevant in the present era, as many people desire increased luxury, even if it is obtained through unethical, prohibited, or corrupt practices. This mindset fuels corruption, which ultimately has the most devastating impact on the economy.

## CONCLUSION

The numerous references to duties and rights found in the Dharamsutra prove that these texts were the first to consider these issues from a humanitarian perspective. The broad concept of citizenship, as described in the Dharamsutra, is rare in modern governance. Even the modern concept of citizenship had already developed in these texts. These principles provide a strong foundational background for the Bharatiya Constitution. The laws and traditions described in the Dharamsutra continue to be reflected in Bharatiya society today.

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119 नित्यं शुद्धः कारुहस्तः पण्यं यच्च प्रसारितम्।
ब्रह्मचारिगतं भैक्षं नित्यं मेध्यमिति श्रुतिः॥ *बौ. धर्म.* १.६.९.१

120 प्रतिग्रहीताऽप्यधर्मसंयुक्ते। *गौ. धर्म.* २.३.४७

121 अजाजानः प्रकाशं यः परद्रव्यं कीणीयात्तत्र तस्यादोषः। स्वामी द्रव्यमाप्नुयात्। यद्यप्रकाशं हीनमूल्यं च क्रीणीयात्तदा क्रेता विक्रेता च चौरवच्छास्यौ। *वि. धर्म.* ५.१६४-१६६

122 अधर्माहृतान् भोगाननुज्ञाय न वयं चाऽधर्मश्चेत्यभिव्याहृत्याऽधो.....। *आप. धर्म.* १.१०.२८.११

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# *JURAL RELATIONS*[1]

Claims, liberties, powers and immunities are subsumed under the term 'rights' in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another.

(1) Y's duty with regard to X would be expressed by X as 'you ought (must)' (X is then said to have a claim or right, *stricto sensu*).

(2) X's freedom to do something in relation to Y would be expressed by X as 'I may": (X has a liberty or privilege).

(3) X's ability to alter Y's legal position would be expressed by X as 'I can': (X has a power).

(4) Y's inability to alter X's legal position would be expressed by X as 'you cannot': (X has an immunity)

The use of the homonym 'right' to denote these separate ideas obscures the distinctions and leads to confusion sooner or later. It would be helpful, therefore, to make the distinctions as obvious as possible by allotting to each a term of its own.

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else. In ***Chapman* v. *Honig*** [(1963) 2 Q. B.502] the defendant's action in terminating the plaintiff's tenancy was lawful (i.e. he had a liberty) as between them, although it was at the same time unlawful (i.e. breach of duty) as between defendant and the court (contempt).

When operating the scheme the following formulae will be helpful.

**Jural Correlatives** (vertical arrows and read both ways):… in one person, X, implies the presence of its correlative …, in another person, Y'. Thus, claim in X implies the presence of duty in Y (but in so far as duties may exist without correlative claims, the converse proposition is not always true). Again, liberty in X implies the presence of no-claim in Y, and vice versa.

**Jural Opposites,** including what one might here call jural negations (diagonal arrows and read both ways) : … in one person, X, implies the absence of its opposite, …, in himself'. Thus, claim in X implies the absence of liberty in himself, and vice versa.

The merit of Professor Williams's presentation is that it is possible to discern at a glance a third set of jural relations not mentioned by Hohfeld. These may be called

**Jural Contradictories** (horizontal arrows and read both ways): … in one person, X, implies the absence of its contradictory, …, in another person, Y'. Thus, claim in X implies the absence of liberty in Y, and vice versa. In the case of duties with correlative claims, a duty in

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* R.W.M. Dias, ***Jurisprudence***, Chapter 2, " Legal Material", pp. 23-40 (5th Ed., 1985).

X (absence of liberty) implies the absence of no-claim in Y and vice versa. (The question whether there are non-correlative duties will be discussed below).

With these formulae in mind the scheme may now be considered in detail.

## CLAIM-DUTY RELATION ('YOU OUGHT')

Hohfeld himself suggested the word 'claim', however, will be preferred in this book. He did not deal at length with this relation, believing that the nature of claim and duty was sufficiently clear. This was perhaps rather a facile assumption. He did, however, point out that the clue to claim lies in duty, which is a prescriptive pattern of behaviour. A claim is, therefore, simply a sign that some person ought to behave in a certain way. Sometimes the party benefited by the pattern of conduct is able to bring an action to recover compensation for its non-observance, or he may be able to avail himself of more indirect consequences. At other times, he can do nothing.

The correlation of claim and duty is not perfect, nor did Hohfeld assert that it was. Every claim implies the existence of a correlative duty, since it has no content apart from the duty. The statement, 'X has a claim', is vacuous; but the statement, 'X has a claim that Y ought to pay him £10' is meaningful because its content derives from Y's duty. On the other hand, whether every duty implies a correlative claim is doubtful. Austin admitted that some duties have no correlative claims, and he called these 'absolute duties' [Austin Jurisprudence, 11th ed., pp 401-403]. His examples involve criminal law. Salmond, on the other hand, thought that every duty must have a correlative claim somewhere [Salmond J*urisprudence* (7th edn) p 240]. Allen supported Austin. Professor G.L. Williams treats the dispute as verbal [In Salmond *Jurisprudence* (11th edn) pp 264-265]. Duties in criminal law are imposed with reference to, and for the benefit of, members of society, none of whom has claims correlative to these duties. As far as their functioning is concerned, it is immaterial whether the claims are in the crown, the Crown in Parliament, or whether there are any claims.

Statutory duties furnish other examples. It rests on the interpretation of each statute whether the duties created by it are correlative to any claims in the persons contemplated by the duties. It was held in ***Arbon v. Anderson*** (1943) 1 All ER 154 that even if there had been a breach of the Prison Rules 1933 which had been made under the Prison Act 1898, s 2, a prisoner affected by such a breach had no action since he had no claim. The decision in ***Bowmaker Ltd.*** **v.** ***Tabor*** (1941) 2 KB I creates a difficulty. The Courts (Emergency Powers) Act 1939, s i (2), for-bade hire-purchase firms to retake possession of things hired without first obtaining leave of court. The claim to damages was conferred by the statute on any hire purchaser from whom goods were retaken without the necessary leave having been obtained. In this case the defendant purchaser consented to the plaintiffs retaking possession of the article hired, and they did so without obtaining leave of court. The plaintiffs later sued the defendant for arrears of rent, which had accrued up to the time of the retaking, and the defendant counterclaimed for damages under the statute. The Court of Appeal held that he was entitled to damages. This means that there was a duty to pay damages, which was correlative to the claim to receive them. The duty not to retake possession without leave of court was, as the Court pointed out, imposed in the public interest and not for the benefit of an individual. The defendant, therefore, could not absolve the plaintiffs from it. The inference is

that the claim was not in him. The further question as to why the defendant's consent to the plaintiffs' course of action did not debar him from exercising his claim to damages was answered by the Court on the ground that consent, or volenti non fit injuria, is no defence to a breach of this kind of statutory obligation [*Cf.* ***Carr* v. *Broaderick & Co. Ltd***. (1942) 2 KB 275].

Conduct is regulated by the imposition of duties. Claims may assist in achieving this end, but if it can be otherwise achieved, there is no reason why the mere fact that Y is under a duty with regard to X should confer upon X, or anyone else for that matter, a corresponding claim (Kelson, ***General Theory of Law and State*** 85). There is nothing to prevent it being the law that every breach of duty, of whatsoever sort, shall be dealt with by the machinery of the state. Such a state of affairs, though possible, would be inconvenient, for it would stretch state machinery to breaking point. Where duties are of private concern, the remedies are best left to individuals to pursue in the event of their breach. Above all, it is expedient to give aggrieved persons some satisfaction, usually by way of compensation. Every system of law has to decide which breaches of duties shall be taken up by the public authorities on their own motion, and which shall be left to private persons to take up or not as they please. The distinction between 'public' and 'private' law is quite arbitrary. It would seem, therefore, that there is no intrinsic reason why claims should be a necessary concomitant of duties (Radin, 'A Restatement of Hohfeld' (1938) 51 *Harv LR.* 1149-1150, says that X's claim and Y's ;duty are the same thing. On the argument above, his statement is unacceptable). Indeed, some modern writers, for different reasons, reject the whole idea of claim as redundant. If non-correlative duties are accepted, they do not fit snughly into the Hohfeldian scheme.

**LIBERTY-NO-CLAIM RELATION ('I MAY')**

Hohfeld distinguished the freedom which a person has to do or not do something from claim, and called it 'privilege' ; but the term liberty will be preferred. X's so-called 'right' to wear a bowler hat consists, on Hohfeld's analysis, of liberty to wear the hat and another liberty not to wear it. The relationship between claim, duty, liberty and no-claim can be explained in the following way.

(I) Duty and liberty are jurally 'opposite'. If, for example, X were under a duty to wear a bowler hat, this would imply the absence in him of any liberty not to wear it, i.e. the Hohfeldian opposite of duty means that there is no liberty to do whatever is opposite to the content of the duty. Similarly, if X were under a duty not to wear the hat, this would be the opposite of a liberty to wear it, i.e. there would be no liberty to do so. The jural opposition between duty and liberty does not mean simply that the one cancels out the other, but that they will only have that effect when the content of one is irreconcilable with the content of the other. For example, X normally has the liberty of wearing his hat. If he puts himself under a duty to wear it, his liberty and duty of wearing the hat are harmonious and co-exist. It is only when he puts himself under a duty not to wear it that his liberty to wear it and his duty conflict and are jurally opposite.

The opposition may be illustrated by ***Mills* v. *Colchester Corpn*** [(1867) LR 2 CP 476. A liberty must be limited by circumstances which may create a duty to grant a licence: ***David* v. *Abdul Cader*** (1963) 3 All ER 579. The owners of an oyster fishery had, since the days of

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Queen Elizabeth I, granted licences to fish to persons who satisfied certain conditions. The plaintiff, who satisfied them but was refused a licence, brought an action alleging a customary claim correlative to a duty in the defendants to grant him one. The Court held otherwise on the basis that the defendants had always exercised a discretion in the matter. This implied not only a liberty to grant licences, but also a liberty not to grant licences, which implied the absence of a duty to do so. If, then, they were under no duty to grant licences, the plaintiff could have no claim.

Sometimes it is held for reasons of policy that the liberty of doing a particular thing cannot be erased by a contrary duty. ***Osborne* v. *Amalgamated Society of Railway Servants*** (1910) AC 87 lays down that the liberty of a member of Parliament to vote in any way he chooses on a given issue cannot be overridden by a contractual duty to vote in a certain way. Similarly in ***Redbridge London Borough* v. *Jacques*** (1971) 1 All ER 260, the respondent had for several years stationed his vehicle on a service road in the afternoons of early closing days and had operated a fruit and vegetable stall from the back of it. The local authority was aware of this practice and had raised no objection. It then charged him with obstructing the highway. The justices dismissed the charge on the ground that the local authority had, in effect, given him a licence (liberty). The decision was reversed on the ground that where there is a public duty, created by statute, this prevents the conferment of liberty to do what the duty forbids.

(2) If Y has a claim, there must be a duty in X. A duty in X implies the absence of a liberty in X. Therefore, a claim in Y implies the absence of a liberty in X, i.e. claim and liberty are 'Jural contradictories'.

(3) Conversely, the presence of liberty in X implies the absence of a claim in Y. Hohfeld calls this condition 'no-claim'. Therefore, a liberty in X implies the presence of 'no-claim' in Y, i.e., liberty and no-claim are 'jural correlatives'. On the opposition between claim and no-claim are 'jural correlatives'. On the opposition between claim and no-claim there is this to be said. The opposition here is different from that between duty and liberty. No question of content arises. No-claim is simply not having a claim, and having a claim is not being in the condition on no-claim is simply not having a claim, and having a claim is not being in the condition on no-claim, just as having a wife is not being in a state of bachelordom (no-wife). If it is thought necessary to distinguish between the opposition of duty and liberty on the one hand, and no-claim and claim on the other, the latter might by styled 'jural negation' instead.

**Distinction between claim and liberty**

A claim implies a correlative duty, but a liberty does not. X's liberty to wear a bowler hat is not correlative to a duty in anyone. There is indeed a duty in Y not to interfere, but Y's duty not to interfere is correlative to X's claim against Y that he shall not interfere. X's liberty to wear the bowler hat and his claim not to be prevented from so doing are two different ideas. Thus, X may enter into a valid contract with Y where X gives Y permission to prevent him from wearing the hat, but X says he will nevertheless try to wear it. If X succeeds in evading Y and leaves the scene wearing the hat, he has exercised his liberty to wear it and Y has no

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cause for complaint. If, on the other hand, Y prevents him from wearing the hat, he cannot complain, for he has by contract extinguished his claim against Y that Y shall not interfere. This shows that the liberty and the claim are separate and separable; the claim can be extinguished without affecting the liberty.

It is usual for liberties to be supported by claims, but it is important to realize that they are distinct and separate, and the distinction is reflected in case law. It was held in ***Musgrove* v. *Chun Teeong Toy*** (1891) AC 272. This case was originally quoted by Salmond. *Cf. Mackenzie King:* 'it is not a "fundamental human right" of an alien to enter Canada. It is a privilege. It is a matter of domestic policy,' quoted in ***Re Hanna*** (1957) 21 WWR NS 400. See also ***R.* v. *Secretary of State for Home Department, exp Bhurosah*** (1968) 1 QB 266] that at common law an alien has the liberty to enter British territory, but no claim not to be prevented; which was re-affirmed in ***Schmidt* v. *Secretary of State for Home Affairs*** (1969) 2 Ch. 149. See also ***DPP* v. *Bhagwan*** (1972) AC 60. ***Chaffers* v. *Goldsmid*** (1894) 1 QB 186. shows that a person has the liberty of presenting a petition to Parliament through his representative member, but no claim against such member that the latter shall comply. ***Bradford Corpn.* v. *Pickles*** (1937) 1 KB 316 shows that a landowner has the liberty of abstracting subterranean water, but no claim against anyone else who, by abstracting the water before it reaches the landowner, prevents him from exercising his liberty. In ***Cole* v. *Police Constable*** (1966) 2 All ER 133, the court considered the position of a non-parishioner in extra-parochial churches, for example Westminster Abbey, which is a Royal peculiar. Although the language of the learned judges is open to criticism, their conclusion, translated into Hohfeldian terminology, was that a non-parishioner has a liberty to be in such a church, but no claim not to be prevented. Therefore, the plaintiff's ejection by the respondent, who acted under instructions from the Dean, gave him no cause for complaint. Again, in ***Piddington* v. *Bates*** (1960) 3 All ER 660 the defendant, a trade unionist, in the course of a trade dispute insisted on going to the rear entrance of certain premises at which two pickets were already standing. To do so would not have been wrongful, for he would merely have exercised a liberty. In fact, however, the complainant, a police officer, who had decided that two pickets were all that were needed in the circumstances, prevented the defendant from going to the rear entrance. The latter then 'pushed gently past' the complainant 'and was gently arrested' by him. The defendant was found guilty of obstructing a constable in the exercise of his duty, since his liberty to stand at the entrance was not supported by a claim not to be prevented.

The failure to distinguish between claim and liberty leads to illogical conclusion. Thus, a member of the public has only a liberty to attend public meeting, which is not supported by a claim not to be prevented. The tribunal in ***Thomas* v. *Sawkins*** (1935) 2 KB 249 argued at one point that such a liberty to attend was a 'right' and that, therefore there was a duty not to prevent the person concerned, who happened to be a policeman. The conclusion is a non sequitur, since it fails to perceive the distinction between the two uses of 'right' as established by case law. If, as was probably the case, it was sought to create a claim-duty relation for reasons of policy, more convincing reasoning should have been employed. Cases on trade competition, whatever the merits of the decisions, present an array of fallacious propositions, which would have been avoided had the distinction between liberty and claim been perceived.

The claim not to be interfered with in trade corresponds to a duty not to interfere. There is indeed a duty not to interfere, e.g. by smashing up the plaintiff's shop; but no duty not to interfere by underselling him. So the question how far a duty not to interfere extends, i.e. how far the liberty of another person to interfere is allowed, is a delicate decision of policy. This is the real issue, which is thrown into relief when these situations are seen to involve conflicting liberties, but which is masked by the language of duties and claims.

The exposure of faulty reasoning also helps in assessing the effect and worth of decided cases. In ***Thomas* v. *Sawkins*** (1935) 2 KB 249 for example, the very demonstration that the conclusion was illogical when stated in terms of 'rights' and duties shows that the way to reconcile it with the established law is by saying that it has, in effect, created a new rule of law for policemen.

Finally, it may be observed that Hohfeld's analysis of claim, duty, liberty and no-claim is useful in many general ways. It may be used for drawing distinctions for purposes of legal argument or decision. It was held, for instance, in ***Byrne* v. *Deane*** (1937) 2 All ER 204. See also ***Berry* v. *Irish Times Ltd.*** (1973) IR 368 that to call a person an 'informer is a person who gives information of crime; there is in law a duty to do so, and Byrne's case decides that it is not defamatory to say that a man has performed a legal duty. There is only a liberty to be a 'conscientious objector', and Byrne's case is thus no authority for saying that it cannot be defamatory to allege that a person has exercised this liberty [Hamson, 'A Moot Case in Defamation' (1948) CLJ 46]. Again, the analysis is useful in considering the relation between common law and equity; in particular, it helps to demonstrate the precise extent to which there was conflict. Thus, the life-tenant had at law the liberty to cut ornamental trees, in equity he was under a duty not to do so. The liberty and duty are jural opposites and the latter cancels out the former. At common law a party had a claim to payment under a document obtained by fraud, in equity he had no-claim to payment under a document obtained by fraud, in equity he had no-claim. Further, such a person had at law the liberty of resorting to a common law court on such a document, where as equity imposed on him a duty not to do so (common injunction) [Hohfeld ***Fundamental Legal Conceptions*** 133].

**Liberty as 'law'**

It has been shown that liberty begins where duty ends. Some have maintained that freedom is outside the law. Thus, Pound declared that liberty is 'without independent jural significance', ['Legal Rights' (1916) 26 *International Journal of Ethics* 92 at 97] and Kelsen said, 'Freedom is an extra-legal phenomenon'. As to this, it is as well to remember that liberty may result (a) from the fact that legislators and judges have not yet pronounced on a matter, and represents the residue left untouched by encroaching duties, e.g. invasion of privacy; or (b) it may result from a deliberate decision not to interfere, as in ***Bradford Corpn.* v. *Pickles*** [(1895) AC 587 (c) from the deliberate abolition of a pre-existing duty, e.g. the statutory abolition of the duty forbidding homosexuality between consenting adults, or an Act of Indemnity absolving a person from a penal duty. There is some plausibility in saying with Pound and Kelsen that liberty in sense (a) lies outside law; but it seems odd to say that the liberty pronounced by a court in (b) and the statutory provisions in (c) are 'without

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independent jural significance' and 'extra-legal'. Analytically, the resulting position in all three cases is the same, namely, no duty not to do the act.

**Kinds of liberties**

Some liberties are recognised by the law generally, e.g. liberty to follow a lawful calling. So, too, are 'Parliamentary privilege' in debate and 'judicial privilege', which are liberties in the Hohfeldian sense in that both connote the absence of a duty not to utter defamatory statements. An infant's position (sometimes called in non-Hohfeldian language an immunity) in contracts for things other than necessaries is more complicated. In some cases it amounts to a power to repudiate the contract; in others it is not clear whether an infant has a liberty not to perform the contract, ie no primary duty to perform ***Coults & Co*. v. *Browne-lecky*** (1947) KB 104, (1946) 2 All ER 207, or whether there is a sanctionless duty, i.e. a primary duty which he ought to fulfil, but no sanctioning duty to pay damages and instead an immunity from the power of judgment.

Other liberties are recognised by law on special occasions, that is to say, the normal duty not to do something is replaced in the circumstances by the liberty to do it, e.g. self-help, self-defence, the defences of fair comment and qualified privilege. Lastly, liberty may be created by the parties themselves, e.g. consent, or *volenti non fit injuria*, one effect of which is that it absolves a defendant from his duty.

**Limit of liberties**

Some liberties are unlimited, even if exercised maliciously, e.g., 'Parliamentary' or 'Judicial privilege'. *Non omne quod licet honestum est*. In other cases, the exercise of liberties may be limited by the law of 'blackmail', by public policy.

**POWER-LIABILITY RELATION ('I CAN')**

Power denotes ability in a person to alter the existing legal condition, whether of oneself or of another, for better or for worse. Liability, the correlative of power, denotes the position of a person whose legal condition can be so altered. This use of 'liability' is contrary to accepted usage, but when operating the Hohfeldian table words have to be divorced from their usual connotations. X has a power to make a gift to Y, and correlatively Y has a liability to have his legal position improved in this way. A further point is that a person's legal condition may be changed by events not under anyone's control, e.g. an accumulation of snow on his roof. A distinction accordingly needs to be drawn between liability, which is correlative to power, i.e. the jural relation; and what for present purposes may be termed 'subjection', namely, the position of a person which is liable to be altered by non-volitional events. This is not a jural relation.

**Distinction between claim and power**

On the face of it the distinction is obvious: a claim is always a sign that some other person is required to conform to a pattern of conduct, a power is the ability to produce a certain result. The 'right', for example, to make a will can be dissected into a liberty to make a will (there is another liberty not to make one), claims against other people not to be prevented from making one, powers in the sense of the ability to alter the legal conditions of persons specified in the will, and immunities against being deprived of will-making capacity.

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The power itself has no duty correlative to it. It would be incorrect to describe this as a 'right' in the testator correlative to the duty in the executor to carry out the testator correlative to the duty in the executor to carry out the testamentary dispositions, for the will takes effect as from death and the executor's duty only arises from that moment. When the testator dies his claims etc cease, so the duty cannot correlate to any 'right' in him.

The distinctions between claim, liberty and power are important for much the same reasons as those considered above. A complex illustration is ***Pryce* v. *Belcher*** (1847) 4CB 866. At an election the plaintiff tendered his vote to the defendant, the returning-officer, who refused to accept it. The plaintiff was in fact disqualified from voting on grounds of non-residence. It was held that he had exercised a power by tendering his vote, which imposed on the defendant the duty to accept it. The latter's refusal to do so was a breach of that duty, which might well have rendered him liable to a criminal prosecution. However, the plaintiff's power to impose such a duty did not carry with it either the liberty of exercising the power or a claim to the fulfillment of the duty.

He, therefore failed in his action against the defendant for the breach of his duty.

> Although a party in the situation of the plaintiff, has the power in this way to compel the returning-officer under the apprehension of a prosecution, to put his name upon the poll, he is acting in direct contravention of the Act of Parliament, the terms of which are express that he shall not be entitled to vote; and that the rejection of his vote cannot amount to a violation of any thing which the law can consider as his right. Coltman J at 883.

In ***David* v. *Abdul Cader*** (1963) 3 All ER 579, the defendant refused to exercise a statutory power to grant the plaintiff a licence to run a cinema. The Supreme Court of Ceylon rejected the latter's action for damages on the ground that an action presupposes violation of a 'right' (claim) in the plaintiff and that until the power had been exercised the plaintiff acquired no 'right'. The fallacy is clear. The 'right' which the plaintiff would have acquired on the exercise of the power is the liberty to run his cinema with appurtenant claims, powers, etc. The acquisition or non-acquisition of these is independent of the question whether the defendant was under a duty to exercise the power and whether there was in the plaintiff a claim correlative to this duty. The Judicial Committee of the Privy Council reversed the Supreme Court on this very ground and remitted the case for trial on those issues. Failure to observe the distinction between power and claim results in confusion, though this occurs less often than in the case of liberty and claim. Also, analysis does help to assess the case law. An example is ***Ashby* v. *White*** (1703) 2 Ld Raym 938 where the 'right' to vote was held to import a duty not to prevent the person from voting. The 'right' to vote is a power coupled with a liberty to exercise it, and the whole point was whether there was a claim not to be prevented. The decision in effect created such a claim, although the reasoning was fallacious. The Sale of Goods Act 1893 (now the Act of 1979), s. 12 (I), introduces an implied condition that a seller of goods 'has a right to sell the goods'. It is clear from the context, which deals with conditions as to title, that 'right' here means 'power' to pass title. It was held in ***Niblett* v. *Confectioners' Materials Co.*** (1921) 3 KB 387 that the defendant company had no 'right' to sell certain articles because a third party could have restrained the sale for infringement of a trade mark. This is confusion between power and liberty. For, the fact that the defendants

had no 'right' to sell certain articles because a third party could have restrained the sale for infringement of a trade mark. This is confusion between power and liberty. For, the fact that the defendants had power to pass title is independent of whether or not they had a duty not to exercise it (i.e. no liberty to do so).

**Distinction between duty and liability**

If X deposits or lends a thing to Y, there is no duty in Y to restore it until X makes a demand. Before such demand is made Y is under a liability to be placed under the duty. The demand itself is the exercise of a power. The distinction is important, for instance, in connection with the limitation of actions. Thus, in Re ***Tidd, Tidd*** **v.** ***Overell*** (1893)3 Cj 154., where money was entrusted to person for safe-keeping, it was held that the period of limitation only commenced from the time that a demand for restoration had been made. Again, a deposit of money with a bank amounts to a loan, and there is no duty to repay until a demand has been made. ***Joachimson*** **v.** ***Swiss Bank Corpn.*** (36)3 KB 110 shows that time only runs from demand and not from the time of the original deposit . A sum of money can be attached under a garnishee order if there is a duty to pay, even though the actual time for payment may be postponed. In ***Seabrook Estate Co. Ltd.*** **v.** ***Ford*** (37) (1949) 2 All ER 94, a debenture holder appointed a receiver, who was to realize the assets and then pay off any preferential claims and the principal and interest to the debenture holders, and having done that, to pay the residue to the company. The judgment creditors of the company sought to attach a certain sum of money in the hands of the receiver before he had paid these other debts and which was estimated to be the residue that would be left in his hands. It was held that this could not be done as there was as yet no duty owing to the company from this kind of situation must be distinguished those where there is a duty owing, but the performance of which is postponed. Such a debt can properly be the subject of attachment.

**Distinction between duty and 'subjection'**

If X promises Y under seal, or for consideration, that he will pay Y £5 on the following day should it rain, there is clearly no duty in x unless and until that event occurs. In the meantime X's position is simply that he is 'subject' to be placed under a duty. The distinction need not be elaborated further and may be dismissed with the comment that this is not liability to a power, but to a non-volitional event and, as such, forms the basis of much of the law of insurance.

An analytical problem arises with such a rule as ***Rylands*** **v.** ***Fletcher,*** 38 (1868) LR 3 HL 330. (under which an occupier has to pay for damage caused by the escape of a substance likely to do mischief) and the rule concerning animals (under which the 'keeper' has to pay for damage done by dangerous animals and trespassing cattle), both of which do not involve fault. There seems to be a distinction between these cases, which are sometimes called 'strict duties'. A duty prescribes a pattern of conduct, and by 'strict duty' (e.g. duty to fence dangerous machinery) is meant one to which the actor may not be able to conform no matter how reasonably he behaves in the circumstances. With ***Rylands*** **v.** ***Fletcher*** and animals, the policy of the law is not to prevent people from keeping mischievous substances or animals, i.e. there is no duty not to keep them. It could be argued, perhaps, that there are duties to prevent escape, in which case they would be correlative to claims; but this is not how the

rules are framed. What they say, in effect, is that one keeps these things at one's peril, i.e. liability attaches in the even of escape, which makes the position analogous to X having to pay £5 tomorrow if it rains. If so, there is no way of accommodating cases of 'subjection' within the Hohfeldian scheme, except to say that they are not jural relations and therefore are not entitled to a place therein.

**Distinction between liberty and power**

Buckland disputes the need for any distinction.

> All rights [liberties] are rights to act or abstain, not to produce legal effects. To say that he has a right that his act shall produce that effect is to imply that if he liked it would not have that effect, and this is not true. The act will produce the legal effect whether he wishes it or not. If I own a jug of water I have a right to upset it, but it is absurd to say that I have a right that the water shall fall out. [Buckland, ***Some Reflections on Jurisprudence*** 96].

It would appear that Buckland misunderstood the nature of the Hohfeldian power. It is not a 'right' that certain effects shall ensue. Acts that have certain effects are called powers; those that do not are not called powers. That is distinct from the liberty to perform or not to perform such an act. The distinction may be put as follows: the liberty to perform or not applies to all types of conduct, but considered with reference to their effects, it can be seen that some actions result in an alteration of existing legal relations, while other do not.

**Rightful and wrongful powers**

The significance of the distinction between the nature of the act and the liberty to do it may be demonstrated in this way. Sometimes a power may be coupled with a liberty to exercise it and a liberty not to exercise it, while at other times it may be coupled with a duty to exercise it. In both situations the exercise of the power may be said to be 'rightful'. When a power is coupled with a duty not to exercise it, such exercise would then become 'wrongful'

Where a power is coupled with a liberty, a party cannot be penalised for having exercised it, or for not having done so. Thus, X may for no consideration at all give Y permission to picnic on his land. He may then change his mind with impunity and order Y to depart, i.e. exercise a power revoking Y's licence and imposing on him a duty to leave. If Y fails to do so within a reasonable time he commits a breach of that duty and becomes a trespasser. ***Chapman*** **v.** ***Honig*** (1963) 2 QB 502, Y had a liberty to be on X's land. X Assigned his interest to A and Y assigned his interest to B and exercised his power to revoke B's liberty. It was held that he could do so; since there was no contract between A and B, A was under no duty not to exercise his power, i.e. he had a liberty to do so. ***Wood*** **v.** ***Lead bitter*** (1845) 13 M & W 838. Little is left of this case since ***Hurst*** **v.** ***Picture Theatres Ltd.*** (1915) 1 KB 1, but the principle is sound is not exactly in point, for the plaintiff's liberty to be on the defendant's premises was created by contract. The defendant ordered the plaintiff to leave and, after a reasonable time, expelled him with reasonable force. The plaintiff did not sue in contract, though there was undoubtedly a contractual duty not to exercise the power, but sued for assault instead. It was held that, since he had become a trespasser, he could be ejected with reasonable force. It was held in ***East Suffolk Rivers Catchment Board*** **v.** ***Kent*** (1941) AC 74 that the Board had a power and discretion (liberty) as to its exercise. In ***R.*** **v.** ***Board of***

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***Referees, exp Calor Gas (Distributing) Co. Ltd***. (1954) 47 R & IT 92, where a statutory power was coupled with a liberty to exercise it and also not to exercise it, the Divisional court refused an application for an order of mandamus to compel the Board to exercise it [***R.* v. *Secretary of State for the Environment, exp Hackney London Borough Council*** [(1984) 1 All ER 956]. Discretionary powers may be controlled as follows. (a) Abusive exercise may be held void: ***Congreve* v. *Home Office*** (1976) QB 629 (b) If reasons are given, the courts may inquire into their adequacy, e.g. if reasons are stated in a return to a writ of habeas corpus for the release of a person committed for contempt by the House of Commons. The Judicial Committee of the Privy Council thought that a malicious refusal to exercise a discretionary power might amount to a breach of duty; but this is a limit on the liberty.

Where a power is coupled with a duty to exercise it, i.e. no liberty not to exercise it, there is no question of any 'right' to do the act; the party 'must' do it. A simple example is the power and duty of a judge to give a decision. Generally the presumption is against there being a duty to exercise statutory powers. The word 'may' in an empowering statute is usually taken to confer a liberty to exercise a power and not a duty, so mandamus will not lie. At the same time, it was held in ***Trigg* v. *Staines UDC*** (1969) Ch 10 that a local authority cannot contract not to exercise a power of compulsory acquisition, i.e. it cannot deprive itself of the liberty to use its power by an opposite contractual duty. Where, however, there is a duty to exercise a power, a remedy will lie for a breach of it. In ***Ferguson* v. *Earl of Kinnoull*** (1842) 9 Cl & Fin 251 especially at 311; ***David* v. *Abdul Cader*** (1963) 3 All ER 579 damages were awarded for the refusal by the Presbytery to take a preacher on trial. In ***R.* v. *Somerset Justices Exp EJ Cole and Partners Ltd***. (1950) 1 KB 519 the Divisional court held that the statutory power of Quarter Sessions to state a case was coupled with a duty to do so in cases of conviction for crimes, but that in other cases there was only a liberty to do so. Mandamus lies in the former. Under s.17 of the Criminal Appeal Act 1968, the Home Secretary has the liberty to exercise his power to refer a criminal case to the Court of Appeal after the normal time limit for appeal has elapsed. Where a power is coupled with a duty not to exercise it, the party concerned has no liberty to do so. Thus, if a person has a liberty to be on premises by virtue of a contract, ***Kerrison* v. *Smith*** (1897) 2 QB 445; ***Thompson* v. *Park*** (1944) KB 408. The case of ***Pryce* v. *Belcher*** (1847) 4 Ch. 866 has already been considered. Another example is that of a thief who sells a thing in market over to an innocent purchaser for value. He exercises a power in that he deprives the owner of his title and confers title on the purchaser, but he is under a duty not to exercise this power and commits a fresh conversion by so doing. The simplest example is the commission of tort: it is a power in that the legal positions both of the victim and of the tortfeasor are altered, but there is a duty, owned to the victim, not to commit the tort. Furthermore, the commission of a tort may operate as a power against a third party. Thus, a servant who commits a tort in the course of his employment alters the legal position of his master by imposing upon him the duty to pay damages vicariously and a liability to be sued therefore, but the servant concurrently owes a duty to his master not to exercise this power of imposing vicarious responsibility upon him for the breach of which the master can recover from the servant by way of indemnity what he has to pay to the victim of the tort. In all these situations the act of the party concerned is a power, for it alters the legal position, even though its exercise is a breach of duty. To call such powers 'rights' would be a misnomer, for it would amount to speaking of 'rights' to commit wrongs,

i.e. breaches of duty. Though Hohfeld purported to distinguish between uses of the word 'right', it is clear that not all powers, in the sense in which he used that term, can be called 'right'. This is hardly a criticism. The power concept is unobjectionable as power; it cannot always be brought under the umbrella of 'rights'; which only reinforces the case for the greater precision and scope of the Hohfeldian terminology.

**Kinds of powers**

Broadly, they may be divided into 'public' and 'private', but both involve ability to change legal relations. When a public power is coupled with a duty to exercise it, it is termed a 'ministerial' power; when it is coupled with a liberty, it is termed 'discretionary'. Public powers, though numerous especially in a administrative law, cannot compete with the profusion of private powers. The appointment of an agent, for instance, is a power, for it confers on the agent further powers to alter the legal position of the principal and creates in the latter corresponding liabilities. A married woman has power to pledge her husband's credit for necessaries, in contract there is a power to make an offer and a power to accept, and innumerable other in contract, property, procedure and, indeed, in every branch of the law. Private powers may also be coupled with duties to exercise them, e.g. certain powers of trustees, or they may be coupled with liberties.

**IMMUNITY- DISABILITY RELATION ('YOU CANNOT')**

Immunity denotes freedom from the power of another, which disability denotes the absence of power. In ***Hurst* v. *Picture Theatres Ltd*.** (1915) 1 KB 1 it was held that where a liberty to be on premises is coupled with and 'interest', this confers an immunity along with the liberty, which cannot therefore the revoked. The relationship between power, liability, immunity and disability may be explained as follows:

(1) If X has a power, Y has a liability. They are therefore 'jural correlatives'. A liability in Y means the absence of an immunity in him. Therefore, immunity and liability are 'jural opposites' (more strictly, 'jural negations', as previously explained).

(2) Conversely, the presence of an immunity in Y implies the absence of a liability in him. The absence of a liability in Y implies the absence of a power in X. Therefore, an immunity in Y implies the absence of a power in X, i.e. power and immunity are 'jural contradictories',

(3) The absence of power could have been styled 'no-power', in the same way as no-claim, but Hohfeld preferred to give it the term disability. Power and disability thus become 'jural opposites' ('negations'). It follows from this that immunity in Y implies the presence of a disability in X, i.e. they are 'jural correlatives'.

**Distinction between claim and immunity**

An immunity is not necessarily protected by a duty in another person not to attempt an invasion of it. If X is immune from taxation, the revenue authorities have no power to place him under a duty to pay. A demand for payment is ineffectual, but X has no remedy against them for having made the demand. If immunity is the same as claim, there should be correlative duty not to make a demand. In ***Kavanagh* v. *Hiscock*** (1974) QB 600, it was held that the relevant section of the Industrial Relations act 1971 (since repealed) conferred on pickets an immunity

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from prosecution or civil suit, but no liberty to stop vehicles on the highway and no claim not to be prevented from trying to stop vehicles. Secondly, there may be an immunity in X, which is protected by a duty in Y, but the claim correlative to that duty is not in X. Thus, diplomatic envoys are immune from the power of action or other legal process. As pointed out earlier, even if there are claims correlative to duties in criminal law, they are not in the persons for whose benefit the duties exist. Finally, an immunity in X may be protected by a duty in Y and the claim correlative to the duty may also be in X, as in the case of the malicious presentation of a petition in bankruptcy [***Chapman* v. *Pickersgill*** (1762) 2 Wils 145]. In 1936 the corporation conveyed to the company a plot of land for 99 years for use as an airfield, and the corporation undertook to maintain it for use by the company. In 1970 the corporation purported to revoke the company's interest in the land. It was held that although the corporation was not entitled to override the company's interest in the land, the latter's only remedy lay in damages and not in an injunction. The effect of the 1936 conveyance would appear to have been to grant, *inter alia*, a liberty to the company; and if the corporation was unable to determine that interest, then that liberty seems to have been coupled with an immunity against revocation. The court refused an injunction on the ground that to issue one would amount to compelling the corporation to fulfil its obligation to maintain the airfield, i.e. be equivalent to an order for specific performance. It is here that the confusion lies. The 'right' of the company, which the court held could not overridden, was its liberty plus immunity; but the 'right' correlative to the duty to maintain the airfield was its contractual claim. Breach of this duty is remediable by damages, but the question whether an injunction could be issued to support the immunity ought not to have been related to compelling performance of the contractual duty.

**Distinction between liberty and immunity**

The position of a diplomatic envoy illustrates this. Such a person is treated as being capable of committing a breach of duty and is under a duty to pay damages, although immune from the power of action or other legal process to compel him to do so. In other words, he has no liberty to do the act, nor a liberty not to pay damages for it, but he has an immunity from process all the same. It was held in ***Dickinson* v. *Del Solar*** (1930) I KB 376 that the fact that an envoy was thus under a sanctionless duty to pay damages was sufficient to involve his insurance company in responsibility. If, on the other hand, he voluntarily pays the damages, he cannot recover them, since there is the duty to pay.

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## THE INADEQUACY OF HOHFELD'S SCHEME : TOWARDS A MORE FUNDAMENTAL ANALYSIS OF JURAL RELATIONS

HOHFELD'S SCHEME of jural relations has succeeded in attracting a great deal of attention to underlying structural properties of legal notions. This is its virtue. But its vice, although unintended, is more significant. The consequent preoccupation with semantical analysis of notions has distracted attention from deeper inquiries into fundamental propositional and logical structures of legal thought. Inquiries about meanings of notions are important, but totally inadequte for legal purposes. Legal arguments finally base themselves on whole propositions and thoughts (principles, ideas) and not just individual notions. Hence despite the fact that Hohfeld called his scheme of jural relations "fundamental", it does not seem to be basic enough to allow one to draw significant conclusions about the appropriateness of jural relations expressed in actual legislations or judgments. A more fundamental analysis of the nature of jural relations seems to be required to be able to achieve this.

In what] follows, I shall first describe the major shortcomings of the Hohfeldian scheme, and then go on to suggest the grounds for a more fundamental analysis which would not only take into account propositional form of basic jural relations but also provide criteria for evaluation of positive law.

As is known, Hohfeld presents the following scheme of fundamental jural relationship :[1]

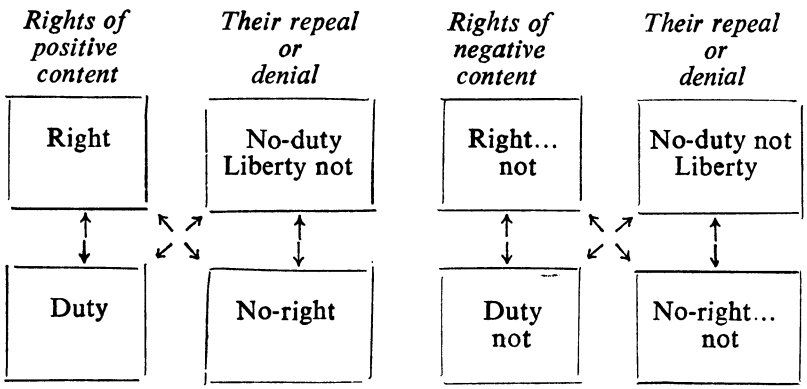
| | | | | |
|---|---|---|---|---|
| *Jural Correlatives* | right | privilege | power | immunity |
| | duty | no-right | liability | disability |
| *Jural opposites* | right | privilege | power | immunity |
| | no-Right | duty | disability | liability |

The attractiveness of the Hohfeldian scheme stems from its apparent symmetry and precision. The symmetry, however, tells us little about the logical relationships between the propositions stating basic legal relationships, because it is presented in terms of the relations themselves rather than in the form of propositions about the relations. Moreover, such a scheme is deceptive because it disguises the fact that basic legal relationship are often triadic and sometimes complex. The dyadic relationship is the jural minimal. The three elements which are usually related in the triadic relations are two persons or groups and the state. In the common law practice the state has been treated as a person, and so are corporate bodies. If one assumes the duty-right correlate to be a dyadic relationship only—which one may mistakenly do on the basis of

1. W.N. Hohfeld, ***Fundamental Legal Conceptions*** 36 (1919; 4th printing 1966) edited by Walter Wheeler Cook.

the Hohfeldian scheme, numerous puzzles arise. For example, it is natural to think that if one has a right to something one cannot simultaneously also have duty to that thing. This assumption has been denied by Lyons.[2] To illustrate, he points out that it is consistent to have a right to vote in a state in which voting is a legal duty. Or, that the policemen have both a right and a duty to arrest criminals. Such illustrations are puzzling only if one assumes a dyadic nature of all jural relationships. Attention to the fact that duties and rights are often triadic relations reveals that a right and a duty can simultaneously coexist for the same person only if they are not in regard to the same object. A police officer has a duty to the authoritative body that employs him to arrest a criminal, and a right only vis-a-vis the criminal to carry out the arrest. Similarly, a citizen may have a duty to the state to vote and a right to vote vis-a-vis other citizens. Lyons merely gives a simplified description of the relations which omits the third term and thus creates the puzzle.

Hohfeld's analysis was a semantical one, based on the meaning of the words, rather than a logical one, that is, based on their propositional forms. For example, a sentence of the form "X has a duty to Y to do C" has the same truth conditions as the corresponding sentence of the form "Y has a right against X that X do C." These two sentences are, therefore, semantically equivalent. Logically, however, Hohfeld's correlatives are a type of converse and his jural opposites correspond to compliments. Glanville Williams attempted to clarify the Hohfeldian relationships by setting them out in the following forms—vertical arrows coupling correlatives and diagonal ones the opposites:[3]

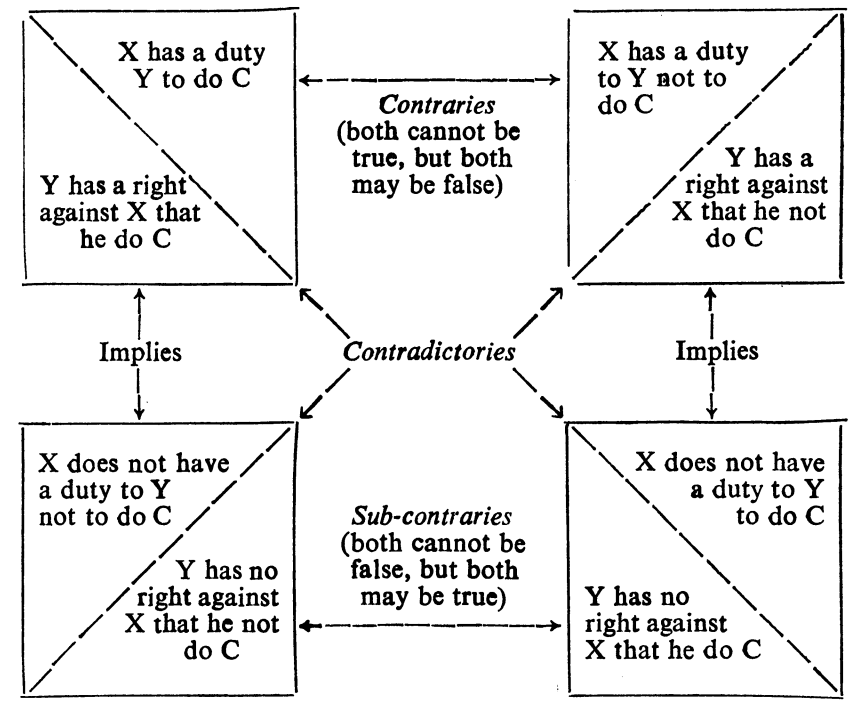



This scheme of representation is in keeping with the traditional square of oppositions of the Aristotelian logic. It is important to note that Williams replaces Hohfeld's "privileges" with "liberties". Hohfeld's definition of a "privilege" is problematic, partly because this notion has various political and social connotations which are not spelt out by him in detail. Hence whether or not Williams is right in interpreting Hohfeld's

2. "The Correlativity of Rights and Duties", 4 *Nous* 45 at 55 (1970).

3. "The Concept of Legal Liberty", in Robert S. Summers (ed.), *Essays in Legal Philosophy* 131 (1968).

"privileges" as "liberties" is a matter of deeper analysis. However, what is interesting is the fact that in the final analysis in defining those notions of his scheme which are not specified in terms of rights and duties (such as "privilege", "power", "liability",), Hohfeld once again resorts to analysing the elements of these complex notions purely in terms of rights and duties. For eaxmple, what Hohfeld calls a "privilege" is, according to him, "the negation of a duty having a content or a tenor precisely opposite to that of the privilege in question."[4] That is, a sentence of the form "X has a privilege against Y to do C" is contradictory to (*i.e*, has the opposite truth value of) the corresponding sentence of the form "X has a duty to Y not to do C". The negation of this last sentence is, thus, semantically equivalent to that of the.former sentence concerning "privilege". Other legal concepts can be similarly analysed out in terms of rights and duties relationships. Evidently, such an analysis will yield a more complex network than what one starts out with. In order to separate the semantic problems of meaning from questions of logical relationships it is possible to devise a square of oppostions, as shown in the following figure, which contains "duty" and "right" as the only terms for basic legal relationships. The logical relationships displayed by this square is based only on the assumption that there are no conflicting obligations, that is, no agent can be obligated to another both to do and not to do the same thing.




4. *Supra* note 1 at 39.

This shows that the various correlates and opposites in Hohfeld's scheme can be all finally analysed out in terms of rights and duties.

It must, however, be noted that it is one thing to reduce all legal relationships to their basic elements, and another to actually use this reduced form in practice. Although understanding the basic structures is extremely important for clarity (so as to resolve hard cases in law) it may prove cumbersome to use these complex structures for ordinary legal cases. Nonetheless, it is important to understand the necessity of redundancy in law, when complex notions are used with overlapping or vague meanings in ordinary practice.

Legal system, being cybernetical, must depend upon a great deal of redundancy if it is to work efficiently and rapidly. As all information theorists now know, redundancy is a necessary aspect of any system in which information is to be rapidly transacted. In fact, the amount of redundant information required to transmit any relevant information can now be calculated with mathematical precison.[5] In law, information is rapidly transferred between the litigating parties and the judge. In such a situation a collective usage of many terms, which may be individually redundant, is more helpful in conveying the message than a single term, since the cluster of these terms may be able to bring the issue into focus in a simpler manner than the straight but difficult path to it by the use of a simple term. In law then, a plenitude of concepts closely or distantly related in meaning is natural.

Whether one works with a cluster theory of concepts or argues, as I have tried to show here, that the cluster can be finally reduced to a complex (but fundamental) dyadic or triadic relation of rights and duties, it is still doubtful if sufficient insight has been gained into the nature of jural relations. On the basis of this are we in a position to say that a particular proposition expresses a real or a potential jural relation and another does not ? I believe this would not be possible. On merely finding that a right-duty relationship is expressed by a proposition we would not have sufficient reason to call that proposition a jural proposition, or that the relation expressed between concepts is really or potentially jural. For example, it is my duty to love my neighbour and I also have a corresponding right to be loved by other human beings. Does it follow that this relationship is or can be a jural relationship ? We would tend to deny this intuitively. What then is the characteristic of some relations that they can qualify to be jural ?

Hohfeld's analysis, whether one accepts a cluster theory or a reductionist theory, succeeds in providing only the necessary conditions for a relationship to be jural. The duty-right relationship is as true of moral and social relations as of legal ones. For example, you have a duty to be

5. See, for an introductory account of information theory, V.L. Parsegian, *This Cybernetic World* (1972).

friendly to others and correspondingly you have a right to have friends. This is a social relation. Can it qualify to be a jural one ? Thus Hohfeld's claim that his analysis pertains to fundamental "jural" relations, lacks justification. It pertains to moral, social and also jural relations. To distinguish jural relations from other sorts of relations one would have to provide both the necessary and sufficient characteristics of jural relations, not merely the necessary ones. In other words, one has to seek an answer to a more basic question: What characteristics qualify a human relationship, expressed in terms of rights or duties, to be a jural relationship ? One characteristic that jurists know well is that the relationship has to be legislated by the appropriate authorities. But is this all that is required ? If this were so then any and every human relationship could be made into a matter of legal relationship by mere legislation. We must, therefore, seek to understand what sorts of human relationships can possibly be made into jural relationships. This understanding will provide sufficient conditions which distinguish human relationships that can become jural and hence be legislated as laws from other type of relationships. An understanding of the nature of jural relationships will also explicate the internal limitations on jural conceptions which are necessary to make a particular right or duty into a legal right or duty.

The external limitations pertain to human *will*, *viz.*, the relationship in question must be willed by a socially accepted authority, whether brought into existence by some political mechanism or by customary practices. The internal limitations pertain to *reason*, *i.e.*, to the very nature of the logic of rights and duties and the conditions for their realization. I proceed now to consider these internal limitations.

Men are related to each other in various ways. There are moral relationships of obligation, accountability, compassion, sympathy, kindness, friendship, and so on. On the other hand, there are religous relationships, such as between man and God. I think one will not hesitate in asserting that the relationship between man and God can never become the subject matter of jural legislation. One may come to this conclusion through a weaker argument, namely, God is a non-person and one cannot bind non-persons into jural relationships. Or one may adduce a stronger argument that God is in fact a person but it is his very nature to transcend the bounds of jural relationships. However, when it comes to human relationships, there seems to be some very serious confusion. Some people seem to think that any and every human relationship can be made jural. This seems to have become the case in the Indian laws. But this is an extremely mistaken view. It is easy to see that there is something crucially wrong with legislation of the type : "It is the duty of all to be humble and modest", or "everyone has a right to be considered sympathetically", or "it is the duty of all citizens to love others". However, it is not so easy to point out what is wrong in principle about such legislation. Moreover, as we shall see, love, modesty and sympathy are not the only

relationships that defy jural legislation. It is necessary to find the criterion which can distinguish jural relationships from others.

A critical account of the grounds for distinguishing between juridical relationships and other types of relationships is to be found in the works of Immanuel Kant, specially in his *Tugendslehre* and *Rechtslehre*.[6] Although Kant's analysis cannot be said to be exhaustive, it provides the necessary groundwork. Hence a discussion with reference to his works will be useful for the purposes here.

A rule concerning human action may either regulate the behaviour of a particular individual or a group. A rule that necessitates the performance or avoidance of some act or acts is a duty. Such a necessitation may be imposed upon the individual by his own will, such as when the individual's understanding of morality makes his reason compel him to undertake certain actions, although his inclinations may be otherwise. In contrast to such duties, there are those necessitations which are imposed on all in the jurisdictions by the will of the socially authorised officials. Kant calls the first type of necessitation inner or subjective legislation, and the second type external or objective legislation. While inner legislation forms the subject matter of *ethics*, those of external legislation of *positive* law.[7]

Every legislation, whether internal of external, contains two elements. First, the rule or maxim which sets forth as objectively necessary the action that must take place, that is, which makes the action a duty; and second, a motive which subjectively joins the reasons for choosing to do the action with the maxim or rule. Legislation can, therefore, be identified by the motives it uses. The legislation that makes an action a duty and also makes the duty the motive is *ethical*. But the legislation which does not include the motive in the rule or maxim and thus permits a motive other than doing a duty for its own sake is *juridical*. Further, the mere conformity or non-conformity of an action with the law, without reference to the motive of action, is called its *legality*. But that conformity in which the ground for doing duty for its own sake is also the motive of the action is called its morality.[8]

It follows, therefore, that whereas all ethical duties are moral duties, all duties in the juridical sphere need not be done for the sake of their morality. They can be done merely for the sake of their legality, that is, so as to be law abiding. One may, of course, also act in accordance with a rule which has been legislated as law, not because it has been so legislated

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6. *Rechtslehre* has been translated by John Ladd as *The Metaphysical Elements of Justice* (1965). See, for the relevant sections, pp. 45-48. See, for a translation of *Tugendslehre*, James Ellington (trans.), *The Metaphysical Principles of Virtue* (1964).

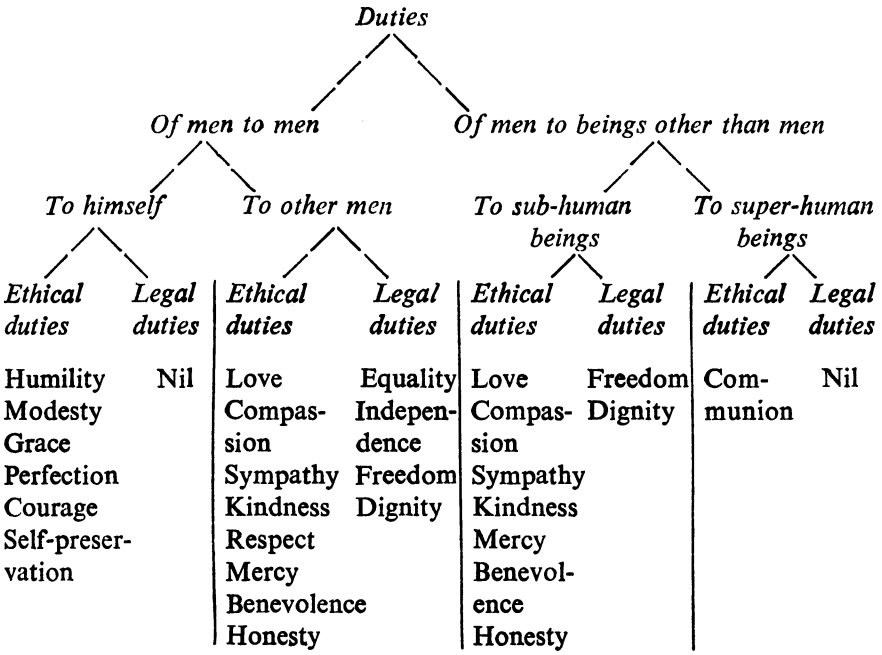
7. See also John Ladd's introduction to *The Metaphysical Elements of Justice* at xii-xviii.

8. *Id.*, para 19.

but because one's own reason compels one to do so. In such a case one will be doing an ethical duty which is also simultaneously a legal duty. According to Kant, a rational person would do this naturally.

Although there are some rules which can be both a matter for ethical and juridical legislation, all rules are not such. A moral rule, such as the duty to allow others to seek their own perfection, which concerns one's relationship with others, can be both ethically and juridically legislated. But a moral rule which concerns only one's relationship with oneself can only be a matter of ethical legislation. This is so because the condition for ethical legislation is self-compulsion, which requires the autonomy of the will. Any external compulsion to do what has a moral worth only if done by internal compulsion destroys the very moral value of that act. All ethical acts necessitated only by autonomous legislation have a moral worth. Hence no ethical act can be a matter of external necessitation. By internal necessitation an individual seeks, what Kant calls, *inner freedom*, that is, freedom from his inclination to do wrong and thus to achieve his perfection and happiness. By external necessitation a society seeks *outer freedom*, that is, freedom in which all can achieve their perfection and happiness and avoid doing wrong. A man who merely follows the law due to fear of external compulsion, even when the law is moral, cannot be said to be virtuous or meriting any praise for doing his duty. Thus it is the very nature of certain duties that they cannot become a matter for juridicial legislation without defeating the very nature of the prescribed action as a duty.

Before attempting to clarify what relationship law can have to ethical duties, it will be helpful to chart out the different spheres of duties :



The above chart is not meant to be exhaustive, only illustrative. It only mentions the concepts central to the ethical or legal propositions.

Although law cannot prescribe ethical duties it will be wrong to assume that it has no function in relation to them. Its main function with relation to them, specifically in relation to those duties which concern ethical duties of men to other men, is to provide the social conditions under which individuals can realize such duties when they want to. In providing such conditions the law does not enforce the ethical motives; it only attempts to delimit the possible field of actions so that the totality of these actions are within the bounds of what is morally acceptable. It is then natural to ask what is meant by delimiting the possibilities of action so that the conditions for doing ethical duties obtain? Delimiting the possibilities of actions simply amounts to preventing the possibilities of those actions which are contrary to what the ethical duties prescribe. Some contraries are presented in thc following chart :

| *Sphere of ethical (personal) legislation (for)* | Contrary | *Sphere of juridical (social) legislation (against)* |
|---|---|---|
| Love | | Hatred |
| Compassion | | Cruelty |
| Sympathy | | Negligence (indifference, spite) |
| Kindness | | Malice |
| Respect | | Disrespect (libel, defamation) |
| Mercy | | Vengeance |
| Benevolence | | Purposive harm |
| Honesty | | Dishonesty (fraud) |

Each of the concepts, mentioned under juridical legislation in the above chart, can manifest itself in various ways. There are equally numerous types of legislation intended to prevent the occurrence of actions which fall under any of these concepts. Again, the list is not meant to be exhaustive but only illustrative.

With relations to duties then, there are two aspects of law which define its internal scope, determined not on the basis of human will but due to reasons of the nature of law itself. In its positive aspect law attempts to realize the juridical duties of men to other men and to sub-humans. In its negative aspect law legislates against only those actions which are contrary to the ethical duties of men to other men and sub-humans.

The foregoing analysis has shown that the sufficient condition which distinguishes juridical relationships from all other types of relationships is that it must neither express nor be based on moral principles of ethical duties which can be realized only by an autonomous will. The sufficient condition follows from the mere explication of notion of external legislation for outer freedom. Since law cannot and must not regulate the

autonomy of the will, its concern is aimed at the heteronomy of the will. That is, that will which relates to the will of others. A heteronomous will must necessarily involve more than one person who are bound in reciprocal relationships for the achievement or prevention of mutual ends. The necessary and sufficient condition for a relationship to be a jural relationship thus is that it must necessarily be dyadic or a complex relationship between two or more persons who have non-ethical reciprocal obligations or claims over other's actions or the results of their actions. A duty or a right, if it is to be a legal duty or right, hence cannot be one-sided. It can only be a legal fact operating between a group of individuals or corporate bodies whose actions are correlated.

Theorists often attempt to locate duties or rights in law which have independent existence. All such attempts are clearly erroneous in principle. Joel Fineberg, for example, has argued that there are cases of duties for which there are no corresponding claim rights.[9] As an example of a legal duty for which there is no corresponding claim right, he mentions stopping at the stop sign while driving an automobile. According to Fineberg, drivers have a duty to stop but no one has the corresponding claim-right. This is a mistaken view. In this case the state does have the corresponding claim-right. It is only on the basis of this right that it can justify bringing action against the erring driver who fails to stop.

This brings to conclusion the discussion about the necessary and sufficient characteristics of jural relations and the internal limits of the scope of juridicial legislation. But, in passing, it will be important to mention a boundary case which has been a matter of controversy since long. This concerns the ethical duty to self-preservation.

The basic reason for the controversy about suicide is that although the duty for self-preservation is an ethical duty of a person towards himself and hence should not fall within the scope of juridical legislation jurists have often asserted that this particular ethical legislation must also be made a juridical legislation. The reason usually offered is that a man owes his life not only to himself but also to others. As such, suicide becomes an action done not only to oneself but also to others, such as to the kith and kin or to the community at large. The force of this argument does not tell against the rational division of duties mentioned earlier, but only reinforces it. It shows that suicide can be brought under legal conviction only by defining it in terms of a dyadic or complex relationship between human beings, which is the characteristic of all jural relationships. However, insofar as the duty for self-preservation is an ethical duty, there is a gross futility in any attempt to make it a legal duty. In transgressing its limits the law will naturally be at a loss in not knowing how to legally enforce this duty or in providing sanctions for the prevention of the violation

9. *Rights, Justice and the Bounds of Liberty : Essays in Social Philosophy* 63 (1980).

of this duty. The promoters of ethical duties have traditionally been the educational and the religious systems, not the legal systems. And there is no reason to believe why this will change. However, my aim in mentioning the problems involved in legislating against suicide is not to get into the moral controversies about it, but through this illustration only to bring the distinction between ethical and legal duties into a sharper focus.

What light do these insights into the nature of jural relations throw on positive law? First, they tell us what type of rights and duties cannot actually belong to the legal realm and hence ought not to be in legal codes. Second, they specify the types of rights and duties that can be legitimately jural and the terms in which they must be expressed.

Good examples of duties that can never be legal duties but nonetheless occur in a legal code are to be found in the Indian Constitution. In article 51-A of the Constitution, concerning "Fundamental Duties", one finds: It is a duty to have compassion for living creatures, and also to develop the scientific temper, humanism and the spirit of inquiry and reform. As we have seen, compassion falls in the realm of ethical duties which concern an autonomous will. Since law pertains to external morality and binds heteronomous will, compassion can never be legislated as a law, even if in ignorance one puts it in legal codes. This inability is not due to any problems about the enforcement of law, but due to internal reasons about what can be proper law. Similarly, the mentioned dispositions towards scientific temper, humanism and spirit of inquiry concern autonomous will and are not the subject matter for binding different free wills. If one chooses to develop a poetic disposition instead of a scientific one and becomes indifferent to inquiry, there is little that law can do about it. What law can do, as explained, is to provide the conditions for the required disposition and compassion, not by legislating duties but by delimiting the conditions which are inhibitive of states of affairs in which compassion can be shown or in which the desired dispositions can be developed, that is, legislating against the contraries of ethical duties, such as actions emerging from hatred.

A prime example of a right that cannot be a legal right but which sometimes finds place in legal codes, is the right to worship or to religious beliefs. The correlated duty to worship is a moral or at best a social duty; it relates man to a transcendent being but not to another will within the legal jurisdiction. As regards religious beliefs one may be an atheist, an agnostic or just indifferent to religion. What the advocates of right to worship are often really championing is the right to entry to public places such as, temples, mosques or churches. But if such places are legally defined to be public places, it suffices to safeguard the right to utilization of public places or services. This has nothing to do with worship or religion; it applies to all public places. The individual's ethical right to worship or to religious beliefs must not, however, be mixed up with ethnic

or cultural group rights. Such rights relate groups of persons to other groups, and hence are genuine candidates for jural legislation.

Let us turn now to the rights and duties that are legitimately jural and the terms in which they need to be expressed. The analysis that I have presented here has major consequnces for natural rights theory and theory of legislation, all of which cannot be explored here,[10] but the minimal essential points need to be noted.

If the basic jural concepts are necessarily dyadic (minimally) and more complex, and if they necessarily pertain to relationships between more than one agent, it follows that the numerous bills of rights found in various legal codes are in effect incomplete statements of law. So long as the actual bodies, whether persons, corporations or state agencies on whom the corresponding duties fall, are not exactly specified, the realization of such rights would be difficult, if not impossible. Since all legal rights are correlated to duties it is necessary that the bill of rights must make the correlation explicit. In actual practice the duties correlated with fundamental or natural rights are often woven into the complexity of federal, provincial and municipal laws and administrative rules. But more often than not it is extremely difficult to tell where the corresponding duty falls. It need not be assumed, of course, that the duties correlated with fundamental rights fall on one particular body; they may by spread out over numerous agencies. In a large way in fundamental rights cases the courts are engaged in precisely this task of locating the duty bound agencies. But insofar as the correlations are obvious they need to be made explicit. For example, if one has a right to freedom of expression and the telephone and post are means to the realization of this right then the legal duties of the telephone and postal departments must be made explicit. The relevant laws (at least the Indian ones) do not do this at all. The duties of these departments are barely traceable in the plethora of rules; their privileges, however, are boldly stated. Similarly, if one has a right to education as a fundamental right, where is the duty located? If the universities have this duty none of the university Acts clearly states this, and certainly not as duties which can be enforced through a court of law. Alignment of fundamental rights to corporate duties needs to be given deep consideration if legal codes are to improve and natural rights are to be realized. This paper, however, is not about such considerations; these examples are meant to be only illustrative of how a deeper understanding of jural relations bears upon positive law and why Hohfeld's analysis is grossly inadequate to serve the purpose.

*Chhatrapati Singh**

10. This paper is abstracted from author's *Human Rights and the Indian Tradition* (unpublished), wherein he has discussed the issues concerning natural rights theory in greater detail.

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# *LACHES AND THE RIGHTS TO CONSTITUTIONAL REMEDIES: QUIS CUSTODIET IPSOS CUSTODES?*[1]*

**V**

The threshold question is one simply of the ambit of the right to constitutional remedies. Interpretative effort is only called for if article 32 formulations are blurred or equivocal. In any case, close textual analysis must precede examination of policy approaches to the interpretation of article 32.

The Constitution makes it admirably clear that the right to constitutional remedies is a fundamental right. Under clause 4, this fundamental right is not to be suspended "except as otherwise provided in the Constitution." But from here on the manifest clarity of article 32 seems to ebb. For, article 32(1) instead of guaranteeing in terms a right to constitutional remedies, guarantees merely "the right to *move* the Supreme Court by appropriate proceedings for the enforcement of fundamental rights."

True, article 32(1) obviously entitles a person or citizen to move the court for the enforcement of fundamental rights, but this right must be exercised through 'appropriate proceedings'. The Constitution nowhere defines what are 'appropriate proceedings' for moving the Supreme Court. Obviously, the court has to decide the appropriateness of the proceedings. It may say what proceedings are 'appropriate' and indeed determine the very scope of the term 'proceedings'.[2] The court has to make law either through the interpretation of the term 'appropriate proceedings' or under its rule-making power by virtue of article 145(l)(c). Whichever way it does this, the court (being included, as will be seen later, in the definition of State under article 12) cannot 'take away' the right to move itself which is a guaranteed right. It is a moot point whether interpretations of article 32(1) or rules elucidating 'appropriate proceedings' under article 145(l)(c) can be said to unconstitutionally 'abridge' article 32 guarantee. Thus, when the court applies the doctrine of *res judicata*, or constructive *res judicata* or laches, the problem of whether in particular situations application of these doctrines is an impermissible 'abridgement' persists. Also persistent is the problem whether the cumulative impact of such 'abridgements' amounts to the court's 'taking away' the article 32 right.

Be that as it may, article 32(1) by itself provides only a right to move the court for the enforcement of fundamental rights. Many scholars argue that is all.[3] But this cannot be the

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***** Upendra Baxi, **"Laches and the Rights to constitutional Remedies: *Quis Custodiet Ipsos Custodes?"***, Alice Jacob (ed.), ***Constitutional Developments since Independence*** (1975).

[2] In *Daryao* v. *State of U.P.*, A.I.R. 1961 S.C. 1457 the court held that the "argument that Art. 32 does not confer upon a citizen the right to move this Court by an original petition but merely gives him the right to move this Court by an appropriate proceeding according to the nature of the case seems to us to be unsound".

[3] E.g., Alice Jacob, "Laches : Denial of Judicial Relief under Articles 32 and 226", being a paper presented at the I.L.I. Seminar on Administrative law (Nainital, May 1973) p. 16. Professor Jacob maintains that Article 32(2) is "an enabling provision" and the court is not "bound to give relief in all

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case. If any person has the right to move the court, the court is under a corresponding duty to be so moved. Although the term 'move' can be interpreted restrictively so as to denote a most casual consideration of the petition or the mere act of receiving it, it is not controversial to say that the bare text of article 32(1) imposes an obligation upon the Supreme Court to take appropriate action if the case is proven.

What then is the significance of the court's power to interpret the term 'appropriate proceedings'? It is submitted that, in strict Hohfeldian analysis, we have here a case of legal duty qualified by a privilege. The Hohfeldian co-relative of privilege is a 'no-right'. We would then have to say that if the court holds that a particular way of moving it for the enforcement of the fundamental rights is not in the nature of 'appropriate proceedings', no right of the individual is thereby violated. But surely this privilege - no-right relation occurs within the context of a right-duty relation. That is to say, the court is not free to say that it is under no legal duty to be moved. It is. It can only say that it has a privilege to hold that a particular manner of initiating proceedings before it is not 'appropriate'. The court has a similar privilege to define the term 'proceedings'.

We now turn to article 32(2) which, as is well-known, empowers the court to issue "directions or orders, or writs...for the enforcement of any of the rights conferred by this Part". This language of article 32(2) is regarded by some scholars to mean that the court is enabled, in cases of proved violations of fundamental rights, to issue certain orders, directions and writs. The argument is that if article 32(2) is an enabling provision, an empowering one, the court has a discretion whether or not to use that power. The conclusion follows inescapably that article 32(1) guarantees a *right*; 32(2) invests the court with *power*. There thus arises a dualism between the two provisions: one under which the court is under a legal obligation to be moved, another under which it has a power which it is under no legal obligation at all to exercise.

The conclusion is manifestly wrong because the reasoning is entirely fallacious. The correct juristic analysis is that the constitutional obligation cast upon the court to be moved for enforcement of part III rights is coupled here with attendant powers to be so moved. The court cannot be moved to any worthwhile effect under article 32(1) if it did not have a power to issue 'directions, orders or writs'. Since the power is conferred in the aid of a constitutional obligation, the exercise of that power cannot at all be discretionary. Whenever an appropriate proceeding as determined by the court is before the court, the court must issue directions, or orders or a writ. And the 'direction, order or writ' must be for the enforcement of a fundamental right if the right is found to be in need of such enforcement. Only the Supreme Court (or a court empowered under article 32(3)) can decide whether right is violated or it needs to be enforced. The moot point here is: Can the Supreme Court itself say otherwise? That is, can the court say that even though the right is violated or needs enforcement, it will not exercise its article 32(2) power?

The answer to this is that it may say so; but when the court so says its judgment is vitiated by unconstitutionality and, even on a strictly legal positivistic approach, the judgment is not entitled to obedience, it being void under article 13. A judgment or an order of the court is

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instances of infringement of fundamental rights discarding certain cardinal principles of administration of justice...."; see also Seervai, *infra* note 3.

undoubtedly a law under article 13. It determines no doubt the legal relations *inter partes*. But decisions for the enforcement of part III rights also create law which is binding on all courts throughout the territory of India. If this answer is correct (and the author believes it is) then article 32(2) cannot at all be regarded as conferring a power merely; it must be appreciated as conferring the power to enable the court to perform its constitutional obligation.

From this viewpoint, the decision by the Supreme Court to dismiss a petition *in limine,* or on the grounds of *laches*, *res judicata* (constructive or otherwise) presents massive problems. This is so because the court in these cases is not really saying that the allegedly infringed fundamental rights need no enforcement. Rather, the court is saying that it itself will *not* examine that issue *at all*. With great respect it is submitted, the court has no authority to so do, more so since the right to constitutional remedies is itself a fundamental right.

Seervai argues, however, that no "fundamental right is conferred to obtain relief from the Supreme Court regardless of all considerations relevant to the administration of justice."[4] Such a statement standing alone cannot signify anything more than an elucidation of Seervai's personal preferences which, though entitled to some weight, cannot be regarded as more authoritative than the plain text of article 32. And Seervai is normally a champion of the rule that the clear text is compelling.

Realising this, he argues as follows:

...Article 32(2)...confers a power to issue writs. This power is not expressly coupled with a duty, nor can a duty to exercise the power be implied because the writs there mentioned, except *habeas corpus*, were discretionary in England and in India.[5]

The language of article 32(2) is, unfortunately for this view, even *more* clear than what Seervai allows. It is *more* clear because *first* the power is the power to issue 'directions, orders and writs'. *Second*, the writs are inclusive of five typical writs but not exhaustive. New writs could be evolved, which are unknown elsewhere. To say that this cannot happen is to impute disingenuity to Indian lawyers and judges. *Third,* and equally important, the powers to issue writs is the power to issue writs in the nature of five writs therein mentioned. So the fact of their being discretionary in England is not constitutionally conclusive in India. The expression writs 'in the nature of the five historic writs does not necessarily refer to the discretionary nature of the writs. The words 'in the nature of rather refer to the mode of proceedings and judicial order upon hearing and disposal of the same.

By the same token, the argument that the Supreme Court has treated article 32(2) as discretionary as far as the issue of the writs is concerned is scarcely an argument for saying that it is necessarily right in so doing. *Golak Nath* showed that an approach to amending power employed by the court for nearly seventeen years may yet be declared wrong.

Indeed, Seervai himself seems to disagree *with his above-quoted views*. In his treatise on constitutional law, he goes so far as to say that the judgments of the Supreme Court which suggest, or state, that the grant of an appropriate writ under Art. 32 is discretionary, are not

[4] See H.M. Seervai, "The Supreme Court, Article 32 of the Constitution and Limitation," *73 Bombay L.R. (Journal)* 35-38 (1969) at p. 37 and V.G. Ramachandran, "Is Article 32 a Discretionary Remedy Subject to the Doctrine of Laches?" 1969 (2) S.C.C. 21-34.

[5] *Id*. at 37-8.

correct because they overlook the difference between the English and the Indian law brought about by Art. 32(1).[6]

Moreover, to say that article 32(2) power is not expressly coupled with a duty is to say the right guaranteed by the Constitution has no co-relative duty or to say that the duty is discretionary but the right is somehow fundamental. Such a statement is absurd from a strictly analytical viewpoint.

The article 32(2) power is necessary to discharge article 32(1) duty. And article 32(2) is on any approach a provision ex *abundanti cautela*. Suppose the constitutional text gave no specific power to the court at all. Can it be seriously urged that the court, therefore, had no power to discharge a duty cast upon it by the guarantee of fundamental right in article 32(1)? When the constitutional duty and power are so explicit, it is scarcely necessary to have recourse to tenuous denials of implied duty-power relation in article 32.

Furthermore, the meaning of the proposition that article 32(2) power is discretionary is not at all clear. Discretion means choice. The Supreme Court may choose to issue a writ or not issue it. None can seriously argue against the view that the power is discretionary in the sense that if a case is not made out at all for the issue of a writ or a direction, the court may properly decline to issue it. The words "for the enforcement of rights conferred by this Part" occurring in article 32(1) and (2) make this very commensensical point abundantly clear. If the rights do not need to be enforced because their violation is not proven, then no writs or directions need be issued. But can we really maintain that the court has discretion whether or not to issue writs, directions or orders if the rights need enforcement? Indeed not. Seervai himself elsewhere argues that such refusal to issue writs to protect fundamental rights would be an "abdication of the duty laid upon the Supreme Court".[7] Indeed, Seervai himself (and quite rightly so) argues that even under article 226 the 'discretion' enjoyed by the High Courts in the issuing of the writs must be properly exercised in the matter of fundamental rights. This means virtually that the High Courts must give relief if a case for relief is made out in a matter involving fundamental right.[8]

The *question whether relevant considerations as are routinely employed* in administration of justice should apply to article 32 is a question of policy and not *merely* a question of textual analysis of article 32. It does not help clear thinking to coalesce two distinct questions. The crucial questions here, tolerating no obfuscation, are: are considerations of public policy underlying administration of justice—(embodied in doctrines like *res judicata,* laches, etc.)—to be imported in enforcing fundamental rights, including the right to constitutional remedies? If so, does the Constitution authorize the court to so do? *These* questions do not even begin to emerge so long as we continue to pour our preferences and values in the text of the Constitution which is compellingly clear.

To conclude this section, let us reiterate the following results of strict juristic analysis of article 32. The article creates the following jural relations:

[6] Seervai, *Constitutional Law of India* 624 (1968).
[7] *Id.* at 625.
[8] *Ibid.*

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(i) a right in the allegedly aggrieved person to move the court by appropriate proceedings and a duty in the court to be so moved for the enforcement of fundamental rights;

(ii) this latter duty is coupled with power (by article 32(2)) vested in the court to facilitate its discharge; the power has its correlative liability of the State for its action to be judicially reviewed;

(iii) the court has the privilege to determine what 'proceedings' are 'appropriate' to article 32 and no right of aggrieved person is violated by the court's exercise of this privilege.

# *THE MODERN CONCEPTION OF RIGHT AND ITS MARXIST CRITIQUE*[1]

During the past few years academic literature on rights has been growing at a considerable pace. Since most of it is written within the liberal-democratic tradition, it tends to concentrate on such questions as whether we can meaningfully talk about natural, human or inalienable right, what criteria a right must satisfy in order to be so called, what rights-if any-meet the requirement and which every state must be required to guarantee, and how the economic and social rights differ from legal, political and civil rights. In this paper I shall discuss two of the many questions that have received comparatively little attention.

First, in much of the literature on the subject it is taken for granted that the currently dominant conception of right is somehow self-evident and represents the 'only' way in which the concept of right can be understood. I propose to argue that it is relatively recent in origin, and does not go back much further than the seventeenth century and is fraught with paradoxes and contradictions. Second, almost from its inception the modern conception of right has been subjected to considerable criticism by such diverse groups of people as the old natural law theorists, religious writers, socialist and the Marxists. They were deeply troubled by it, and explored either an alternative conception of right or a society to which the concept of right was not central. Since the Marxist critique of it is the most systematic and highly influential, I shall focus on it and indicate the lines along which a richer and more satisfactory conception of right could be developed.

## I

We have become so accustomed to conceptualizing human relations in terms of rights that we do not appreciate that nearly all non-western and most pre-modern European societies managed, to do without them. Not all of them were despotic or autocratic. In some of them men enjoyed many of the liberties characteristic of a free society, such as security of life and possessions. They did not murder each other at will, nor did their rulers deprive them of their lives-except according to established procedures and for commonly agreed purposes. They also had possessions which they used as they pleased and bequeathed to their children. They followed the occupations of their choice and enjoyed freedom of movement. Yet they did not regard these are their rights or claims. They took these freedoms for granted, and enjoyed and exercised them without in any way feeling self-conscious about them. Even as they had eyes and ears, they had certain freedoms of which they did not feel the need to remind either themselves or others. Even classical Athens, widely acknowledged to be the cradle of western democracy, managed to do without the concept of right. Indeed, like many classical languages, classical Greek did not even have word for it.

The concept of right was first systematically developed in Rome, which was also the first western society to develop the concept of the private realm and to insist on its relative inviolability and equality with the pubic realm. For the Roman jurists, right, law and justice were inseparable and the term just was used to refer to them all. Rights were created by the law, and the law was an articulation of the community's conception of justice. Law was associated primarily not with order as in the current expression 'law and order', but with justice. Justice alone created and sustained order; and when dissociated from it, the law became a source and an instrument of disorder. The concept of a right was inseparable from that of right. As both of Gaius and Ulpain observed, a right consisted in enjoying what was right; and justice secured a man's right by 'giving him his right.'

A Roman *cive* had several rights, such as the right to property, to discipline and to exercise the power of life and death over the members of his family and household, to enjoy access to common land, and to participate in the conduct of public affairs. These rights belonged to him not as an individual but as the head

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[1] Bhikhu Parekh in Upendra Baxi (ed.), ***The Right to be Human*** 1-22 (1987).

of a family or *pater familiae;* and the family, not the individual, was deemed to be the primary subject of rights.

The individual enjoyed rights because it was believed that only thus could the community realize its general ends. He had no claim to the rights; and he did not enjoy rights as of right. The community conferred them on him as the necessary conditions for the realization of its common purpose. A man's legal personality was made up of the interests and powers of action conceded to him by the social order, and justice consisted in respect for each other's legal personality.

Rights were subject to several constraints, and restricted in depth and scope. The law was not their only source; customs, usages and traditions also generated rights, and these were in no way inferior. A right, further, did not imply absolute control. One had a right to use but not to own certain things and one was not free to do what one liked with the things one owned. Thus one was not free to sell one's land, if it was located at a certain place, substantial in area, or for generations had been inhabited by people. Under the influence of the Stoic idea of naturalist ratio, the Romans also thought that certain things could not be individually owned, for that ran counter to their 'natural purpose', and formed part of *res extra commercium*. Above all, in their view the language of rights was limited in scope and inherently inapplicable to such areas of life as familial and political and political morality. Rights pertained primarily to the civil society, not to the state or the family and governed the relations between the individuals and not between them and the state.

During the several centuries of feudalism, the picture was equally complex. Not only the individuals but such traditional communities and groups as the cities, guilds and estates were also bearers of rights. Individuals acquired rights by virtue of their membership of specific groups or by entering into certain types of relationship. Rights were derived from several sources, of which the law was but one and not the most important. The long established traditions, which defined the content of justice and rights, severely limited the scope and authority of the law. Further, the concept of duty, not right, dominated the feudal society. The king and his subjects, and the lord and his vassal, entered into quasi-contractual and unequal relationship, and acquired reciprocal and limited duties. Each party was expected to act in the contracted manner because he had a duty to do so, not because the other party had a right to require him so to act. The concept of duty was logically prior to that of right, in the sense that the duties generated rights, not the other way round. And the language of duties was for the most part considered self-sufficient in the sense that social relations were deemed to be adequately conceptualized in terms of duties, without introducing the language of rights. Further, private and public relations were never separated. A vassal's right to his property, whether it consisted in cultivating land, operating a mill or collecting a toll, entailed a public service of some specified kind, such as military service and attendance at the lord's court. Every private right had a public dimension, and implied public and institutional obligations.

From the seventeenth century onwards, the traditional conception of right begins to undergo profound changes. Broadly speaking, the changes occur in four areas, namely, the subject of right, its object, the relations between the two, and the place of right in moral and political life. Let us take each in turn.

## II

Unlike in pre-modern society where communities, traditional groups, guilds, corporations, families and even land were bearers of rights, the modern conception of rights regards the individual as its primary bearer. Groups do of course have rights, but these are derivative, and in principle reducible to those of their members.

The concept of the individual is obviously complex and presupposes a theory of individuation. By the very conditions of his existence, every man is inseparably connected with other men and nature. The individual is not given by nature, but socially demarcated and defined. To individuate a man is to decide where to draw the boundary between him and other men and nature. Individuation is thus a matter of social convention, and obviously different societies individuate men and define the individual differently. The ancient Athenians saw man as an integral part of nature and society and believed that a man taken together with his land and political rights constituted an individual. Almost right up to the end of the Middle Ages, a craftsman's tools were believed to be inseparable from the man. They constituted his 'inorganic body' and were just as much an integral part of his self as his hands and feet. To deprive the craftsman of his tools was

thus to mutilate him, and he was not free to alienate them. For the Hindus the set of social or caste relation into which an individual is born are an inseparable part of himself, and define him as an individual. The Chinese view the family as an indissoluble organism. Linking the ancestors and their descendants into a living union, and have a highly complex conception of the individual.

The seventeenth century writers define the individual in extremely narrow terms. For them the naturally given biological organism, neatly encapsulated in the body, constitutes the individual. As a neatly self enclosed natural organism, each human being constitutes a self-contained unit. The limits of his body are taken to be the limits of his self. He appropriates the world by means of his senses and reason, and creates an internal world of sensations, ideas, feelings and experiences. Everything lying outside the outer surface of his skin constitutes the 'external' world and does not form an integral part of his self; everything lying 'within' it is internal to and an indivisible part of his self. In this way of thinking the center of each individual is firmly located within himself. Others can enjoy varying degrees of closeness to him, but only he can constitute the center or axis of his life.

With the modern naturalist or physicalist conception of the individual, the body acquires unprecedented ontological, epistemological, moral and political significance. It becomes the criterion of reality in that an individual is deemed to be real and to exist as long as he inhabits a living body. Its dissolution represents his dissolution. Life, the continuation of the body in time, and liberty, the unhindered moment of the body, become two of the highest moral values. Violence is defined in physical terms so that the infliction of physical harm is violence, but that of psychic or moral harm is not. A man's freedom is deemed to be restricted when he is physically restrained from moving as he pleases, but not when his ideas or beliefs or emotions are conditioned and moulded. Morally, it is physical more than any other type of suffering that dominates the moral imagination. If one saw someone crying, dying, starving, one might find that one ought to do something about it; but if one saw a child frustrated from developing his abilities for want of money, or a man in despair for lack of gainful employment, one would not generally see that a moral problem was involved and that its redress was just as urgent as the prevention of death.

**III**

The second important change which the concept of right undergoes during and after the seventeenth century relates to its scope. The earlier constraints on what can legitimately become an object of right, and how far a right can extend, more or less disappear. The natural world gets desacralised. It is no longer seen as a quasi-rational and moral whole, or even as an autonomous world of living beings endowed with measure of dignity, but rather as a material world, a world of 'dead matter' which man, its sovereign master, is free to plunder at will. Everything in the natural world therefore becomes an object of right, and capable of alienation.

Land, which in earlier centuries was invested with rights and whose alienation was subject to restraints, could now be freely bought and sold. In the earlier centuries, again, property largely meant the right to a revenue rather than to a thing, and it consisted in rights in rather than to things. The great bulk of property was in the form of land, and in the case of substantial estates the owner was not free to sell this. His property comprised the revenues accruing from his land. Another large segment of individual property consisted in the right to a revenue from such generally non-saleable things as corporate characters, monopolies and various political and ecclesiastical offices.

From the seventeenth century onwards, the right to property comes to imply the right to dispose to things as one pleases; and thus a more or less absolute and exclusive right to own, use and alienate them. In the earlier centuries, again, common land was regarded as an important part of communal life; and people had a right of access to it. After the seventeenth century, common land more or less disappears, and is privately divided up.

Even as the natural world is reduced to the material world and viewed as a collection of material objects, the human being is reduced to a collection of capacities and powers, almost all of which could be alienated and made objects of rights. In order that an individual can alienate and give others rights over his powers and capacities, two conceptual conditions must be satisfied. First, he himself must be presumed to have a right to them; that is, he must view them as his property-as things he owns and is free to dispose of at will. If for example, he were believed to be a custodian of his capacities and powers which he held as a trust

from god, society or mankind, he would obviously not be free to alienate them at will. Second, he must be presumed to be somehow separate from them, so that he does not sell or alienate himself when he sells or alienates them.

Both these conditions obviously require a new definition of man, of the nature and basis of his dignity, freedom and personal identity. In order to say that his freedom is not compromised when his abilities, skills and activities are placed at another man's disposal, he needs to be defined in the barest possible manner. Since almost everything about an individual is considered alienable, the crucial question arises as to what is to be considered essential to his human identity such that its alienation of his alienation, and his loss of control over it amounts to a loss of his humanity. The theorists of the modern conception of right locate his essential humanity in the interrelated capacities of choice and will. For them they represent man's differential specificia, and are the bases of human dignity. The individual differs from the rest of the universe in possessing the two basic capacities of reason and will. Thanks to them, he is capable of freedom and self-determination. As long as he is not physically over-powered, hypnotized or otherwise deprived of his powers of choice and will, he is considered to be autonomous; his actions are uniquely his, and therefore his sole responsibility. It does not matter how painful his alternatives are, how much his character is distorted by his background and upbringing, and how much his capacities of choice and will are debilitated by his circumstances. As long as he is able to choose, his choices and actions are his responsibility.

The individual is abstracted from his social background and circumstances, which are not therefore co-agents of, and co-responsible for his actions. He stands alone, all by himself, stripped of his social relations, circumstances and background, facing the world in his sovereign isolation and, like god, and the traditional distance between a man and god almost disappears.

When the individual is so austerely conceived, the question arises as to how he is related to his alienable bodily and mental activities and powers. They cannot be conceived as his modes of being, the manner in which 'he' expresses himself and exists for himself and for others. They can be understood only as things he possesses. Modern writer appropriately define them as his properties, which in legal language become his possessions. If 'he" referred to the totality of his being and not merely to the capacities of choice and will, his powers and activities would be seen as an integral part of his self, as constitutive of his self, and therefore not as his possessions which he could dispose of 'at will'. He would not be able to alienate them any more than he could alienate his will or choice. And his so-called 'freedom' to sell his capacities and activities would appear not as freedom, but slavery.

Once the subject and the object of rights were defined in this way, certain rights became most important, especially the rights to life, liberty and property. Each came to be defined in narrow and restricted terms. Thus the right to life was taken to mean the right to be free from physical harm by other men; but not the right to material sustenance without which life is impossible, or the right to be free from in sanitary conditions of work or an unhealthy living environment or excessively long hours of work-all of which directly or indirectly reduce the span of life. The right to be free from the arbitrary will be other, including the government, and to participate in the conduct of public affairs, did not include the right to be free from the arbitrary will of employees or reduce their wages at will. As for the right to property, it meant the right to acquire property and to have it defended against others' interference; and not what it literally meant, the right to (possess at least some) property. We need hardly discuss why only these rights, and not such other rights as personal development, self-respect, employment and education, were emphasized; nor even why they were so narrowly defined.

Another important change occurred in the second half of the nineteenth century. The rights of life, liberty and property that had so far been emphasized were all rights to protection, in the sense that the only things their agents required to enjoy or exercise them were forbearance or non-interference by their fellow citizens, and protection by the government. In the nineteenth century social and economic rights were added to the list. Now, obviously, these have a very different character. They are not rights to protection but provision-the provision of sustenance, the means of material of well-being, employment and even basic opportunities for personal growth. As such, they require the government to play a positive and active role in economic life. They also imply that, in order to meet the social and economic rights of those in need, citizens

should not merely forbear from interference, but positively contribute by taxes and other means to the resources which a government requires.

These new rights thus called a radical change in the prevailing views on the role of the government and, more importantly, in the nature of the state. If the citizens of a state are to be required to help those in need, not as matter of duty entailed by the latter's legal or moral rights, it can no longer be seen as a mere collection of self-contained and atomic individuals united by allegiance to a common authority. Instead, it becomes a community of interdependent individuals, each caring and concerned about the way the others live, that is, a political community as different from a mere civil society. The new social and economic rights thus presuppose a very different view of man and society to the one underlying the old trinity of rights to life, liberty and property. Not surprisingly, a long and sometimes bloody struggle had to be undertaken before they were taken seriously. Even they were recognized as legitimate rights, their underlying assumptions were not. Not surprisingly, they continue to enjoy a precarious existence, and their recipients are treated as an inferior and sub-human species.

**IV**

The third important change since the seventeenth century has occurred in the way the concept of right is defined. The modern concept of right represents a novel and explosive combination of some of the features that it shares in common with its pre-modern cousins, and several other that it acquired for the first time in the seventeenth century. As it is commonly understood, a right has the following features.

First, a right is a claim. To say that 'A has a right to B' is to say that A possesses B not because others have kindly allowed him to acquire or enjoy it, but because he has a claim to it which others must recognize and respect. His claim is wholly independent of their personal feelings and sentiments towards him and requires a specific pattern of behaviour from them.

Second, the claim has the nature of a title and its bearer is entitled to make it. His claim is not arbitrary, but based on recognized procedures. Every bearer of a right is a title-holder, and able, when challenged, to point to his title-deed.

Third, the title is conferred upon him by the established legal authority, the generally acknowledged source of all titles within a territorially organized source of all titles within a territorially organized community. When challenged, the bearer of a right can point to a specific law which has given him the title. Since both he and others must know what he is entitled to own or enjoy and what he and they may or may not do, the law must publicly and unambiguously announce the title. The modern concept of right thus requires that customs, traditions and usages should all be replaced by the civil law as the sole and exclusive source of right. Not that they all disappear; rather they have no legal force or relevance unless the law takes cognizance of their existence and confers legal status upon them. The modern concept of right necessarily requires the modern concept of sovereignty as its logical correlative.

Fourth, to have a right is to be free to do what one likes with it in conformity with the condition of its grant. The modern concept of right places minimum restraints upon its exercise. For A to have a right to B means that he may give it away, store it up, destroy it and in general dispose of it in the way he pleases. Similarly, for A to possess a right to have C return his books, or repay his money, or render the contracted service, means that he can demand it of C irrespective of whether he needs these things, or C needs them more than he does, or C is in a position to do what he is required to do.

Fifth, to have a right to a thing means not only that one can do what one likes with it if it is within the legally prescribed limits, but also that others are excluded from access to it. The concept of exclusivity is built into the modern concept of right. It is not inherent in the concept or fight itself for, as we saw, in several pre-modern societies, a man's enjoyment of a right did not prevent others from gaining access to its objects if their need for it was urgent or greater.

Sixth, a right not only excludes others but also requires a specific set of services from and imposes hardship on them. Minimally, they are required to refrain from interfering with it. At a different level, they are also required to make financial contributions towards the maintenance of the apparatus of the state which is required both to create and protect rights. A starving man, or one whose wife is dying for want of money to buy medicine, is naturally tempted to help himself to the surplus resources of his neighbour. The latter's

right requires him to resist the temptation, even at the risk of his own or his loved one's life. Again, rights impose a considerable moral burden. The rich man's right to do what he likes with his wealth, engage in conspicuous and wasteful consumption, buy and sell property, or set up an industry tends to damage a poor man's pride, self-respect and sense of dignity. It also set a vulgar social trend corrosive of traditional moral values, destroys long established communities and tends to weaken civic pride and unity.

A right then is at once both a source of benefits and burdens. It benefits its bearer, but only by imposing legal disabilities loss of liberty, suffering, and emotional, moral, cultural and financial burden on others. Different rights impose different kinds of degrees of burden upon others. For example, the right to life imposes fewer or lighter burdens than the right to property; for the former requires of others no more than self-restraint, whereas the latter imposes the additional social, economic and moral costs referred to earlier.

Again, the burdens imposed by the rights exercised by all are easier to bear than those by the rights restricted to a few. For example, the right to life is in practice enjoyed and exercised by all, and the burdens which it imposes are fairly distributed; whereas the right to property has virtually no meaning for those unlikely to own it. The meagre property which a poor man might possess imposes infinitely fewer burdens than the vast investment of an industrialist.

The equality of rights is therefore an ambiguous and misleading expression. All citizens may formally possess rights. However, since some rights make far greater demands on others and are in that sense more costly, expensive or burdensome, those in a position to exercise them impose far greater burdens upon their fellow-men than those who are not. The modern doctrine of rights treats them as homogeneous entities of identical weight, and ignores the differences in their nature, structure and consequences.

Seventh, a right is legally enforceable. To have a right implies that the state stands guard over a specific area of action, and punishes those who dare to transgress it. Every bearer of right has at his disposal the entire coercive machinery of the state which he can activate when his right is threatened. A right thus is a form of power, a share in the exercise of the state's sovereignty. Indeed to have right is to have a lease of the state for a specific purpose, for a specific period of time.

Eighth, since a right is a formal title conferred by the state, one's possession of it is not dependent on one's ability to exercise it. A man continues to possess and, strange as it may seem, 'enjoy' a right of life – even when he is dying for lack of food or medicine, or works in an asbestos factory or under conditions that make premature or painful death a virtual-certainty. Similarly, he possesses the right to sue his employer for breach of contract, even if he lacks the money to hire a lawyer and may never be able to exercise the right. And he enjoys the right to liberty, even when it is drastically curtailed by the power others wield over him. In short, the modern right is a strange ontological entity; it exists even when it is not a worldly reality, and one can possess it even if one can do nothing with it. By its very nature the modern concept of right is biased against those lacking the resources to exercise it. It promises them opportunities they can rarely enjoy, and which tantalize them but systematically elude their grasp.

## V

We have outlined three important changes the concept of right has undergone since the seventeenth century. We may now turn to the last one, namely, the enormous importance it has acquired as the central organizing principle of modern society. In pre-modern societies the moral conduct had many sources, such as communal loyalties, common sentiments and affections, traditional ties, customary duties and common interests and men cared for each other for one or more of these reasons. Indeed, each of them was tied to others by so many bonds that he did not define himself and his interest in isolation from, let alone in opposition to them.

From the seventeenth century onwards, social life changes radically. Communal ties and customary bonds disappear; men begin to define themselves as free individuals, with no ties to each other save those they have chosen to establish; and no duties other than those entailed by such ties. Lacking the background of traditional bonds and localities they cannot obviously take these constraints for granted. They do not, of course, need to assume that others are all vicious men determined to harm them; rather that in the absence of traditional restraints they cannot take any chances. Each must therefore look after his own interest, and devise ways of protecting them against the invasion of others who are at best indifferent and at worst hostile.

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A group of equal, self-interested, self-assertive, otherwise unrelated and mutually suspicious individuals necessarily requires the modern state to hold them together. They recognize no authority save that of impersonal rules and the centralized public authority as their sole legitimate source. The state is based on rules and enjoys that monopoly of legislation. In order to enforce laws and protect rights, the state must enjoy also the monopoly violence. In short the modern state, a unique historical institution, characterized by such features as centralized authority, monopoly of violence, impersonality, the rules of law and protection of individual rights, comes to replace earlier forms of organizing the community. It represents a particular kind of order and a particular manner of creating and sustaining it. The order consists in the maintenance of a clearly established system of rights and obligations; it is structured in terms of rules, especially laws; and it is underpinned by the state's monopoly of violence.

Order in modern society is articulated in terms of a system of rights and obligations created by the law. Law created civil morality as the primary and dominant form of morality in it and it is articulated in the idiom of rights, obligations and duties. Morality entails a scrupulous regard for each mother's rights. One fights for one's rights, but at the same time respects others' rights.

In a right-centered society every man is not a wolf to everyone else. People do show respect for each other, but the respect is confined to a regard for their rights. In order that A can expect or ask B to do X for him, he must establish that he has a right to require B to do so. If he does not have a right, B has no duty; and in the absence of a duty he cannot see why he would do it. When A has a right and B a corresponding duty, B may discharge his duty because he may fear punishment, or because he may have internalized, that is, developed a character adequate to civil morality and act out of respect for A's right, or for the law which gives him the right, or because he may conclude that rationality or consistency requires him to respect A's right even as he wants A in turn to respect his. Whatever his reasons and motives, a right-based society rests on civil morality and requires no deeper moral motivation.

Since civil morality is the basis of modern society and dominates its public life, it predictably casts a long and deep shadow over all areas of human life, and determines the way these are conceptualized and talked about. Thanks to its domination, when men do good to others that is not apparently entailed by the latter's rights, they feel uneasy unless they can somehow show that their conduct is really a response to some unspecified rights of theirs. They postulate another category of rights, usually moral or natural or human rights, attribute these to others and view their own actions as duties entailed by them. They might intuitively feel that, either individually or collectively through the states, they ought to relieve distress, help their potential, but they feel unable to explain the 'ought' except as an act of charity or a mark of respect of their rights. And since the former turns them into helpless objects dependent upon others' contingent goodwill, they opt for the language of rights. They do not think it enough to say that they love their fellow-men, are deeply concerned about them, feel a sense of solidarity towards them, or feel guilty about their own undeserved privileges. Thanks to the fact that they live in a society almost wholly governed by the morality of rights, such moral emotions have either dried up in them, or they feel nervous and shy about admitting their existence. They have become so conditioned into thinking that every duty presupposes a right, that human dignity can be preserved only by endowing men with rights, that a right is the only alternative to charity, and so on, that a morality not based on rights somehow seems gravely inadequate or deeply flawed. This is not to say that human beings do not have moral or other kinds of non-legal rights. Rather that the postulation of such rights often springs from the inability to conceptualize moral relation in terms other than rights, and sustains a right-obsessed moral ethos.

Sometimes the right-centered moral thinking is taken to strange extremes. We would all agree that parents ought to look after their children and bring them up in a environmental of love and warmth. As the writings of Plato, Aristotle, Augustine, Aquinas and Hegel show, the 'ought' in question can be derived in several different ways. The tendency since the seventeenth century onwards is to contend that children have rights to parental maintenance, love and even inheritance, and that parents have corresponding duties. What is generally a matter of love is first reduced to a duty, and then the duty is conceived as a demand originating from the child's right. To many pre-modern society this whole manner of thinking would have appeared perverse, even offensive. Parents have freely brought their children into the world, care for them, love them and make spontaneous sacrifices going far beyond the call of duty, and do not need to be morally bludgeoned into loving their children by the latter waving their legal or moral title-deeds. The relations

between the two is not and can never be reduced to that between two strangers. The family is not a civil morality. It is of course true that parents might occasionally ignore their children's needs and even maltreat them. However, such occasional lapses cannot justify a radical reinterpretation of the whole pattern of relationship. In any case they can be punished, if necessary without introducing the language of rights.

In the modern right-based society then, moral life undergoes radical transformation. Rights acquire a monopoly of moral legitimacy, and nothing has any or at least much value unless it is directly or indirectly related to and articulated in the vocabulary of rights, titles and claims. Even the most basic human needs do not generate an appropriate moral response unless those involved are shown to have a right to their satisfaction. Further, almost all types of morally desirable or commendable conduct are reduced to duties entailed by others' actual or hypothetical rights. On the mistaken assumption that whenever there is a smoke of duty, there must be a fire of right smouldering somewhere in the background, we conceptualize duties as response to rights. The duties to god, animals, friends, parents and the state are all mistakenly construed as responses to the rights allegedly possessed by their respective recipients.

In a right-based society, the moral and political discourse gets assimilated to the juristic discourse. Moral and political disputes come to center around who has the rights to enjoy what, and how best these can be secured. Further, we are afraid that the state might not create these rights or arbitrarily curtail or withdraw them. We, therefore, feel the need to show that we have the rights to these rights, the titles to these titles. To avoid infinite regress, we feel compelled to derive the right to rights from such allegedly indisputable nature, human nature, moral intuition, the structure of the universe, the original condition, the moral law and god. Most of contemporary literature on rights is centered upon the inherently suspect exercise of finding such allegedly unshakeable foundations for rights.

## VI

Like many other thinkers from the eighteenth century onwards, Marx subjected the modern conception of right to a searching critique. He developed his critique in three stages, first from a radical democratic standpoint, then from the perspective of a rather simplistic and reductionist theory of historical materialism, finally from that of its more sophisticated version. Although the languages and degree of penetration of his critique varied with each stage; its basic thrust and direction remained substantially the same.

Marx's critique of the modern conception of rights is too well known to require detailed elaboration. For him, it is basically an ideological rationalization of the capitalist society. As he understand it, the capitalist society has two conflicting requirements. First, since labour power is the sole source of surplus value, the capitalist society is compelled by its inherent logic to view man as a commodity or an alienable object. Second, since it is based on voluntary transactions between free individuals, it is compelled to define man as a self-determining being or a free subject. The logic of capitalism thus requires it to define man both as a subject and an object, a self-determining human being and a commodity.

The dominant ideology of the capitalist society meets the conflicting requirements and reconciles its contradictory social pre-suppositions by advancing a dualistic theory of man. As an empirical being, man is regarded as an object whose skills, services and powers can be alienated. He is also however invested with the juridical form of a person, and *qua* person he is regarded as a subject enjoying equality with other persons. The real living man who possesses powers and capacities is a saleable commodity; whereas his abstract and empty juristic personality or form is inviolable. Man is a 'profane' object capable of being bought and sold, whereas the formal person is sacred. The bourgeois society thus locates man's subjectively and dignity in a mere abstraction.

The bourgeois legal theory takes over this view of man and gives it a juristic expression in the theory of rights. Not a human being but a juristic person is invested with rights, and since the former is abstract and formal, so are his rights. The rights belong to the individual not as a concrete and socially situated human being occupying a specific position in society, but as a socially transcendental abstraction, as a more juristic fiction. Equality in the capitalist society is therefore equality of (abstract) persons, not of (concrete) human beings. As concrete and socially situated beings, men belong to different classes and possess unequal resources, and are obviously unequal in their powers, capacities and opportunities. Although the rights they possess are equal, those they exercise or enjoy are therefore necessarily unequal. The formal equality of rights is thus little more than a device to veil and legitimize the stark reality of inequality.

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For Marx the modern theory of rights also alienates man from his fellow-men and destroys the unity of the human species. Rather than appreciate man's social nature and institutionalize and nurture human interdependence, the capitalist society is compelled by its logic to isolate and privatize men. Being a competitive and exploitative society, it necessarily presupposes isolated and egoistic men aggressively pursuing their narrow and exclusive interests. The modern theory of rights is a juristic expression of this. It institutionalizes isolation, legitimizes the egoistic pursuit of self-interest, and turns each individual into an 'isolated monad, withdrawn into himself.' 'A limited individual who is limited to himself'. It draws a boundary around each individual which others are forbidden to cross, and confines him to his clearly demarcated and fully fortified world.

By dividing up society into a cluster of little islands, the modern theory of rights conceals the reality of classes. Since a worker is free to leave one capitalist employer and work for another, he entertains the illusion that he is a self-determining individual freely deciding who to alienate his labour power. His personal freedom remains grounded in and severely circumscribed by his class slavery. The modern theory of rights, further, encourages the worker to think of himself primarily as a distinct individual, and thus weakens the objective unity of the working class. Since it heightens his consciousness of himself as a self-contained and self-enclosed individual constantly concerned to exclude and distance others, he fails to appreciate the class basis of his social being. The modern doctrine of rights creates a hiatus between his self-consciousness and his being, and prevents the emergence of class consciousness and class solidarity. It thus helps perpetuate the exploitative capitalist mode of production and is inherently ideological.

It is not entirely clear what conclusions Marx intended to draw from his critique of the modern theory of rights. The lack of clarity has encourages some Marxists to draw two dubious conclusions. First, they argue that rights in the capitalist society are little more than devices of ideological legitimation and, like the state which grants and protects them, instruments of class domination. They obscure the harsh reality of class rule and create the illusion of genuine equality between free and self-determining individuals. For these Marxists the ideological nature of bourgeois rights receives further confirmation from the fact that the capitalist state respect the rights only as long as they do not threaten its existence and jettisons them the moment they do. The rights are therefore a mere 'camouflage', having little value and hardly worth fighting for. Indeed, since they conceal the reality of class struggle and lull the working class into a false sense of security, their disappearance is ultimately a boon.

Second, some Marxists argue that the very idea of right is bourgeois in nature and has no place in the communist society. As a distinct judicial product of the capitalist mode of production, it must of necessity disappear with the latter. The idea of right owes its origin to the two basic historical facts of material scarcity and unsocial individuality. In the communist society, scarcity is replaced by material abundance, and hence there is no need for the institution of right. Since men in the communist society are fully social and do not invade each other, they again do not need an essentially aggressive system of rights to protect themselves against each other.

Although some of Marx's polemical remarks may seem to support it, the first conclusion is obviously untenable. It is based on a mistaken interpretation of his theory of ideology. For Marx the logic of the capitalist society requires its dominant ideology to satisfy two contradictory demands. First, it must justify the prevailing system of inequality and exploitation. Second, since the capitalist society is based on freely negotiated contracts, the justification must be based on the general principles of freedom, equality and individual rights. The bourgeois legal and political theory must thus rest on egalitarian premises and draw inegalitarian conclusions; it must swear by human dignity and justify man's reduction to a commodity. In other words it is condemned by its provenance to remain inherently self contradictory.

Every component of bourgeois legal and political theory, be it liberty, equality, right, law, or state, is vitiated by this inescapable contradiction. The common mistake, or illusion as Marx calls it, consists in not fully appreciating their self-contradictory character. Thus in the capitalist society men have formally equal but substantively unequal rights. To believe with the bourgeois writers that all men in fact enjoy equal rights in the capitalist society is to entertain an illusion. However, the rights themselves are not illusions. The illusion consists in mistaking them for what they are not, in taking them to be more than what they really are. That the doctrine of equal rights formally recognizes the equality of all men and gives institutional

recognition and protection to the dignity of all men is not an illusion but a legal fact much to be valued and fought for. To imagine that the equality of legal persons is or amounts to the substantive equality of concrete men is an illusion. For Marx the bourgeois society is compelled by its inner logic to advocate and institutionalize the theory of equal rights. In so doing it provides a weapon that can be turned against it. The task of the working class is to accept the theory as its starting point, use it to expose the prevailing inequalities, and exert collective pressure to give it a new content. The bourgeois society cannot be fought in terms of abstract and transcendental ideals derived from outside it, but only in terms of those that are immanent in it and to which it itself subscribes.

For Marx, far from being illusions, right in the capitalist society in fact restrain the state, subject the capitalist class to certain norms and provide the conditions under which the working class can organize and grow. It is of course true that the state does suspend them, it weakens its authority in the eyes of its own functionaries as well as many of its subjects, including some members of the capitalist class. Further, to say that the rights are illusory is to imply that there is not real difference between a liberal democratic state on the one hand and a Bonapartist or fascist state on the other. Marx explicitly rejected such a view.

As for the second conclusion, it too is mistaken, although there is some support for it in Marx's writings, and hence its continued appeal. In the mature period of his life, Marx was so heavily preoccupied with the economic analysis of the capitalist mode of production that he did not offer comparable detailed critique of bourgeois legal and political theory. At the same time, he could not avoid making remarks about it, and these by their very nature were general and sweeping and open to dubious interpretations. Further, he tended to present the communist society as qualitatively different from the capitalist, and encouraged the belief that it therefore excluded all that was characteristic of the latter. Again, Marx's distinction between form and content, or shell and kernel, seems to imply that only the content of the capitalist society is valuable and worth preserving. Although the distinction is suspect and even perhaps invalid, it might not have done much damage if Marx had provided a clear criterion for deciding what was to count as the form and what as the content of capitalism. He did not furnish such a criterion, and tended to regard all that pertained to the realm of thought and institutions as the form and the productive forces as the content of the capitalist society. Marx did not carefully examine the concept of form either. He well knew that the content was inseparable from the form, and could not be taken over without taking over at least some aspects of the form. This meant that he needed to develop a method of subjecting the form itself to a systematic critique and separating its permanent features from the merely transitory.

From the dialectical point of view, the juristic form of the bourgeois society cannot be entirely bourgeois; it is bound to have features that point beyond the bourgeois society and require to be preserved. Historical progress cannot consist only in the continuity of the technological content, it must include also the preservation and consolidation of the different dimensions and forms of individuality achieved by mankind during successive historical epochs. In short the distinction between form and content was not enough; an analogous distinction needed to be drawn at the level of the form as well. Marx did not explicitly work out such a deeper conception of critique.

In spite of these and other ambiguities and confusions, a careful reading of Marx suggests that he did not intend to reject the modern theory of rights altogether and his attitude to it was subtle and discriminating. When he rejected the bourgeois conception of the isolated and atomic individual, he rejected also the opposite view that the individual was nothing more than an indissoluble part of the social organism. For him this kind of collectivism was characteristic of the tribal society over which bourgeois individualism represented a great historical advance.

Further, for Marx the communist society transcended the very dualism between individuals and society, as a network of relations among them. It could not therefore aim to destroy individuality; to the very contrary it aimed to preserve and develop it. For Marx individuality was a great bourgeois achievement secured, no doubt, under hostile conditions, and hence profoundly distorted. As such his task was to purge it of its bourgeois distortions, not to reject it altogether.

For Marx individuality cannot be protected indeed the consciousness of it cannot even emerge, let alone be sustained, unless it has an objective basis in society. It requires an institutional recognition in the form of rights and a material basis in the form of personal (though not private) property. In the absence of both, the

individual lacks social and material objectification and remains abstract and illusory. To claim to respect the individual and at the same time not to provide for his institutional and material objectification is to be quality of idealism. The great lesson Marx learned from Hegel was that the subject and the object constituted a unity and that the subject without a corresponding objective correlate was abstract and unreal. This is indeed how he explained the rise of individuality in Athens and Rome and its absence in India. Although he did not stress the point explicitly, the very logic of his materialist epistemology required him to recognize and stress rights and personal property as the necessary basis of individuality. To put the point differently, even as Marx did not reject the bourgeois concept of individuality but only its distortions, he did not reject the bourgeois concept of right but only its perverted forms.

Even Marx's ideal communist society then needs a theory of rights. The theory is obviously very different from the one that has been dominant for the past three hundred years. Not an abstract juristic person but a human being becomes the bearer of rights. Human being now define themselves as social and creative being concerned fully to develop such distinctively human powers as the intellectual, moral, emotional and aesthetic. And it is their development rather than the accumulation of property, the unhindered pursuit of private interest and the exercise of power over others that now becomes the object of rights.

Further, by their very nature, these and other human capacities and powers are such that they can be developed only in co-operation with others. Indeed, they are inherently non-competitive and non-conflictual in the sense that, far from hindering others, their development by one man stimulates and inspires others to develop them as well. The changes in the objects of right therefore entail profound changes in human relationships. Rights in the communist society are not defined in exclusive and possessive terms, and men do not constantly look over their shoulders in nervous fear or run for safety from others invasive presence. They develop cooperative rather than competitive dispositions and seek ways of building co-operation into the very structure of their society. A good deal of what they need from each other thus comes to be spontaneously offered. Conflicts cannot of course be wholly eliminated. However, they are now removed by persuasion, appeals to shared purposes and recognition of common interests and moderated by a deep sense of mutual concern built up over time and nurtured by social institutions. In a society based an trust, cooperation, mutual help and goodwill, the law has a very limited role to play, and is directive and advisory rather than punitive in orientation. Rights are therefore no longer the sole bases of social morality. The communist society is able to evoke and utilize many a noble human emotion and sentiment; the motives of self-interest and fear lying at the basis of modern society play only a minor role.

This inescapably sketchy and tentative outline of the kind of theory of rights that can be teased out of Marx's writings has been designed to highlight two points. First, Marx does not and cannot dispense with the concept of right altogether. Marxists commit grave mistakes when they argue that individuality is a bourgeois illusion and has no place in the communist society. That it can somehow be protected without some institutional provision of rights, that the communist society consists of angels who never interfere with each other, or that it is somehow free from the intractable problem of coping with conflicts and disagreements.

Second, Marx's thought is capable of offering an alternative theory of rights to the one currently dominant. Although the liberal ideologists might wish us to think otherwise, it is possible to define the concept of right in a non-possessive, non-absolutist, non-exclusive and non-aggressive manner, to propose other rights than those emphasized during the past three centuries, and to visualize a sensitive society in which men are grown up and caring enough to offer their co-operation without having to bludgeon each other with their titles and rights.

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# PERSONALITY

## *The Rights of Animals and Unborn Generations* [*]

EVERY PHILOSOPHICAL PAPER must begin with an unproved assumption. Mine is the assumption that there will still be a world five hundred years from now, and that it will contain human beings who are very much like us. We have it within our power now, clearly, to affect the lives of these creatures for better or worse by contributing to the conservation or corruption of the environment in which they must live. I shall assume furthermore that it is psychologically possible for us to care about our remote descendants, that many of us in fact do care, and indeed that we ought to care. My main concern then will be to show that it makes sense to speak of the rights of unborn generations against us, and that given the moral judgment that we ought to conserve our environmental inheritance for them, and its grounds, we might well say that future generations *do* have rights correlative to our present duties toward them. Protecting our environment now is also a matter of elementary prudence, and insofar as we do it for the next generation already here in the persons of our children, it is a matter of love. But from the perspective of our remote descendants it is basically a matter of justice, of respect for their rights. My main concern here will be to examine the concept of a right to better understand how that can be.

### THE PROBLEM

To have a right is to have a claim[1] *to* something and *against* someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened conscience. In the familiar cases of rights, the claimant is a competent adult human being, and the claimee is an officeholder in an institution or else a private individual, in either case, another competent adult human being. Normal adult human beings, then, are obviously the sorts of beings of whom rights can meaningfully be predicated. Everyone would agree to that, even extreme misanthropes who deny that anyone in fact has rights. On the other hand, it is absurd to say that rocks can have rights, not because rocks are morally inferior things unworthy of rights (that statement makes no sense either), but because rocks belong to a category of entities of whom rights cannot be meaningfully predicated. That is not to say that there are no circumstances in which we ought to treat rocks carefully, but only that the rocks themselves cannot validly claim good treatment from us. In between the clear cases of rocks and normal human beings, however, is a spectrum of less obvious cases, including some bewildering borderline ones. Is it meaningful or conceptually possible to ascribe rights to our dead ancestors? to individual animals? to whole species of animals? to plants? to idiots and madmen? to fetuses? to generations yet unborn? Until we know how to settle these puzzling cases, we cannot claim fully to grasp the concept of a right, or to know the shape of

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[*] Joel Feinberg, **"The Rights of Animals and Unborn Generations"** in ***Philosophy & Environmental Crisis*** by William T. Blackstone (ed.), pp. 43-68 (1974).

[1] I shall leave the concept of a claim unanalyzed here, but for a detailed discussion, see my "The Nature and Value of Rights," *Journal of Value Inquiry 4* (Winter 1971): 263-277.

its logical boundaries.

One way to approach these riddles is to turn one's attention first to the most familiar and unproblematic instances of rights, note their most salient characteristics, and then compare the borderline cases with them, measuring as closely as possible the points of similarity and difference. In the end, the way we classify the borderline cases may depend on whether we are more impressed with the similarities or the differences between them and the cases in which we have the most confidence. It will be useful to consider the problem of individual animals first because their case is the one that has already been debated with the most thoroughness by philosophers so that the dialectic of claim and rejoinder has now unfolded to the point where disputants can get to the end game quickly and isolate the crucial point at issue. When we understand precisely what *is* at issue in the debate over animal rights, I think we will have the key to the solution of all the other riddles about rights.

## INDIVIDUAL ANIMALS

Almost all modern writers agree that we ought to be kind to animals, but that is quite another thing from holding that animals can claim kind treatment from us as their due. Statutes making cruelty to animals a crime are now very common, and these, of course, impose legal duties on people not to mistreat animals; but that still leaves open the question whether the animals, as beneficiaries of those duties, possess rights correlative to them. We may very well have duties r*egarding* animals that are not at the same time duties *to* animals, just as we may have duties regarding rocks, or buildings, or lawns, that are not duties *to* the rocks, buildings, or lawns. Some legal writers have taken the still more extreme position that animals themselves are not even the directly intended beneficiaries of statutes prohibiting cruelty to animals. During the nineteenth century, for example, it was commonly said that such statutes were designed to protect human beings by preventing the growth of cruel habits that could later threaten human beings with harm too. Prof. Louis B. Schwartz finds the rationale of the cruelty-to-animals prohibition in its protection of animal lovers from affronts to their sensibilities. "It is not the mistreated dog who is the ultimate object of concern," he writes. "Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings."[2] This seems to me to be factitious. How much more natural it is to say with John Chipman Gray that the true purpose of cruelty-to-animals statutes is "to preserve the dumb brutes from suffering."[3] The very people whose sensibilities are invoked in the alternative explanation, a group that no doubt now includes most of us, are precisely those who would insist that the protection belongs primarily to the animals themselves, not merely to their own tender feelings. Indeed, it would be difficult even to account for the existence of such feelings in the absence of a belief that the animals deserve the protection in their own right and for their own sakes.

Even if we allow, as I think we must, that animals are the in- tended direct beneficiaries of

[2] Louis B. Schwartz, "Morals, Offenses and the Model Penal Code," *Columbia Law Review 63* (1963): 673.

[3] John Chipman Gray, *The Nature and Sources of the Law,* 2d ed. (Boston: Beacon Press, 1963), p. 43·

legislation forbidding cruelty to animals, it does not follow directly that animals have legal rights, and Gray himself, for one,[4] refused to draw this further inference. Animals cannot have rights, he thought, for the same reason they cannot have duties, namely, that they are not genuine "moral agents." Now, it is relatively easy to see why animals cannot have duties, and this matter is largely beyond controversy. Animals cannot be "reasoned with" or instructed in their responsibilities; they are inflexible and unadaptable to future contingencies; they are subject to fits of instinctive passion which they are incapable of repressing or controlling, postponing or sublimating. Hence, they cannot enter into contractual agreements, or make promises; they cannot be trusted; and they cannot (except within very narrow limits and for purposes of conditioning) be blamed for what would be called "moral failures" in a human being. They are therefore incapable of being moral subjects, of acting rightly or wrongly in the moral sense, of having, discharging, or breeching duties and obligations.

But what is there about the intellectual incompetence of animals (which admittedly disqualifies them for duties) that makes them logically unsuitable for rights? The most common reply to this question is that animals are incapable of *claiming* rights on their own. They cannot make motion, on their own, to courts to have their claims recognized or enforced; they cannot initiate, on their own, any kind of legal proceedings; nor are they capable of even understanding when their rights are being violated, of distinguishing harm from wrongful injury, and responding with indignation and an outraged sense of justice instead of mere anger or fear.

No one can deny any of these allegations, but to the claim that they are the grounds for disqualification of rights of animals, philosophers on the other side of this controversy have made convincing rejoinders. It is simply not true, says W. D. Lamont,[5] that the ability to understand what a right is and the ability to set legal machinery in motion by one's own initiative are necessary for the possession of rights. If that were the case, then neither human idiots nor wee babies would have any legal rights at all. Yet it is manifest that both of these classes of intellectual incompetents have legal rights recognized and easily enforced by the courts. Children and idiots start legal proceedings, not on their own direct initiative, but rather through the actions of, proxies or attorneys who are empowered to speak in their names. If there is no conceptual absurdity in this situation, why should there be in the case where a proxy makes a claim on behalf of an animal? People commonly enough make wills leaving money to trustees for the care of animals. Is it not natural to speak of the animal's right to his inheritance in cases of this kind? If a trustee embezzles money from the animal's account,[6] and a proxy speaking in the dumb brute's behalf presses the animal's claim, can he not be described as asserting the animal's *rights*? More exactly, the animal itself claims its rights through the vicarious actions of a human proxy speaking in its name and in its behalf. There appears to be no reason why we should require the animal to understand what is going on (so the argument concludes) as a condition for regarding it as a possessor of rights.

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[4] And W. D. Ross for another. See *The Right and the Good* (Oxford: Clarendon Press, 1930), app. r, pp. 48-56.

[5] W. D. Lamont, *Principles of Moral Judgment* (Oxford: Clarendon Press, 1946), pp. 83-85.

[6] Cf. H.]. McCloskey, "Rights," *Philosophical Quarterly* I5 (1965): I2I, 124.

Some writers protest at this point that the legal relation between a principal and an agent cannot hold between animals and human beings. Between humans, the relation of agency can take two very different forms, depending upon the degree of discretion granted to the agent, and there is a continuum of combinations between the extremes. On the one hand, there is the agent who is the mere "mouthpiece" of his principal. He is a "tool" in much the same sense as is a typewriter or telephone; he simply transmits the instructions of his principal. Human beings could hardly be the agents or representatives of animals in this sense, since the dumb brutes could no more use human "tools" than mechanical ones.

On the other hand, an agent may be some sort of expert hired to exercise his professional judgment on behalf of, and in the name of, the principal. He may be given, within some limited area of expertise, complete independence to act as he deems best, binding his principal to all the beneficial or detrimental consequences. This is the role played by trustees, lawyers, and ghost-writers. This type of representation requires that the agent have great skill, but makes little or no demand upon the principal, who may leave everything to the judgment of his agent. Hence, there appears, at first, to be no reason why an animal cannot be a totally passive principal in this second kind of agency relationship.

There are still some important dissimilarities, however. In the typical instance of representation by an agent, even of the second, highly discretionary kind, the agent is hired by a principal who enters into an agreement or contract with him; the principal tells his agent that within certain carefully specified boundaries "You may speak for me," subject always to the principal's approval, his right to give new directions, or to cancel the whole arrangement. No dog or cat could possibly do any of those things. Moreover, if it is the assigned task of the agent to defend the principal's rights, the principal may often decide to release his claimee, or to waive his own rights, and instruct his agent accordingly. Again, no mute cow or horse can do that. But although the possibility of hiring, agreeing, contracting, approving, directing, canceling, releasing, waiving, and instructing is present in the typical (all-human) case of agency representation, there appears to be no reason of a logical or conceptual kind why that *must* be so, and indeed there are some special examples involving human principals where it is not in fact so. I have in mind legal rules, for example, that require that a defendant be represented at his trial by an attorney, and impose a state-appointed attorney upon reluctant defendants, or upon those tried *in absentia*, whether they like it or not. Moreover, small children and mentally deficient and deranged adults are commonly represented by trustees and attorneys, even though they are incapable of granting their own consent to the representation, or of entering into contracts, of giving directions, or waiving their rights. It may be that it is unwise to permit agents to represent principals without the latters' knowledge or consent. If so, then no one should ever be permitted to speak for an animal, at least in a legally binding way. But that is quite another thing than saying that such representation is logically incoherent or conceptually incongruous-the contention that is at issue.

H. J. McCloskey,[7] I believe, accepts the argument up to this point, but he presents a new and different reason for denying that animals can have legal rights. The ability to make claims,

[7] Ibid.

whether directly or through a representative, he implies, is essential to the possession of rights. Animals obviously cannot press their claims on their own, and so if they have rights, these rights must be assertable by agents. Animals, however, cannot be represented, McCloskey contends, and not for any of the reasons already discussed, but rather because representation, in the requisite sense, is always of interests, and animals (he says) are incapable of having interests.

Now, there is a very important insight expressed in the requirement that a being have interests if he is to be a logically proper subject of rights. This can be appreciated if we consider just why it is that mere things cannot have rights. Consider a very precious "mere thing"-a beautiful natural wilderness, or a complex and ornamental artifact, like the Taj Mahal. Such things ought to be cared for, because they would sink into decay if neglected, depriving some human beings, or perhaps even all human beings, something of great value. Certain persons may even have as their own special job the care and protection of these valuable objects but we are not tempted in these cases to speak of "thing-rights" correlative to custodial duties, because, try as we might, we cannot think of mere things as possessing interests of their own. Some people may have a duty to preserve, maintain, or improve the Taj Mahal, but they can hardly have a duty to help or hurt it, benefit or aid it, succor or relieve it. Custodians may protect it for the sake of a nation's pride and art lovers' fancy; but they don't keep it in good repair for "its own sake," or for "its own true welfare," or "well-being." A mere thing, however valuable to others, has no good of its own. The explanation of that fact, I suspect, consists in the fact that mere things have no conative life: no conscious wishes, desires, and hopes; or urges and impulses; or unconscious drives, aims, and goals; or latent tendencies, direction of growth, and natural fulfillments. Interests must be compounded somehow out of conations; hence mere things have no interests. *A fortiori*, they have no interests to be protected by legal or moral rules. Without interests a creature can have no “good" of its own, the achievement of which can be its due. Mere things are not loci of value in their own right, but rather their value consists entirely in their being objects of other beings' interests.

So far McCloskey is on solid ground, but one can quarrel with his denial that any animals but humans have interests. I should think that the trustee of funds willed to a dog or cat is more than a mere custodian of the animal he protects. Rather his job is to look out for the interests of the animal and make sure no one denies it its due. The animal itself is the beneficiary of his dutiful services. Many of the higher animals at least have appetites, conative urges, and rudimentary purposes, the integrated satisfaction of which constitutes their welfare or good. We can, of course, with consistency treat animals as mere pests and deny that they have any rights; for most animals, especially those of the lower orders, we have no choice but to do so. But it seems to me nevertheless that in general, animals *are* among the sorts of beings of whom rights can meaningfully be predicated and denied.

Now, if a person agrees with the conclusion of the argument thus far, that animals are the sorts of beings that *can* have rights, and further, if he accepts the moral judgment that we ought to be kind to animals, only one further premise is needed to yield the conclusion that some animals do in fact have rights. We must now ask ourselves for whose sake ought, we to treat (some) animals with consideration and humaneness. If we conceive our duty to be one of obedience to authority, or to one's own conscience merely, or one of consideration for tender

human sensibilities only, then we might still deny that animals have rights, even though we admit that they are the kinds of beings that *can* have rights. But if we hold not only that we ought to treat animals humanely but also that we should do so for the animals' own sake that such treatment is something we owe animals as their due' something that can be claimed for them, something the withholding of which would be an injustice and a wrong, and not merely a harm, then it follows that we do ascribe rights to animals. I suspect that the moral judgments most of us make about animals do pass these phenomenological tests, so that most of us do believe that animals have rights, but are reluctant to say so because of the conceptual confusions about the notion of a right that I have at- tempted to dispel above.

Now we can extract from our discussion of animal rights a crucial principle for tentative use in the resolution of the other riddles about the applicability of the concept of a right, namely, that the sorts of beings who *can* have rights are precisely those who have (or can have) interests. I have come to this tentative conclusion for two reasons: (I) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or “sake" of its own. Thus, a being without interests has no “behalf" to act in, and no “sake" to act for. My strategy now will be to apply the “interest principle," as we can call it, to the other puzzles about rights, while being prepared to modify it where necessary (but as little as possible), in the hope of separating in a consistent and intuitively satisfactory fashion the beings who can have rights from those which cannot.

**DEAD PERSONS**

So far we have refined the interest principle but we have not had occasion to modify it. Applied to dead persons, however, it will have to be stretched to near the breaking point if it is to explain how our duty to honor commitments to the dead can be thought to be linked to the rights of the dead against us. The case against ascribing rights to dead men can be made very simply: a dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights. If, nevertheless, we grant dead men rights against us, we would seem to be treating the interests they had while alive as somehow surviving their deaths. There is the sound of paradox in this way of talking, but it may be the least paradoxical way of describing our moral relations to our predecessors. And if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving.

Most persons while still alive have certain desires about what is to happen to their bodies, their property, or their reputations after they are dead. For that reason, our legal system has developed procedures to enable persons while still alive to determine whether their bodies will be used for purposes of medical research or organic transplantation, and to whom their wealth (after taxes) is to be transferred. Living men also take out life insurance policies guaranteeing that the accumulated benefits be conferred upon beneficiaries of their own choice. They also make private agreements, both contractual and informal, in which they receive promises that certain things will be done after their deaths in ex- change for some present service or consideration. In all these cases promises are made to living persons that

their wishes will be honored after they are dead. Like all other valid promises, they impose duties on the promisor and confer correlative rights on the promisee.

How does the situation change after the promisee has died? Surely the duties of the promisor do not suddenly become null and void. If that were the case, and known to be the case, there could be no confidence in promises regarding posthumous arrangements; no one would bother with wills or life insurance companies to pay benefits to survivors, which are, in a sense, only conditional duties before a man dies. They come into existence as categorical demands for immediate action only upon the promisee's death. So the view that death renders them null and void has the truth exactly upside down.

The survival of the promisor's duty after the promisee's death does not prove that the promisee retains a right even after death, for we might prefer to conclude that there is one class of cases where duties to keep promises are not logically correlated with a promisee's right, namely, cases where the promisee has died. Still, a morally sensitive promisor is likely to think of his promised performance not only as a duty (i.e., a morally required action) but also as something owed to the deceased promisee as his due. Honoring such promises is a way of keeping faith with the dead. To be sure, the promisor will not think of his duty as something to be done for the promisee's "good," since the promisee, being dead, has no "good" of his own. We can think of certain of the deceased's interests, however, (including especially those enshrined in wills and protected by contracts and promises) as surviving their owner's death, and constituting claims against us that persist beyond the life of the claimant. Such claims can be represented by proxies just like the claims of animals. This way of speaking, I believe, reflects more accurately than any other an important fact about the human condition: we have an interest while alive that other interests of ours will continue to be recognized and served after we are dead. The whole practice of honoring wills and testaments, and the like, is thus for the sake of the living, just as a particular instance of it may be thought to be for the sake of one who is dead.

Conceptual sense, then, can be made of talk about dead men's rights; but it is still a wide open moral question whether dead men in fact have rights, and if so, what those rights are. In particular, commentators have disagreed over whether a man's interest in his reputation deserves to be protected from defamation even after his death. With only a few prominent exceptions, legal systems punish a libel on a dead man "only when its publication is in truth an attack upon the interests of living persons."[8] A widow or a son may be wounded, or embarrassed, or even injured economically, by a defamatory attack on the memory of their dead husband or father. In Utah defamation of the dead is a misdemeanor, and in Sweden a cause of action in tort. The law rarely presumes, however, that a dead man himself has any interests, representable by proxy, that can be injured by defamation, apparently because of the maxim that what a dead man doesn't know can't hurt him.

This presupposes, however, that the whole point of guarding the reputations even of living men, is to protect them from hurt feelings, or to protect some other interests, for example,

[8] William Salmond, *Jurisprudence*, 12th ed., P. J. Fitzgerald ed (London: Sweet and Maxwell, 1966), p. 304.

economic ones, that do not survive death. A moment's thought, I think, will show that our interests are more complicated than that. If someone spreads a libelous description of me, without my knowledge, among hundreds of persons in a remote part of the country, so that I am, still without my knowledge, an object of general scorn and mockery in that group, I have been injured, even though I never learn what has happened. That is because I have an interest, so I believe, in having a good reputation *simpliciter*, in addition to my interest in avoiding hurt feelings, embarrassment, and economic injury. In the example, I do not know what is being said and believed about me, so my feelings are not hurt; but clearly if I did know, I would be enormously distressed. The distress would be the natural consequence of my belief that an interest other than my interest in avoiding distress had been damaged. How else can I account for the distress? If I had no interest in a good reputation as such, I would respond to news of harm to my reputation with indifference.

While it is true that a dead man cannot have his feelings hurt, it does not follow, therefore, that his claim to be thought of no worse than he deserves cannot survive his death. Almost every living person, I should think, would wish to have this interest protected after his death, at least during the lifetimes of those persons who were his contemporaries. We can hardly expect the law to protect Julius Caesar from defamation in the history books. This might hamper historical research and restrict socially valuable forms of expression. Even interests that survive their owner's death are not immortal. Anyone should be permitted to say anything he wishes about George Washington or Abraham Lincoln, though perhaps not everything is morally permissible. Everyone ought to refrain from malicious lies even about Nero or King Tut, though not so much for those ancients' own sakes as for the sake of those who would now know the truth about the past. We owe it to the brothers Kennedy, however, as their due, not to tell damaging lies about them to those who were once their contemporaries. If the reader would deny that judgment, I can only urge him to ask himself whether he now wishes his own interest in reputation to be respected, along with his interest in determining the distribution of his wealth, after his death.

**FETUSES**

If the interest principle is to permit us to ascribe rights to infants, fetuses, and generations yet unborn, it can only be on the grounds that interests can exert a claim upon us even before their possessors actually come into being, just the reverse of the situation respecting dead men where interests are respected even after their possessors have ceased to be. Newly born infants are surely noisier than mere vegetables, but they are just barely brighter. They come into existence, as Aristotle said, with the capacity to acquire concepts and dispositions, but in the beginning we suppose that their consciousness of the world is a "blooming, buzzing confusion." They do have a capacity, no doubt from the very beginning, to feel pain, and this alone may be sufficient ground for ascribing both an interest and a right to them. Apart from that, however, during the first few hours of their lives, at least, they may well lack even the rudimentary intellectual equipment necessary to the possession of interests. Of course, this induces no moral reservations whatever in adults. Children grow and mature almost visibly in the first few months so that those future interests that are so rapidly emerging from the unformed chaos of their earliest days seem unquestionably to be the basis of their present rights. Thus, we say of a newborn infant that he has a right now to live and grow into his

adulthood, even though he lacks the conceptual equipment at this very moment to have this or any other desire. A new infant, in short, lacks the traits necessary for the possession of interests, but he has the capacity to acquire those traits, and his inherited potentialities are moving quickly toward actualization even as we watch him. Those proxies who make claims in behalf of infants, then, are more than mere custodians: they are (or can be) genuine representatives of the child's emerging interests, which may need protection even now if they are to be allowed to come into existence at all.

The same principle may be extended to "unborn persons." After all, the situation of fetuses one day before birth is not strikingly different from that a few hours after birth. The rights our law confers on the unborn child, both proprietary and personal, are for the most part, placeholders or reservations for the rights he shall inherit when he becomes a full-fledged interested being. The law protects a potential interest in these cases before it has even grown into actuality, as a garden fence protects newly seeded flower beds long before blooming flowers have emerged from them. The unborn child's present right to property, for example, is a legal protection offered now to his future interest, contingent upon his birth, and instantly voidable if he dies before birth. As Coke put it: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth";[9] but this is quite another thing than recognizing a right actually to be born. Assuming that the child will be born, the law seems to say, various interests that he will come to have after birth must be protected from damage that they can incur even before birth. Thus prenatal injuries of a negligently inflicted kind can give the newly born child a right to sue for damages which he can exercise through a proxy-attorney and in his own name any time *after* he is born.

There are numerous other places, however, where our law seems to imply an unconditional right to be born, and surprisingly no one seems ever to have found that idea conceptually absurd. One interesting example comes from an article given the following headline by the *New York Times*: "Unborn Child's Right Upheld Over Religion."[10] A hospital patient in her eighth month of pregnancy refused to take a blood transfusion even though warned by her physician that "she might die at any minute and take the life of her child as well." The ground of her refusal was that blood transfusions are repugnant to the principles of her religion (Jehovah's Witnesses). The Supreme Court of New Jersey expressed uncertainty over the constitutional question of whether a non- pregnant adult might refuse on religious grounds a blood trans- fusion pronounced necessary to her own survival, but the court nevertheless

[9] As quoted by Salmond, *Jurisprudence*, p. 303. Simply as a matter of policy the potentiality of some future interests may be so remote as to make them seem unworthy of present support. A testator may leave property to his unborn child, for example, but not to his unborn grandchildren. To say of the potential person presently in his mother's womb that he owns property now is to say that certain property must be held for him until he is "real" or "mature" enough to possess it. "Yet the law is careful lest property should be too long withdrawn in this way from the uses of living men in favor of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants"-Salmond, ibid.

[10] *New York Times*, 17 June 1966, p. 1.

ordered the patient in the present case to receive the transfusion on the grounds that "the unborn child is entitled to the law's protection."

It is important to reemphasize here that the questions of whether fetuses do or ought to have rights are substantive questions of law and morals open to argument and decision. The prior question of whether fetuses are the kind of beings that can have rights, however, is a conceptual, not a moral, question, amenable only to what is called "logical analysis," and irrelevant to moral judgment. The correct answer to the conceptual question, I believe, is that unborn children are among the sorts of beings of whom possession of rights can meaningfully be predicated, even though they are (temporarily) incapable of having interests, because their future interests can be protected now, and it does make sense to protect a potential interest even before it has grown into actuality. The interest principle, however, makes perplexing, at best, talk of a noncontingent fetal right to be born; for fetuses, lacking actual wants and beliefs, have no actual interest in being born, and it is difficult to think of any other reason for ascribing any rights to them other than on the assumption that they will in fact be born.[11]

## CONCLUSION

For several centuries now human beings have run roughshod over the lands of our planet, just as if the animals who do live

there and the generations of humans who will live there had no claims on them whatever. Philosophers have not helped matters by arguing that animals and future generations are not the kinds of beings who can have rights now, that they don't presently qualify for membership, even "auxiliary membership," in our moral community. I have tried in this essay to dispel the conceptual confusions that make such conclusions possible. To acknowledge their rights is the very least we can do for members of endangered species (including our own). But that is something.

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[11] In an essay entitled "Is There a Right to be Born?" I defend a negative answer to the question posed, but I allow that under certain very special conditions, there can be a "right *not* to be born." See *Abortion*, ed. J. Fein- berg (Belmont, Calif.: Wadsworth, 1973).

# PERSONALITY

## *Theories of the Nature of 'Legal Persons'**

Professor Wolff has observed that on the Continent legal writers may be grouped into two categories: those who have written on the nature of legal persons and those who have not yet done so. In dealing with some of these theories it is as well to bear in mind that the attitude of the law has not been consistent and also that there is a distinction between appreciating the unity of a group and the way the word 'person' is used.

**'Purpose' Theory**

This theory, that of Brinz primarily, and developed in England by Barker, is based on the assumption that 'person' is applicable only to human beings; they alone can be the subjects of jural relations. The so-called 'juristic' persons are not persons at all. Since they are treated as distinct from their human sub-stratum, if any, and since jural relations can only vest in human beings, they should be regarded simply as 'subjectless properties' designed for certain purposes. It should be noted that this theory assumes that other people may owe duties towards these 'subjectless properties' without there being correlative claims, which is not impossible, although critics have attacked the theory on this ground. As applied to ownership, the idea of ownerless ownership is unusual, but that is not necessarily an objection. The theory was designed mainly to explain the vacant inheritance, the *hereditas jacens,* of Roman law. It is not applicable to English law. Judges have repeatedly asserted that corporations, for instance, are 'persons', and it is this use of the word that needs explaining. If they say that these are 'persons', then to challenge this usage would amount simply to using the word differently from judges.

To Duguit 'purpose' assumed a different meaning. To him the endeavour of law in its widest sense is the achievement of social solidarity. The question is always whether a given group is pursuing a purpose which conforms with social solidarity. If it does, then all activities falling within that purpose deserve protection. He rejected the idea of collective will as unproven; but there can be, he said, a collective purpose.

**Theory of the 'Enterprise Entity'**

Related though somewhat removed from the above, is the theory of the enterprise entity'. The corporate entity, it is said, is based on the reality of the underlying enterprise. Approval by law of the corporate form establishes a *prima facie* case that the assets, activities and responsibilities of the corporation are part of the enterprise. Where there is no formal approval by law, the existence, extent of responsibility and so forth of the unit are determined by the underlying enterprise.

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* R.W.M. Dias, ***Jurisprudence*** 265-270 (5th ed., 1994).

**'Symbolist' or 'Bracket' Theory**

According to Ihering the members of a corporation and the beneficiaries of a foundation are the only 'persons'. 'Juristic person' is but a symbol to help in effectuating the purpose of the group, it amounts to putting a bracket on the members in order to treat them as a unit. This theory, too, assumes that the use of the word 'person' is confined to human beings. It does not explain foundations for the benefit of mankind generally or for animals. Also-and this is not so much an objection as a comment-this theory does not purport to do more than to say what the facts are that underlie propositions such as, 'X & Co owe Y'. It takes no account of the policy of the courts in the varying ways in which they use the phrase, 'X and Co'; whether they will, for instance, lift the mask, ie remove the bracket, or not.

Closely related to this theory is that of Hohfeld, which may be considered next.

**Hohfeld's Theory**

Hohfeld drew a distinction between human beings and 'juristic persons'. The latter, he said, are the creation of arbitrary rules of procedure. Only human beings have claims, duties, powers and liabilities; transactions are conducted by them and it is they who ultimately become entitled and responsible. There are, however, arbitrary rules which limit the extent of their responsibility in various ways, eg to the amount of the shares. The 'corporate person' is merely a procedural form, which is used to work out in a convenient way for immediate purposes a mass of jural relations of a large number of individuals, and to postpone the detailed working out of these relations among the individuals *inter se* for a later and more appropriate occasion.

This theory is purely analytical and, like the preceding one, analyses a corporation out of existence. Although it is reminiscent of a person who feels that Hohfeld was advocating that corporations should be viewed in this way. He was only seeking to reduce the corporate concept to ultimate realities. What he said was that the use of group terminology is the means of taking account of mass individual relationships. It is to be noted, however, that he left unexplained the inconsistencies of the law; his theory was not concerned with that aspect of it. Finally, to say that corporate personality is a procedural form may seem to be rather a misleading use of the word 'procedural'. What seems to be meant is that the unity of a corporation is a convenient way of deciding cases in court.

**Kelsen's Theory**

Kelsen began by rejecting, for purposes of law, any contrast between human beings as 'natural persons' and 'juristic persons'. The law is concerned with human beings only in so far as their conduct is the subject of rules, duties and claims. the concept of 'person' is always a matter of law; the biological character of human beings is outside its province. Kelsen also rejected the definition of person as an 'entity' which 'has' claims and duties. the totality of claims and duties *is* the person in law; there is no entity distinct from them. Turning to corporations, he pointed out that it is the conduct of human beings that is the subject matter of claims and duties. A corporation is distinct from one of its members when his conduct is

governed not only by claims and duties, but also by a special set of rules which regulates his actions in relation to the other members of the corporation. It is this set of rules that constitutes the corporation. For example, whether the contract of an individual affects only him or the company of which he is a member will depend on whether or not the contract falls within the special set of rules regulating his actions in relation to his fellow members.

This theory is also purely analytical and accurate as far as it goes. It omits the policy factors that bring about variations in the attitude of the courts, and it does not explain why the special set of rules, of which Kelsen spoke, is invoked in the case of corporations, but not in partnerships. In fairness to Kelsen it must be pointed out that he expressly disclaimed any desire to bring in the policy aspects of the law. All he was concerned to do was to present a formal picture of the law, and to that extent he did what he set out to do.

**'Fiction' Theory**

Its principal supporters are Savigny and Salmond. Juristic persons are only treated *as if* they are persons, ie human beings. It is thought that Sinibald Fieschi, who became Pope Innocent IV in 1243, was the first to employ the idea of *persona ficta; 'cum collegium in causa universitatis fingatur una persona'.* It is clear that the theory presupposes that only human beings are 'properly' called 'persons'. Every single man and only the single man is capable of rights', declared Savigny; and again, 'The original concept of personality must coincide with the idea of man'. The theory appears to have originated during the Holy Roman Empire and at the height of Papal authority. Pope Innocent's statement may have been offered as the reason why ecclesiastical bodies could not be excommunicated or be capitally punished. All that the fiction theory asserts is that some groups and institutions are regarded as if they are persons and does not find it necessary to answer why. This gives it flexibility to enable it to accommodate the cases in English law where the mask is lifted and those where it is not, cases where groups are treated as persons for some purposes but not for others. The popularity of this theory among English writers is explained partly by this very flexibility, partly by its avoidance of metaphysical notions of 'mind' and 'will,' and partly by its non-political character.

**'Concessions' Theory**

This is allied to the fiction theory and, in fact, supporters of the one tend also to support the other. Its main feature is that it regards the dignity of being a 'juristic person' as having to be conceded by the state, i.e. the law. The identification of 'law' with 'state' is necessary for this theory, but not for the fiction theory. It is a product of the era of the power of the national state, which superseded the Holy Roman Empire and in which the supremacy of the state was emphasised. It follows, therefore, that the concession theory has been used for political purposes to strengthen the state and to suppress autonomous bodies within it. No such body has any claim to recognition as a 'person.' It is a matter of discretion for the state. This is consistent with the deprivation of legal personality from outlaws; but on the other hand it is possible to argue that the common law corporations of English law discredit it somewhat though, even with these, there is a possibility of arguing that they are persons by virtue of a lost royal grant.

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The 'realist' theory, of which Gierke is the principal exponent and Maitland a sympathiser, asserts that 'juristic persons' enjoy a real existence as a group. A group tends to become a unit and to function as such. The theory is of German origin. Until the time of Bismarck Germany consisted of a large number of separate states. Unification was their ideal, and the movement towards it assumed almost the character of a crusade. The very idea of unity and of collective working has never ceased to be something of a marvel, which may be one reason for the aura of mysticism and emotion which is seldom far from this theory.

The 'realist' theory opposes the concession theory. Human beings are persons without any concession from the state and, so the argument runs, so far as groups are 'real,' they too are automatically persons.

The 'organism' theory, with which the 'realist' theory is closely associated, asserts that groups are persons because they are 'organisms' and correspond biologically to human beings. This is based on a special use of the term 'organism' and the implications of such biological comparison can lead to absurdity. It is said that they have a 'real life'. Professor Wolff points out that if this were true, a contract between two companies whereby one is to go into voluntary liquidation would be void as an agreement to commit suicide. It is also said that they have a 'group will' which is independent of the wills of its component members. Professor Wolff has pointed out that the 'group will' is only the result of mutually influenced wills, which indeed every fictionist would admit. To say, on the other hand, that it is a single will is as much a fiction as ever the fictionists asserted. As Gray, quoting Windscheid, said, 'To get rid of the fiction of an attributed will, by saying that a corporation has a real general will, is to drive out one fiction by another.

It has also been stated that group entities are 'real' in a different sense from human beings. The 'reality' is physical, namely the unity of spirit, purpose, interests, and organisation. Even so, it fails to explain the inconsistencies of the law with regard to corporations.

Connected with the realist theory is the 'Institutional' theory which marks a shift in emphasis from an individualist to a collectivist outlook. The individual is integrated into the institution and becomes part of it. The 'pluralist' form of this theory allowed the independent existence of many institutions within the supreme institution of the state. The 'fascist' form of it, however, gave it a twist so as to make the state the only institution, which integrated all others and allowed none to survive in an autonomous condition.

**Conclusions**

In the first place, no one explanation takes account of all aspects of the problem, and criticism becomes easy. Two questions should be kept clear:

What does any theory set out to explain? and, What does one want a theory to explain? Those that have been considered are philosophical, political or analytical: they are not so much concerned with finding solutions to practical problems as with trying to explain the meaning of the word 'person'. Courts, on the other hand, faced with the solving of practical problems, have proceeded according to policy, not logic. The objectives of the law are not uniform. One of its main purposes in the case of human beings is to regulate behaviour; so there is, on the one hand, constant concern with the performance or non-performance of duties by individuals. With corporations the main purpose is the organise concerted activities and to

ascribe collective responsibility therefore; so there is, on the other hand, emphasis on collective powers and liabilities.

Secondly, as has been pointed out by more than one writer, English lawyers have not committed themselves to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects actual decisions. Authority can sometimes be found in the same case to support different theories.

Thirdly, two linguistic fallacies appear to lie at the root of much of the theorising. One is that similarity of language form has masked shifts in meaning and dissimilarities in function. People *speak* of corporations in the same language that they use for human beings, but the word 'person' does not 'mean' the same in the two cases, either in point of what is referred to or function. The other fallacy is the persistent belief that words stand for things. Because the differences in function are obscured by the uniform language, this has led to some curious feats of argumentation to try and find some referent for the word 'person' when used in relation to corporation which is similar to the referent when the word is used in relation to human beings. A glance at the development of the word *persona*, set out at the beginning of this chapter, shows progressiveness in the ideas represented by it.

There is no 'essence' underlying the various uses of 'person'. The need to take account of the unity of a group and also to preserve flexibility are essential, but neither is tied to the word. The application of it to human beings is something which the law shares with ordinary linguistic usage, although its connotation is slightly different, namely a unit of jural relations. Its application to things other than human beings is purely a matter of legal convenience. Neither the linguistic nor legal usages of 'person' are logical. If corporations aggregate are 'persons', then partnerships and trade unions should be too. The error lies in supposing that there should always be logic. Unless this has been understood, the varied uses of the word will only make it a confusing and emotional irritant.

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# SPIRITUAL AND CULTURAL LINKAGES IN THE RECOGNITION OF RIVER PERSONHOOD IN SELECT JURISPRUDENCE: A CRITICAL ANALYSIS*

The current environmental jurisprudence is witnessing a revival of the "Rights of nature" movement. Dissatisfied with the anthropocentric bias existing in the current environmental jurisprudence, the legal systems have started exploring alternate methods, such as recognizing the rights of nature, as a means for the protection of natural ecological systems. This trend is more noticeable in the context of river ecosystems. Many countries across the globe have started recognizing the rights of rivers and river personhood in their respective legal systems. In 2017, New Zealand became the first country in the world where, by way of Parliamentary legislation, it declared that the River Whanganui, considered sacred by the native Maori tribe, is to be treated as a living entity. Shortly thereafter, the Uttarakhand High Court (India) also declared that the rivers Ganga and Yamuna are also living entities having the status of a legal person with all corresponding rights. This came after taking into account the deep spiritual and cultural connection that the people of India have with these rivers.[1] Shortly afterwards, the Constitution Court of Columbia recognized that the river Atrato is a subject and holder of rights. In July 2019, the Supreme Court of Bangladesh granted all of its rivers the same legal status as humans, making it the first country in the world to grant riverine rights to all its rivers. In February 2021, River Magpie in Canada's province of Quebec became the first Canadian river to which the city council granted personhood. However, the legal systems have a noticeable tendency to recognize the personhood of only those rivers that have a special spiritual or cultural significance to their people. In a way, the deep spiritual and cultural connections of these rivers with the native populations is fuelling the "Rights of rivers" movement across the globe. However, this paper argues that this selective trend of recognizing rights and personhood of only those rivers that have a spiritual and cultural significance needs to be discouraged as it will ultimately weaken the "Rights of Nature" movement. In doing so, the author compares the different approaches adopted by the other jurisdictions while granting personhood and rights to rivers. As the jurisprudence in this area is still at a nascent stage, every step taken in this direction needs to be thoroughly analysed and improved upon to enable smooth introduction and implementation of rights of rivers in India (and the world!).

## 1. Introduction

Legal systems across the globe are re-evaluating and reaching out to their indigenous beliefs to recognize how the "Rights of nature" movement can be used to protect the natural resources from further degradation. In 2008, Ecuador became the first country to recognize and codify the rights of nature as a constitutional right.[2] More specifically, Arts. 71-74 of the Ecuadorian Constitution acknowledge the rights of nature or *Pacha Mama* (the native name for Mother Nature), to exist, persist, maintain and regenerate its vital cycles. At the same time, it is the responsibility of the people, state, and communities to enforce and protect these rights before the legal authorities. It needs to be pointed out that the indigenous Quechua peoples of the Andes believe that the "good way of living" or *Buen Vivir* is rooted in community and harmony with and nature.[3] Their worldviews prefer a developmental model that prioritizes ecological balance over unrestrained and relentless growth.

The trend of recognizing the rights of nature and its personhood is more pronounced in the context of the river ecosystem. Since 2008, many jurisdictions across the globe have given recognition to riverine

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[1] *Mohd. Salim* v. *State of Uttarakhand* UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.

[2] CONSTITUCION DE LA REPUBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, arts. 71 - 74, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html last accessed on 13-08-2021.

[3] Caria, S.; Domínguez, R., 2016, Ecuador's Buen vivir: A New Ideology for Development, 206:43, *LAT. AMR. PERS*. pp 18–33,

rights and river personhood, either by an act of legislation or by way of judicial interpretation. In 2017, New Zealand became the first country in the world when, by way of Parliamentary legislation, it was declared that the River Whanganui, considered sacred by the native Maori tribe, is to be treated as a living entity.[4] Shortly thereafter the High Court of the state of Uttarakhand (India) also recognized the personhood of rivers Ganga and Yamuna and declared them as living entities having the status of a legal person with all corresponding rights, after considering the deep spiritual significance of these rivers with the native population.[5] Soon afterward, the Constitution Court of Columbia recognized that the river Atrato is a subject and holder of rights.[6] In July 2019, the Supreme Court of Bangladesh granted all of its rivers the same legal status as humans, making it the first country in the world to grant riverine rights to all its rivers.[7] In February 2021, River Magpie in Canada's province of Quebec became the first Canadian river that the city council granted personhood.[8]

However, upon closer examination, it is observed that in all these jurisdictions, the basis for grant and recognition of riverine rights and river personhood respectively has been the special religious, spiritual and cultural significance that these rivers have for the indigenous persons.

With this background, this paper looks into the fundamental basis of the grant of riverine rights and recognition of river personhood in select jurisdictions across the globe. After inquiring into the fundamental basis of recognition, this paper seeks to reorient the focus of the legislatures as well as judicial bodies to consider all rivers as eligible for the grant of riverine rights and recognition of river personhood, irrespective of their religious, cultural, and spiritual significance to the indigenous persons. The selective conferment of the river personhood status on religious or cultural bases will ultimately weaken the rights of nature movement. Further, the rights of nature movement, does not differentiate between the different river ecosystems and treats all of them equally.

Structurally this paper is divided into four parts, i.e., followed by a brief introduction of the research topic; the second part of the paper traces the genesis and evolution of the rights of nature movement in modern legal history. The third part of the paper is dedicated to identifying the fundamental basis for the grant of riverine rights and recognition of river personhood in select jurisdictions. The fourth part of the paper concludes the research findings and makes suggestions of legal reforms to facilitate smooth introduction and effective implementation of rights of rivers in the legal systems the world over.

## 2. Worldwide recognition of the rights of nature movement

Around half a century ago, Prof. Christopher Stone, while working as a professor at the prestigious University of Southern California, in his path-breaking article titled. 'Should trees have a standing? - Toward Legal Rights for Natural Objects'[9], challenged the very basis of the historical legal premise, which treated nature, trees, and other such constituents of nature as objects in the eyes of the law and therefore devoid of any rights.

While arguing that the natural environment should be seen as capable of holding certain rights, he observed that,

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[4] Perlman, P., 2017, "New Zealand river to be recognized as living entity after 170-year legal battle". The Telegraph, 15-03-2017 available at https://www.telegraph.co.uk/news/2017/03/15/new-zealand-river-recognised-living-entity/ accessed on 18-06-2021.

[5] *Mohd. Salim v State of Uttarakhand* UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.

[6] Bram Ebus, "Colombia's constitutional court grants rights to the Atrato River and orders the government to clean up its waters", Mongabay, 22-05-2017 available at https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/ accessed on 18-04.2021.

[7] Mohd. Sohidul Islam & Erin O'Donnell, Legal Rights for the Turag: Rivers as Living Entities in Bangladesh, 23:2, *ASIA PAC. J. ENV. LAW*, 160 (2020).

[8] Graham,J., 2021, "Canadian river wins legal rights in global push to protect nature", Reuters, 25-02-2021 available at https://www.reuters.com/article/us-land-rights-nature-trfn-idUSKBN2AO2I3 accessed on 18-04.2021.

[9] Stone, C.D., 1972, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45, *S. CAL. L. REV*. 450 (

> *"[I]t is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems. One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents-human beings who have become vegetable…"*[10]

He further observed that,

> *"[O]n a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship."*[11]

Thus, as the natural environment could not stand on its own before any authority or Tribunal, he further proposed that the natural environment should be represented through guardians, who would be responsible for protecting its rights and overseeing its legal affairs.

Since then, many jurisdictions such as Ecuador, Bolivia, New Zealand, India, Columbia, Bangladesh, Canada, and even some local jurisdictions in the United States, have started developing versions of rights of nature regimes. However, the jurisprudence in this area is still at a nascent stage, and the rights of nature are not conferred on all the elements of nature uniformly in these regimes; and in some cases, parts of nature – such as a river or a species-become named as persons or otherwise equipped to litigate their own rights.[12]

In 2008, followed by a national referendum, Ecuador became the first country in the world that changed its constitution to reflect rights for nature. Soon afterward, this move was followed legislatively by Bolivia in 2010. It is pertinent to note that in both these countries, the recognition of the rights of nature coincided with a rise in political power for indigenous groups.[13]

The next part of the paper considers the influence of the holistic theories of environmental protection of indigenous persons to discourses of personhood, specifically in the context of river personhood.

## 3. Fundamental basis for the grant of riverine rights and recognition of river personhood in select jurisdictions

The history of humankind is witness to the fact that almost all ancient civilizations have existed and prospered around the river systems. For example, the Indus valley civilization (c. 3300 – c. 1300 BCE, present-day north-western South Asia) prospered around the river Indus, and its various tributaries, the Mesopotamian civilization (c. 4000 to c. 3100 BCE) flourished near Tigris River, and the civilization of ancient Egypt (c. 3100 BCE) saw agricultural settlements around river Nile as early as c. 5500 BCE. Because river systems connect people, places, and sustain the Ecosystems for a variety of flora and fauna, it is but natural that rivers become an integral part of the cultural and spiritual beliefs, ways of life, and values of the indigenous persons.[14]

### I. New Zealand

In New Zealand, as was observed in the case of Ecuador and Bolivia, rights of nature came to be realized primarily due to the influence of holistic indigenous beliefs surrounding the man-nature relationship.[15] For centuries the natives of the Maori tribe (*iwi*) believe that a particular river or mountain might be their living ancestor (*tupuna*) in the physical world. However, the arrival of the British settlers on the

[10] *Id.* at p. 464.
[11] *Ibid.*
[12]. Gordon, G.J. ,2018 Environmental Personhood, 43 *COLUM. J. ENVTL. L*. 49
[13] *Id*. at p. 53.
[14] Anderson,E.P.; Jackson, S. *et al*.,2019, Understanding rivers and their social relations: A critical step to advance environmental water management, 6(6) *WIREs WAT*. 1381
[15] Hutchison,A. 2014, The Whanganui River as a Legal Person, 39 *ALT. L.J.* 179,pp 180-81 .

island undermined the control of the natives of the Maori Tribe over the river and its surrounding ecosystem. For centuries, they watched helplessly their living ancestor (*tupuna*) being subject to developmental activities, resulting in its degradation. And this belief led to the struggles of the indigenous persons to protect and prevent further degradation of River Whanganui, which ultimately culminated in the grant of personhood to the Whanganui River with the passing of the Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017 by the Parliament of New Zealand.[16] The new legal entity was designated as *Te Awa Tupua*, which constitutes "an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements."[17] The 2017 Act further states that the river would be represented before any public authority by two guardians, one is representing the Whanganui *iwi* and the other from the Crown.[18]

## II. India

Shortly after recognizing the personhood of the river Whanganui, the High Court of the state of Uttarakhand (India) also recognized the personhood of rivers Ganga and Yamuna and declared them as living entities in the case of *Mohd. Salim v State of Uttarakhand.*[19] While granting this recognition, the Uttarakhand High Court categorically highlighted the deep spiritual and cultural significance these rivers have for the local people. The High Court observed that,

> "[*A]ll the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well-being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea."*[20]

Further, the High Court referred to a plethora of Judgments of the Supreme Court of India, which recognized a 'Hindu deity' as a juristic person. Drawing from this analogy, the Hon'ble High Court was of the opinion that a river can also be treated as a juristic person and granted personhood. The High Court observed that:

> *"[A]ccordingly, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna."*[21]

## III. Columbia

In 2017, the Colombian Constitutional Court (Corte Constitucional de Colombia) delivered a ground-breaking judgment recognizing river Atrato and its ecosystem as a legal subject of rights (an entidad sujeto de derechos).[22] This landmark judgment aims to protect and restore the health of river Atrato - which had already witnessed enough degradation because of unchecked mining, deforestation, and contamination of its river waters attributable to the developmental activities in the region.

[16] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[17] *Id*. at s. 13.
[18] *Ibid.*
[19] UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.
[20] *Id*. at para 17.
[21] *Id*. at para 19
[22] *Tierra Digna y otros v Presidencia de la República y otros*, Colombian Constitutional Court, ruling T-622 of 10 November 2016. The decision was released to the public in May 2017. Full text in Spanish, available at http://cr00.epimg.net/descargables/2017/05/02/14037e7b5712106cd88b687525dfeb4b.pdf last accessed on 13-08-2021.

Shortly afterward, in April 2018, the Colombian Supreme Court, following the same eco-centric approach as was adopted by the Colombian Constitutional Court in the case of the river Atrato case, declared that the Colombian Amazon Rainforest is to be treated as an autonomous rights-bearing entity. [23]

In both these cases, the Colombian Courts have taken a very pragmatic approach. At the time of passing of these judgments, there was no legislation on rights of nature in existence in Colombia. By declaring that natural entities such as these two river systems are capable of being treated as rights-bearing subjects, the Columbian courts have successfully demonstrated that the rights of nature can be recognized by way of judicial channels as well.[24]

Another striking feature of these two judgments is that the Columbian Courts, particularly in River Artato's case, have combined cultural and environmental imperatives and evolved a concept of '*biocultural rights*'.[25] The concept of biocultural rights draws from the close linkages that exists between the river ecosystems and indigenous/ethnic communities who call the river region their home.[26] The conceptualization of the biocultural rights considers the community perception of the river as a spiritual being or ancestor, which provides for life, sustenance and needs and which deserves to be respected and protected.

## IV. Bangladesh

In 2019, the South Asian country Bangladesh joined the growing number of jurisdictions that had recognised the riverine rights and personhood of rivers, when the High Court division of the Supreme Court of Bangladesh declared that the River Turag was to be treated as a legal person and living entity[27] and also observed that,

> *"[A]ll rivers flowing inside and through Bangladesh will also get the same status of legal persons or legal entities or living entities".*[28]

The Court further went on to designate the National River Conservation Commission (NRCC) as the lawful guardian or as the '*Person in Loco Parenties'* of all rivers of Bangladesh, including River Turag to protect them from pollution and encroachment.[29]

With this pronouncement, Bangladesh has become the only jurisdiction in the world to recognize the legal personality of all of its rivers. While granting personhood to the rivers, the Court has based its

[23] *Dejusticia y otros v Presidencia de la República y otros*, Colombian Supreme Court, ruling STC4360 of 4 May 2018. Full text in Spanish, available at https://cdn.dejusticia.org/wp-content/uploads/2018/01/Fallo-Corte-Suprema-de-Justicia-Litigio-Cambio-Clim%C3%A1tico.pdf?x54537 last accessed on 13-08-2021.

[24] Calzadilla,P.V. 2021, A Paradigm Shift in Courts' View on Nature: The Atrato River and Amazon Basin cases in Colombia, 15/1 *LAW, ENV. & DEV. J*. 29, available at http://www.lead-journal.org/content/19049.pdf last accessed on 13-08-2021.

[25] Elizabeth Macpherson, Julia T. Ventura & Felipe C. Ospina, Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects, 9 *TRANS. ENV. LAW* 521–540 (2020) available at https://www.cambridge.org/core/journals/transnational-environmental-law/article/constitutional-law-ecosystems-and-indigenous-peoples-in-colombia-biocultural-rights-and-legal-subjects/43A29974BD5A3E948AB0461003627951 last accessed on 13-08-2021.

[26] Id. at p. 537

[27] WP No. 13989/2016 filed on 7/11/2016, Judgment dated 30/01/2019, order dated 03/02/2019.

[28] Human Rights and Peace for Bangladesh, Turag River Case, para 2 available at http://hrpb.org.bd/upload/judgement/Writ-Petition-No.-13989-of-2016-only-17-directions--River-Turag-Case.pdf last accessed on 13-08-2021.

[29] Id. at para 3

decision primarily on public trust doctrine.[30] However, it needs to be remembered that the normal perception is to treat the rivers as divine mothers amongst the indigenous population.[31]

## V. Canada

Canada is the most recent jurisdiction to recognize the personhood of rivers. The Muteshekau Shipu or the Magpie River in Québec became the first river in Canada to be conferred legal status - through twin resolutions adopted by the Innu Council of Ekuanitshit and, the Minganie Regional County Municipality, a local body.[32] In fact, the resolutions recognized nine riverine rights of River Magpie, including the rights to evolve naturally and be protected, be free of pollution, and sue.[33] Further, The members of the Innu Council of Ekuanitshit will now act as the river's guardians. The recognition of the River Magpie as a living entity is a classic example of indigenous community-led conservation initiatives. The native tribe of the Innu people inhabiting the river valley firmly believe that nature is a living thing that must be respected and protected.[34]

## 4. Conclusion

The legal developments discussed in the preceding parts of the paper make it clear that the national legislatures, various levels of government, and judicial bodies in countries across the globe have started recognizing the rights of rivers and river personhood in different ways over the last decade or so. While there is no doubt that the trend to recognize riverine rights has been gaining momentum in the recent past, yet it is submitted that the jurisprudence in this area is still at an early stage of evolution. Thus, every step taken towards recognizing river personhood needs to be thoroughly studied, analysed, and improved upon to enable the smooth introduction and implementation of rights of rivers in jurisdictions across the globe.

The select jurisdictions covered in part three of this paper make it clear that, except for Bangladesh, the legal systems have been selective in granting personhood to only those rivers that have a special religious or cultural significance to the native populations. The idea that nature is a sentient being isn't new to Indigenous, ethnic, and traditional communities. In fact, the indigenous community-led conservation initiatives have been empowering the rights of nature movement across the globe. While there is no doubt that indigenous community-led conservation efforts providing momentum to the rights of nature movement is a positive development as this presents a rare opportunity to inculcate eco-centric ethics in environmental jurisprudence, yet this selective approach needs to be analysed with precaution.

It needs to be remembered that the "Rights of nature" movement derives its inspiration from the ideas propagated by Prof. Christopher Stone wherein he suggested that the natural environment should be seen as capable of holding certain rights. Because the natural environment could not stand on its own before any authority or Tribunal, it was proposed that the natural environment should be represented through guardians, who would be responsible for protecting its rights and overseeing its legal affairs. As conceptualized by Prof. Stone, the rights of nature movement didn't differentiate between the different elements of nature. This by analogy would mean that all elements of nature should be given equal respect before the law, irrespective of their religious, spiritual, or cultural significance to the indigenous communities. Thus, it will not be an overstatement to say that the practice of attributing personhood to only those rivers that have a special cultural and spiritual significance to the indigenous communities is discriminatory and will weaken the rights of nature movement in times to come.

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[30] Shinde,M.; 2021, Legal Transplants as seen in the Comparative Analysis of Judicial Decisions on the Environmental Personhood of Rivers, 7:2 *RGNUL STU. RES. REV.* 85, pp 103 available at http://rsrr.in/wp-content/uploads/2021/05/Mrinalini-Shinde.pdf last accessed on 13-08-2021.

[31] *Supra* Note no. 8

[32] Townsend,J.,; Bunten,A.; Iorns, C.; et al, 2021 Why the first river in Canada to become a legal person signals a boon for Indigenous Rights, The Narwhal, available at https://thenarwhal.ca/opinion-muteshekau-shipu-magpie-river-personhood/ last accessed on 13-08-2021.

[33] *Ibid.*

[34] D'Amours, J.K., 2021, This river in Canada is now a 'legal person', Aljazeera, 3-04-2021 available at https://www.aljazeera.com/news/2021/4/3/this-river-in-canada-now-legal-person last accessed on 13-08-2021.

Henceforth, the countries should avoid this tendency and recognize the rights of rivers (and nature!) of all rivers flowing through their territories, as has been done in the South Asian jurisdiction of Bangladesh.

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**Pramatha Nath Mullick vs Pradyumna Kumar Mullick**
**28 April, 1925**
*(Summarised)*
*(For the full judgment, refer to the https://indiankanoon.org/)*

The case concerns the control and worship of a Hindu family idol. The dispute arose within the Mullick family regarding the worship and location of an idol called Thakur Radha Shamsunderji, along with other associated deities. The idols were originally installed by Mutty Lal Mullick, a wealthy Hindu of Calcutta, in his family dwelling house.

The main contention in the case was whether the idol could be relocated from the family temple (Thakurbari) to the house of one of the Shebaits (caretakers of the deity) during their turn of worship (Pala system).

Mutty Lal Mullick, the founder of the idol, died in 1846, leaving behind his widow, Ranganmoui, and an adopted son, Jadulal. In his will, Mutty Lal Mullick assigned responsibility for the idol's maintenance and worship to his widow until his adopted son attained the age of 20. After reaching adulthood, Jadulal Mullick assumed responsibility for managing the idol's worship and continued to maintain the deity in the family temple (Thakurbari). In 1881, Jadulal expanded the Thakurbari and built a new worship hall (puja dalan).

The key legal issues revolved around: The nature of the Shebait's (caretaker's) rights – Whether the Shebaits (family members responsible for worship) could relocate the idol during their assigned turn of worship. Interpretation of the 1888 Deed – Whether the deed executed by Jadulal Mullick in 1888 restricted the idol's movement to any location outside the Thakurbari. Idol as a Juristic Entity – The Court had to determine whether a Hindu idol had independent legal status, which could prevent its relocation without just cause. Family Rights to Worship – Whether partition of the right to worship was legally permissible. Role of Female Members – Whether the rights of the women in the family were being protected in the dispute.

The Court reaffirmed that a Hindu idol is a juristic entity, meaning it has legal status and can own property, sue, and be sued. The Shebait (caretaker) is the idol's guardian and manager, responsible for ensuring its proper worship and maintenance. The daily rituals, including bathing, clothing, feeding, and resting the deity, were considered sacred duties of the Shebait. The Court emphasized that the idol is not mere property, but a spiritual being with legal recognition.

In 1888, Jadulal Mullick executed a deed of trust, dedicating the Thakurbari and worship hall (puja dalan) for the idol. The deed stated that the idol must remain in the dedicated temple unless another temple of equal or greater value was provided. This deed became central to the dispute, as it was interpreted by the opposing side to mean that the idol could not be removed from the temple to an individual Shebait's house.

After Jadulal's death in 1894, his three sons inherited his estate and Shebait responsibilities. In 1905, a legal scheme was introduced, allowing each son to worship the idol in turns (Pala system). In 1910-1911, one of the Shebaits moved the idol to his own house for a festival, and then during his turn of worship (Pala). The relocation of the idol was objected to by another Shebait when the practice continued in 1917. The opposing party argued that the 1888 Deed prohibited any movement of the idol. The appellant (Pramatha Nath Mullick),

however, argued that family idols could be temporarily moved for worship as long as reverence and rituals were maintained.

The Court rejected the argument that the idol was mere property that could be disposed of. It reaffirmed that an idol is a juristic person, requiring proper management by the Shebait. The Court held that Shebaits can divide their right to worship (Pala system) among themselves. The practice of worship by turns was legally valid, provided it did not violate the sanctity of the idol's worship.

The Court ruled that the deed did not create an absolute restriction against moving the idol.

The deed only restricted relocation unless an equal or better Thakurbari was provided.

Since temporary relocation for worship was an established Hindu custom, removing the idol temporarily did not violate the deed.

The Court recognized that internal family disputes could interfere with the worship of the idol. It ordered the appointment of a neutral party (next friend) to represent the idol and protect the rights of female family members. A new scheme for worship was to be drafted to balance the interests of all Shebaits.

The decrees of the lower courts were set aside. The case was remanded to the High Court to frame a new scheme for the idol's worship. No costs were awarded each party was to bear its own legal expenses.

Hindu idols are juristic entities with legal rights and cannot be treated as mere property.

Shebaits are custodians, not owners, and must act in the idol's best interest. Partition of worship rights (Pala system) is legally valid, provided it does not disrupt the sanctity of the idol's worship. Temporary relocation of idols is permissible, as long as rituals are maintained properly. Family disputes should not interfere with religious worship, and a legal scheme can be framed to ensure orderly worship.

The Supreme Court balanced religious traditions with legal principles, ensuring that family disputes did not interfere with the proper worship of the idol. The ruling reinforced the idea that idols have independent legal rights, and their worship must be managed with reverence and fairness.

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**Rama Reddy vs Ranga Dasan And Ors.**
**28 October, 1925**
*(Summarised)*
*(For the full judgment, refer to the https://indiankanoon.org/)*

The case concerns the recovery of immovable property belonging to a temple, which was alienated by a trustee. The plaintiff, the trustee of a temple, sought to recover possession of the temple's property that had been transferred more than 12 years earlier. The third defendant in the case filed this Letters Patent Appeal challenging the ruling of the single judge in favour of the plaintiff.

The main legal issue in the case was whether the suit was barred by limitation under Article 134 of the Limitation Act. Key Legal Issues: Does Article 134 of the Limitation Act apply to the case? Article 134 provides a 12-year limitation period for recovering possession of immovable property transferred by a trustee. The question was whether the transfer by the temple trustee fell under this provision. Was the transfer valid under Hindu law? If the trustee had no authority to transfer the temple's property, did the buyer acquire any valid title? Was the property vested in the trustee, or did it belong to the deity as a juristic entity? Does adverse possession apply? If the property was wrongfully transferred, could the buyer claim ownership after 12 years of possession? Could Article 144 (which allows for adverse possession) apply in this case?

The court referred to the Privy Council decision in Vidya Varuthi v. Baluswami Aiyar (1921), which held that: Hindu trustees are not "trustees" in the English law sense. The property of a religious institution is vested in the deity (idol), not in the trustee. The trustee is merely a manager, responsible for ensuring proper worship and administration. The judgment stated that in Hindu law, religious endowments belong not to the trustee, but to the deity itself. The trustee does not have ownership rights, only a managerial role. The court held that a trustee of a religious institution has no right to permanently alienate temple property. Any such alienation is void, as the property belongs to the deity and not to the trustee personally. The transferee (buyer) only acquires what the trustee could transfer, which was nothing more than a temporary managerial right. The court rejected the argument that a permanent lease is different from an outright sale: A permanent lease is still an alienation. The fact that rent is paid does not change the nature of the transaction. The trustee cannot transfer rights he does not possess.

The court analyzed whether Article 134 of the Limitation Act applied: Article 134 sets a 12-year limitation period for recovering possession of trust property that was transferred by a trustee. The court held that this only applies if the trustee had the legal power to transfer the property. Since the trustee never had the power to alienate the property, the transfer was void. Therefore, Article 134 did not apply.

The defendants argued that even if the transfer was invalid, their possession for more than 12 years gave them ownership under Article 144 (adverse possession). The court rejected this argument: The deity (idol) is legally treated as a perpetual minor. Time does not run against the deity, as it is always under legal protection. Therefore, the successor trustee could reclaim the property at any time. The court distinguished this case from earlier rulings such as: *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram (1899)* and *Damodar Das v. Lakhan Das (1910)*, where Article 144 was applied. The court clarified that these cases were overruled by the Privy Council ruling in Vidya Varuthi (1921).

The court dismissed the appeal and ruled in favour of the temple trustee. The temple property must be returned, as the original transfer was invalid. The suit was not barred by limitation, as: Article 134 did not apply because the transfer was void. Article 144 (adverse possession) did not apply because the idol, as a juristic entity, is permanently protected. The buyer of the property did not acquire a valid title, as the trustee had no right to transfer it. Hindu temple property belongs to the deity (idol), not the trustee. The trustee is merely a manager and cannot claim ownership. A trustee has no power to permanently transfer temple property. Any such transfer is void, and the successor trustee can reclaim the property at any time. The 12-year limitation under Article 134 does not apply if the transfer was void. A buyer from a trustee does not get ownership rights if the trustee had no authority to sell. Adverse possession (Article 144) does not apply to temple property. Since the deity is legally considered a minor, time does not run against it. Successor trustees have the right to reclaim property alienated by previous trustees. There is no deadline for a temple to recover its property.

The judgment reinforces the special legal status of Hindu religious institutions and protects temple properties from unauthorized alienation. It clarifies that no trustee has ownership rights and that temple property remains perpetually vested in the deity, immune from adverse possession claims.

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## *Shriomani Gurudwara Prabandhak Committee, Amritsar* vs. *Shri Som Nath Dass & Ors.,*

**AIR 2000 SC 1421**

**MISRA, J.**, The question raised in this appeal is of far reaching consequences and is of great significance to one of the major religious followers of this country. The question is: whether the Guru Granth Sahib could be treated as a juristic person or not? If it is, then it can hold and use the gifted properties given to it by its followers out of their love, in charity. This is by creation of an endowment like others for public good, for enhancing the religious fervour, including feeding the poor etc.. Sikhism grew because of the vibrating divinity of Guru Nanakji and the 10 succeeding gurus, and the wealth of all their teachings is contained in Guru Granth Sahib. The last of the living guru was Guru Gobind Singhji who recorded the sanctity of Guru Granth Sahib and gave it the recognition of a living Guru. Thereafter, it remained not only a sacred book but is reckoned as a living guru. The deep faith of every earnest follower, when his pure conscience meets the divine under-current emanating from their Guru, produces a feeling of sacrifice and surrender and impels him to part with or gift out his wealth to any charity may be for gurdwaras, dharamshalas etc. Such parting spiritualises such follower for his spiritual upliftment, peace, tranquility and enlightens him with resultant love and universalism.

Such donors in the past, raised number of Gurdwaras. They gave their wealth in trust for its management to the trustees to subserve their desire. They expected trustees to faithfully implement the objectives for which the wealth was entrusted. When selfishness invades any trustee, the core of trust starts leaking out. To stop such leakage, legislature and courts step in. This is what was happening in the absence of any organised management of Gurdwaras, when trustees were either mismanaging or attempting to usurp such trusts. The Sikh Gurdwaras and Shrines Act 1922 (VI of 1922) was enacted to meet the situation. It seems, even this failed to satisfy the aspirations of the Sikhs. The main reason being that it did not establish any permanent committee of management for Sikh gurdwaras and did not provide for the speedy confirmation by judicial sanction of changes already introduced by the reforming party in the management of places of worship.This was replaced by the Sikh Gurdwaras Act, 1925 (Punjab Act No. 8 of 1925) under which the present case arises.This Act provided a legal procedure through which gurdwaras and shrines regarded by Sikhs as essential places of Sikh worship to be effectively and permanently brought under Sikh control and management, so as to make it consistent with the religious followings of this community.

About 56 persons of villages Bilaspur, Ghodani, Dhamot, Lapran and Buani situated in the Village Bilaspur, District Patiala moved petition under Section 7(1) of the said Act for declaration that the disputed property is a Sikh Gurdwara. The State Government through Notification No. 1702 G.P. dated 14th September, 1962 published the aforesaid petition in the Gazette including the boundaries of the said gurdwaras which were to be declared as Sikh Gurdwaras. Thereafter, a composite petition under Sections 8 and 10 of the said Act was filed by Som Dass son of Bhagat Ram, Sant Ram son of Narain Dass and Anant Ram son of Sham Dass of Village Bilaspur, District Patiala, challenging the same. They claimed it to be a dharamshala and Dera of Udasian being owned and managed by the petitioners and their

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predecessors since the time of their forefathers and that they being the holders of the same, received the said Dera in succession, in accordance with their ancestral share. They also claimed to be in possession of the land attached to the said Dera. They denied it to be a Sikh Gurdwara. This petition was forwarded by the Government to the Sikh Gurdwara Tribunal, hereinafter referred to as the Tribunal. In reply to the notice, the Shiromani Gurdwara Parbandhak Committee, hereinafter referred to as the SGPC (appellant), claimed it to be a Sikh Gurdwara, having been established by the Sikhs for their worship, wherein Guru Granth Sahib was the only object of worship and it was the sole owner of the gurdwara property. It denied this institution to be an Udasian Dera. However, appellant Committee challenged the *locus standi* of the respondent to file this objection to the notification. The appellants case was under Section 8 and objection could only be filed by any hereditary office-holders or by 20 or more worshippers of the gurdwara, which they were not.

The Tribunal held that the petitioners before it (respondents here), admitted in their cross-examination that the disputed premises was being used by them as their residential house that there was no object of worship in the premises, neither they were performing any public worship nor they were managing it. So it held they were not hereditary office holders, as they neither managed it nor performed any public worship. Thus, their petition under Section 8 was rejected on 9th February, 1965 by holding that they have no *locus standi*. Aggrieved by this they filed first appeal being FAO No. 40 of1965 which was also dismissed by the High Court on 24th March, 1976, which became final. Thereafter, the Tribunal took the petition under Section 10 in which the stand of SGPC was that the land and the buildings were the properties of Gurdwara Sahib Dharamshala Guru Granth Sahib at Bilaspur. The respondents and their predecessors along with their family members had all along been its managers and they had no personal rights in it. The Tribunal framed two issues:

(1) What right, title or interest have the petitioners in the property in dispute?

(2) What right, title or interest has the notified Sikh Gurdwara in the property in dispute.

The Tribunal decided both issue No. 1 and issue No. 2 in favour of present appellants and held that the disputed property belonged to the SGPC. Thus respondents petition under Section 10 was also rejected on 4th September 1978. Tribunals conclusion is reproduced hereinbelow:

The above discussion shows that the respondent-Committee has been successful in bringing its case rightly in Clauses 18 (1)(a) and 18(1)(d) of the Act and has been successful in discharging its onus as regards issue no. 2 and the issue is, iala is the owner of the property in dispute consisting of Gurdwara building, the place of which is given in the Notification No. 1702 G.P. dated 14.9.68 at page 2527 and the agricultural land measuring 115 Bighas 12 Biswas the detail of which are given in the copy of Jamabandi for the year 1955-56 A.D. attached to the above-said Notification at page 2529 and is comprised of Khasra Nos. 456 min, 457, 451, 644 and 452 bearing Khawat No. 276 Khatauni nos. 524 to 527.

Aggrieved by this, respondents filed first appeal being FAO No. 449 of 1978. During its pendency, the SGPC on the basis of final order passed by the High Court in FAO No. 40 of 1965 against the order of the Tribunal rejecting Section 8 application, filed suit No. 94 of 1979 against the respondents under Section 25-A of the Act for the possession of the building

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and the land. The respondents contested the suit by raising objection about misdescription of the property in the plaint and also raising an issue about jurisdiction since the income from the gurdwara was more than Rs. 3,000/- per annum for which a committee was to be constituted before any suit could be filed. On contest, the said suit of SGPC was decreed and respondents' objections were rejected, against which the respondents filed FAO No. 2 of 1980. The High Court vide its order dated 11th February, 1980 directed this FAO No. 2 of 1980 to be listed for hearing along with FAO No. 449 of 1978. It is also relevant to refer to, which was also stated by the respondents in their petition before the Tribunal, that a notification under Section 9 of the Act was published declaring the disputed gurdwara to be a Sikh Gurdwara.

It is necessary to give some more facts to appreciate the contentions raised by the respective parties. In jamabandi Ex. P-1 of 1961-62 BK, (which would be 1904 AD) Mangal Dass and Sunder Dass, Bhagat Ram sons of Gopi Ram Faqir Udasi were mentioned as owners in possession of the land. They had also mortgaged part of this land to some other persons. This village Bilaspur where the disputed gurdwara exists formed part of the erstwhile Patiala Estate. The then ruler of the Patiala Estate issued Farman-

Shahi dated 18th April, 1921. Its contents are quoted hereunder:

In future, instructions be issued that so long the appointment of a Mahant is not approved by Ijlas-I-khas through Deori Mulla, until the time, the Mahant is entitled to receive turban, shawl or Bandhan or Muafi etc. from the Government, no property or Muafi shall be entered in his name in the revenue papers.

It should also be mentioned that the land which pertains to any Dera should not be considered as the property of any Mahant, nor the same should be shown in the revenue papers as the property of the Mahant, but these should be entered as belonging to the Dera under the management of the Mahant and that the Mahants shall not be entitled to sell or mortgage the land of the Dera. Revenue Department be also informed about it and the order be gazetted.

On Maghar 10, 1985 BK (1920 AD) at the instance of Rulia Singh and others the patwari made a report in compliance with the aforesaid Farman-e- Shahi for the change of the entries in favour of Guru Granth Sahib Barajman Dharamshala Deh. This was based on the enquiry and evidence produced before him. In this mutation proceeding which led to the mutation viz., Ex. P8, Narain Dass, Bhagat Ram and Atma Ram Sadh appeared before the Revenue Officer and stated that their ancestors got this land which was gift in charity (Punnarth) by the then proprietors of the village. This land was given to the ancestors of the respondent for the purpose that they should provide food and comfort to the travelers passing through this village. In the same proceeding Kapur Singh, Inder Singh Lambardars and other right-holders of the said village also stated that their fore-fathers had given this land in the name of Guru Granth Sahib Barajman Dharamshala Deh under the charge of these persons for providing food and comfort to the travelers. But Atma Ram and others, ancestors of respondents were not performing their duties. This default was for a purpose, which is revealed through the last settlement that they got this land entered in their personal names, in the revenue records against which a matter was pending before Deori Mualla in the mutation proceedings. Based

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on the evidence, the Revenue Officer after enquiry recorded the finding that Atta Ram and others admitted that this land had been given to them without any compensation for providing food and shelter to the travelers which they were not performing. He further held that Atma Ram and others could not controvert the aforesaid assertion made by the villagers. So, based on this enquiry and evidence on record, he ordered the mutation, in the name of Guru Granth Sahib Barajman Dharamshala Deh by deleting the name of Atma Ram and others from the column of ownership of the land. He further observed, so far as the question of appointment of Manager or Mohatmim was concerned that it was to be decided by the Deori Mualla as the case about this was pending before the Deori Mualla. Similarly, in the other mutation No., 693 which is Ex. 9 in 27th Maghar 1983 (1926 AD) also, mutation was ordered by removal of the name of Narain Dass, Bhagat Ram sons of Gopi Ram in favour of Guru Granth Sahib Barajman Dharamshala Deh. Since that date till the filing of the petitions by the respondents under Sections 8 and 10 of the Act entries in the ownership column of the land continued in the name of "Guru Granth Sahib Barajman Dharamshala Deh and no objection was filed either by the ancestors of respondents or respondents themselves.

It was for the first time objection was raised by respondents through their counsel before the High Court in FAO No. 449 of 1978 regarding validity of Ex.P8-9 contending that the entry in the revenue records in the name of Guru Granth Sahib was void as Guru Granth Sahib was not a juristic person. The case of the respondents was that the Guru Granth Sahib was only a sacred book of the Sikhs and it would not fall within the scope of the word, juristic person. On the other hand, with vehemence and force learned counsel for the appellant, SGPC submits that Guru Granth Sahib is a juristic person and hence it can hold property, can sue and be sued. On this question, whether Guru Granth Sahib is a juristic person, a difference arose between the two learned judges of the Bench of the High Court. Mr. Justice Tiwana held, it to be a juristic person and dismissed both the FAOs, namely, FAO No. 449 of 1978 and 2 of 1980 upholding the judgment of the Tribunal. On the other hand Mr. Justice Punchhi, (as he then was) recorded dissent and held, the Guru Granth Sahib not to be a juristic person, but did not decide the issue on merits. The case was then referred to a third judge, namely, Mr. Justice Tiwatia who agreed with the view of Mr. Justice Punchhi and held the Guru Granth Sahib not to be a juristic person. After recording this finding the learned judge directed that the FAO may be placed before the Division Bench for final disposal of the appeal on merits.

The question, whether Guru Granth Sahib is a juristic person is the main point which is argued in the present appeal to which we are called upon to adjudicate. It is relevant to mention here that after adjudication of the question whether the Guru Granth Sahib is a juristic person, the matter again went back to the same Bench which again gave rise to another conflict between Justice Tiwana and Mr. Justice Punchhi. Justice Tiwana held on merits that mutations were valid and respondents had no right to this property. But Mr. Justice Punchhi held to the contrary that the mutation was invalid and this property was the private property of the respondents. Thereafter, the said FAO No. 449 of 1978 and FAO No. 2 of 1980 were placed before the third judge, namely, Justice J.B.Gupta, who concurred with the view taken by Mr. Justice Punchhi, as he then was. He recorded the following conclusion:

In view of the findings that Guru Granth Sahib is not a juristic person, and that the

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notification issued under section 9 was not conclusive, in view of the Full Bench Judgment of this Court in *Mahant Lachhman Dass Chela Mahant Moti Rams* case, the findings of the Tribunal are liable to be set aside. The Tribunal mainly based its findings on the mutations, Exhibits P.8 and P.9, which are in the name of Guru Granth Sahib, since Guru Granth Sahib is not a juristic person, any mutation a sanctioned in its name in the present case was of no consequence. There is no other cogent evidence except the said mutations relied upon by the Tribunal in that behalf. Similar was the position as regards the building. In that behalf, the Tribunal relied upon the notification issued earlier.The same being not conclusive, there was not other reliable evidence to conclude that the building formed part of the Sikh Gurdwara, notified under Section. In these circumstances, I concur with the view taken by M.M.Punchhi, J. in the order dated December 16, 1986.

The foundation of his decision on merits is based on the finding that Guru Granth Sahib is not a juristic person and hence Exs. P8 and P9, the mutations in its name were not sustainable. The present appellants preferred Special Leave Petition No. 7803 of 1988 in this Court, which was dismissed in default on 16th November, 1995 and its restoration application was also dismissed on 19th August, 1996. In this petition it was specifically stated that the present Civil Appeal No. 3968 of 1987 is pending in this Court. However, it is significant as we have said above, the judgment of Mr. Justice Gupta concurring the judgment of Mr. Justice Punchhi, as he then was, was mainly on the basis that the mutation in the name in favour of Guru Granth Sahib Barajman Dharamshala Deh was void in as much as Guru Granth Sahib was not a juristic person. Thus the foundation of that decision rests on the question which we are considering.

The crux of the litigation now rests on the question, whether Guru Granth Sahib is a juristic person or not. Now, we proceed to consider this issue.

The very words Juristic Person connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a Person in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a Slave was not a person. He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.

In Roscoe Pounds Jurisprudence Part IV, 1959 Ed. at pages 192-193, it is stated as follows:

In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antoninus Pius the slave was not a person. He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such, like animals, could be the object of rights of property. In the French colonies, before slavery was there abolished, slaves were put in the class of legal persons by the statute of

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April 23, 1833 and obtained a somewhat extended juridical capacity by a statute of 1845. In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights.

With the development of society, where an individual interaction fell short, to upsurge social developments, cooperation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very constitution of State, municipal corporation, company etc. are all creations of the law and these Juristic Persons arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says: A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition, it is stated that the word person, in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons. Corpus Juris Secundum, Vol. VI, page 778 says: Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic. Salmond on Jurisprudence, 12th Edn., 305 says: A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination.

Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. If, however, we take account of other systems than our own, we find that the conception of legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention.

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members.

2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself.

3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses a charitable fund, for example or a trust estate.

Jurisprudence by Paton, 3rd Edn., page 349 and 350 says: It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty- bearing units-all entities recognised by the law as capable of being parties to a legal relationship. Salmond said: So far as legal theory is concerned, a person is

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any being whom the law regards as capable of rights and duties.

Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract; and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities.

Analytical and Historical Jurisprudence, 3rd Ed. At page 357 describes person: We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

Thus, it is well settled and confirmed by the authorities on jurisprudence and courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living, inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church, hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such.

In this background, we find that this Court in ***Sarangadeva Periya Matam & Anr.* Vs. *Ramaswami Goundar (dead) by legal representatives,*** AIR 1966 SC 1603, held that a Mutt was the owner of the endowed property and that like an idol the Mutt was a juristic person

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and thus could own, acquire or possess any property. In ***Masjid Shahid Ganj & Ors.* Vs. *Shiromani Gurdwara Parbandhak Committee, Amritsar,*** AIR 1938 Lahore 369, a Full Bench of that High Court held that a mosque was a juristic person. This decision was taken in appeal to the Privy Council which confirmed the said judgment. There may be an endowment for a pious or religious purpose. It may be for an idol, mosque, church etc. Such endowed property has to be used for that purpose. The installation and adoration of an idol or any image by a Hindu denoting any god is merely a mode through which his faith and belief is satisfied. This has led to the recognition of an idol as a juristic person.

In ***Som Prakash Rekhi* Vs. *Union of India & Anr.***, 1981 (1) SCC 449, this Court held that a legal person is any entity other than a human being to which the law attributes personality. It was stated: Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Indeed, a legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality is one of the most noteworthy feats of the legal imagination. Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law.

This Court in ***Yogendra Nath Naskar* Vs. *Commissioner of Income Tax, Calcutta***, 1969 (1) SCC 555, held that the consecrated idol in a Hindu temple is a juristic person and approved the observation of West J. in the following passage made in ***Manohar Ganesh* Vs. *Lakshmiram,*** ILR 12 Bom 247; The Hindu Law, like the Roman Law and those derived from it, recognises not only incorporate bodies with rights of property vested in the Corporation apart from its individual members but also juridical persons called foundations. A Hindu who wishes to establish a religious or charitable institution may according to his law express his purpose and endow it and the ruler will give effect to the bounty or at least, protect it so far at any rate as is consistent with his own Dharma or conception or morality. A trust is not required for the purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early law a gift placed as it was expressed on the altar of God, sufficed it to convey to the Church the lands thus dedicated. It is consistent with the grants having been made to the juridical person symbolised or personified in the idol. Thus, a trust is not necessary in Hindu Law though it may be required under English Law.

In fact, there is a direct ruling of this Court on the crucial point. In ***Pritam Dass Mahant* Vs. *Shiromani Gurdwara Prabandhak Committee***, 1984 (2) SCC 600, with reference to a case under Sikh Gurdwara Act, 1925 this Court held that the central body of worship in a Gurdwara is Guru Granth Sahib, the holy book, is a Juristic entity. It was held: From the foregoing discussion it is evident that the *sine qua non* for an institution being a Sikh gurdwara is that there should be established Guru Granth Sahib and the worship of the same by the congregation, and a Nishan Sahib as indicated in the earlier part of the judgment. There may be other rooms of the institution meant for other purposes but the crucial test is the existence of Guru Granth sahib and the worship thereof by the congregation and Nishan Sahib.

Tracing the ten Sikh gurus it records: They were ten in number each remaining faithful to

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the teachings of Guru Nanak, the first Guru and when their line was ended by a conscious decision of Guru Gobind Singh, the last Guru, succession was invested in a collection of teachings which was given the title of Guru Granth Sahib. This is now the Guru of the Sikhs. xx xx The holiest book of the Sikhs is Guru Granth Sahib compiled by the Fifth Master, Guru Arjan. It is the Bible of Sikhs. After giving his followers a central place of worship, Hari-Mandir, he wanted to give them a holy book. So he collected the hymns of the first four Gurus and to these he added his own. Now this Sri Guru Granth Sahib is a living Guru of the Sikhs. Guru means the guide. Guru Granth Sahib gives light and shows the path to the suffering humanity. Where a believer in Sikhism is in trouble or is depressed he reads hymns from the Granth.

When Guru Gobind Singh felt that his worldly sojourn was near, he made the fact known to his disciples. The disciples asked him as to who would be their Guru in future. The Guru immediately placed five pies and a coconut before the holy Granth, bowed his head before it and said: The Eternal Father Willed, and I raised the Panth. All my Sikhs are ordained to believe the Granth as their preceptor. Have faith in the holy Granth as your Master and consider it the visible manifestation of the Gurus. He who hath a pure heart will seek guidance from its holy words.

The Guru repeated these words and told the disciple not to grieve at his departure. It was true that they would not see his body in its physical manifestation but he would be ever present among the Khalsas. Whenever the Sikhs needed guidance or counsel, they should assemble before the Granth in all sincerity and decide their future line of action in the light of teachings of the Master, as embodied in the Granth. The noble ideas embodied in the Granth would live for ever and show people the path to bliss and happiness. The aforesaid conspectus visualises how Juristic Person was coined to subserve to the needs of the society. With the passage of time and the changes in the socio-political scenario, collective working instead of individualised working became inevitable for the growth of the organised society. This gave manifestation to the concept of Juristic Person as an unit in various forms and for various purposes and this is now a well recognised phenomena. This collective working, for a greater thrust and unity gave birth to cooperative societies, for the success and implementation of public endowment it gave rise to public trusts and for purpose of commercial enterprises the juristic person of companies was created, so on and so forth. Such creations and many others were either statutory or through recognition by the courts.

Different religions of the world have different nuclei and different institutitonalised places for adoration, with varying conceptual beliefs and faith but all with the same end. Each may have differences in the perceptive conceptual recognition of god but each religion highlights love, compassion, tolerance, sacrifice as a hallmark for attaining divinity. When one reaches this divine empire, he is beholden, through a feeling of universal brotherhood and love which impels him to sacrifice his wealth and belongings, both for his own bliss and for its being useful to a large section of the society. This sprouts charity, for public endowment. It is really the religious faith that leads to the installation of an idol in a temple. Once installed, it is recognised as a juristic person. The idol may be revered in homes but its juristic personality is only when it is installed in a public temple. Faith and belief cannot be judged through any judicial scrutiny. It is a fact accomplished and accepted by its followers. This faith

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necessitated the creation of a unit to be recognised as a Juristic Person. All this shows that a Juristic Person is not roped in any defined circle. With the changing thoughts, changing needs of the society, fresh juristic personalities were created from time to time.

It is submitted for the respondent that decisions of courts recognised an idol to be a as juristic person but they did not recognise a temple to be so. So, on the same parity, a gurdwara cannot be a juristic person and Guru Granth Sahib can only a sacred book. It cannot be equated with an idol nor does Sikhism believe in worshiping any idol. Hence Guru Granth Sahib cannot be treated as a juristic person. This submission in our view is based on a misconception. It is not necessary for Guru Granth Sahib to be declared as a juristic person that it should be equated with an idol. When belief and faith of two different religions are different, there is no question of equating one with the other. If Guru Granth Sahib by itself could stand the test of its being declared as such, it can be declared to be so.

An idol is a Juristic Person because it is adored after its consecration, in a temple. The offerings are made to an idol. The followers recognise an idol to be symbol for God. Without the idol, the temple is only a building of mortar, cement and bricks which has no sacredness or sanctity for adoration. Once recognised as a Juristic Person, the idol can hold property and gainfully enlarge its coffers to maintain itself and use it for the benefit of its followers. On the other hand in the case of mosque there can be no idol or any images of worship, yet the mosque itself is conferred with the same sacredness as temples with idol, based on faith and belief of its followers. Thus the case of a temple without idol may be only brick, mortar and cement but not the mosque. Similar is the case with the Chruch. As we have said, each religion has different nuclei, as per their faith and belief for treating any entity as a unit.

Now returning to the question, whether Guru Granth Sahib could be a Juristic Person or not, or whether it could be placed on the same pedestal, we may first have a glance at the Sikh religion. To comprehend any religion fully may indeed be beyond the comprehension of any one and also beyond any judicial scrutiny for it has its own limitations. But its silver lining could easily be picked up. In the Sikh religion, Guru is revered as the highest reverential person. The first of such most revered Gurus was Guru Nanak Dev, followed by succeeding Gurus, the Tenth being the last living, viz., Guru Gobind Singh Ji. It is said that Adi Granth or Guru Granth Sahib was compiled by the Fifth Guru Arjun and it is this book that is worshiped in all the gurdwaras. While it is being read, people go down their knees to make reverential obeisance and place their offerings of cash and kind on it, as it is treated and equated to a living Guru. In the Book, A History of the Sikhs by Kushwant Singh, Vol. I, page 307:

The compositions of the gurus were always considered sacred by their followers. Guru Nanak said that in his hymns the true Guru manifested Himself, because they were composed at His orders and heard by Him (Var Asa). The fourth guru, Ram Das said: Look upon the words of the True Guru as the supreme truth, for God and the Creator hath made him utter the words: (Var Gauri). When Arjan formally installed the Granth in the Hari mandir, he ordered his followers to treat it with the same reverence as they treated their gurus. By the time of Guru Gobind Singh, copies of the Granth had been installed in most Gurdwaras. Quite naturally, when he declared the line of succession of gurus ended, he asked his followers to turn to the Granth for guidance and look upon it as the symbolic representation of the ten gurus. The Grant Sahib is the central object of worship in all Gurdwaras.

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It is usually draped in silks and placed on a cot. It has an awning over it and, while it is being read, one of the congregations stands behind and waves a flywhisk made of Yaks hair. Worshippers go down on their knees to make obeisance and place offerings of cash or kind before it as they would before a king: for the Granth is to them what the gurus were to their ancestors the Sacha Badshah (the true Emperor). The very first verse of the Guru Granth Sahib reveals the infinite wisdom and wealth that it contains, as to its legitimacy for being revered as guru:- The First verse states: The creator of all is One, the only One. Truth is his name. He is doer of everything. He is without fear and without enmity. His form is immortal. He is unborn and self-illumined. He is realized by Gurus grace.

The last living guru, Guru Gobind Singh, expressed in no uncertain terms that henceforth there would not be any living guru. The Guru Granth Sahib would be the vibrating Guru. He declared that henceforth it would be your Guru from which you will get all your guidance and answer. It is with this faith that it is worshiped like a living guru. It is with this faith and conviction, when it is installed in any gurudwara it becomes a sacred place of worship. Sacredness of Gurudwara is only because of placement of Guru Granth Sahib in it. This reverential recognition of Guru Granth Sahib also opens the hearts of its followers to pour their money and wealth for it. It is not that it needs it, but when it is installed, it grows for its followers, who through their obeisance to it, sanctify themselves and also for running the langer which is an inherent part of a Gurdwara.

In this background, and on over all considerations, we have no hesitation to hold that Guru Granth Sahib is a Juristic Person. It cannot be equated with an Idol as idol worship is contrary to Sikhism. As a concept or a visionary for obeisance, the two religions are different. Yet, for its legal recognition as a juristic person, the followers of both the religions give them respectively the same reverential value. Thus the Guru Granth Sahib it has all the qualities to be recognised as such. Holding otherwise would mean giving too restrictive a meaning of a juristic person, and that would erase the very jurisprudence which gave birth to it.

Now, we proceed to examine the judgment of the High Court which had held to the contrary. There was difference of opinion between the two Judges and finally the third Judge agreed with one of the differing Judges, who held Guru Granth Sahib to be not a Juristic Person. Now, we proceed to examine the reasonings for their holding so. They first erred, in holding that such an endowment is void as there could not be such a juristic person without appointment of a Manager. In other words, they held that a juristic person could only act through some one, a human agency and as in the case of an Idol, the Guru Granth Sahib also could not act without a manager. In our view, no endowment or a juristic person depends on the appointment of a Manager. It may be proper or advisable to appoint such a manager while making any endowment but in its absence, it may be done either by the trustees or courts in accordance with law. The property given in trust becomes irrevocable and if none was appointed to manage, it will be managed by the court as representing the sovereign. This can be done by the Court in several ways under Section 92, CPC or by handing over management to any specific body recognised by law. But the trust will not be allowed by the Court to fail. Endowment is when donor parts with his property for it being used for a public purpose and its entrustment is to a person or group of person in trust for carrying out the objective of such entrustment. Once endowment is made, it is final and it is irrevocable. It is the onerous duty

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of the persons entrusted with such endowment, to carry out the objectives of this entrustment. They may appoint a manager in the absence of any indication in the trust or get it appointed through Court. So, if entrustment is to any juristic person, mere absence of manager would not negate the existence a juristic person. We, therefore, disagree with the High Court on this crucial aspect.

In Words and Phrases Permanent Edition, Vol. 14A, at page 167:- Endowment means property or pecuniary means bestowed as a permanent fund, as endowment of a college, hospital or library, and is understood in common acceptance as a fund yielding income for support of an institution.

The further difficulty the learned Judges of the High Court felt was that there could not be two Juristic Persons in the same building. This they considered would lead to two juristic persons in one place viz., gurudwara and Guru Grant Sahib. This again, in our opinion, is a misconceived notion. They are no two Juristic Persons at all. In fact, both are so interwoven that they cannot be separated as pointed by Tiwana, J. in his separate judgment. The installation of Guru Granth Sahib is the nucleus or nectar of any gurudwara. If there is no Guru Granth Sahib in a Gurdwara it cannot be termed as gurudwara. When one refers a building to be a gurudwara, he refers it so only because Guru Granth Sahib is installed therein. Even if one holds a Gurdwara to be a juristic person, it is because it holds the Guru Granth Sahib. So, there do not exist two separate juristic persons, they are one integrated whole. Even otherwise in ***Ram Jankijee Deities and Ors.* Vs. *State of Bihar and Ors.***, 1999 [5] SCC 50, this Court while considering two separate deities, of Ram Jankijee and Thakur Raja they were held to be separate Juristic Persons. So, in the same precincts, as a matter of law, existence of two separate juristic persons were held to be valid.

Next it was the reason of the learned Judges that, if Guru Granth Sahib is a Juristic Person then every copy of Guru Granth Sahib would be a Juristic Person. This again in our considered opinion is based on erroneous approach. On this reasoning it could be argued that every idol at private places, or carrying it with one self each would become a Juristic Person. This is a misconception. An idol becomes a juristic person only when it is consecrated and installed at a public place for public at large. Every idol is not a juristic person. So every Guru Granth Sahib cannot be a juristic person unless it takes juristic role through its installation in a gurudwara or at such other recognised public place.

Next submission for the respondent is that Guru Granth Sahib is like any other sacred book, like Bible for Christians, Bhagwat Geeta and Ramayana for Hindus and Quran for Islamic followers and cannot be a Juristic Person. This submission also has no merit. Though it is true Guru Granth Sahib is a sacred book like others but it cannot be equated with these other sacred books in that sense. As we have said above, Guru Granth Sahib is revered in gurudwara, like a Guru which projects a different perception. It is the very heart and spirit of gurudwara. The reverence of Guru Granth on the one hand and other sacred books on the other hand is based on different conceptual faith, belief and application.

One other reason given by the High Court is that Sikh religion does not accept idolatry and hence Guru Granth Sahib cannot be a juristic person. It is true that the Sikh religion does not accept idolatry but, at the same time when the tenth guru declared that after him, the Guru

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Granth will be the Guru, that does not amount to idolatry. The Granth replaces the guru henceforward, after the tenth Guru.

For all these reasons, we do not find any strength in the reasoning of High Court in recording a finding that the Guru Grant Sahib not a Juristic Person. The said finding is not sustainable both on fact and law.

Thus, we unhesitantly hold Guru Granth Sahib to be a Juristic Person.

Thus, in our considered opinion there would not be any useful purpose to remand the case. That apart since this litigation stood for a long time, we think it proper to examine it ourselves. Learned senior counsel for the respondents who argued with ability and fairness said that in fact the only question which arises in this case is whether Guru Granth Sahib is a juristic person. Examining the merits, we find that the mutation in the revenue papers in the name of Guru Granth Sahib was made as far back as in the year 1928, in the presence of the ancestors of respondents and no objection was raised by anybody till the filing of the present objection by the respondents as aforesaid under Section 8/10 of the 1925 Act. This is after a long gap of about forty years. Further, this property was given in trust to the ancestors of respondents for a specified purpose but they did not perform their obligation. It is also settled, once an endowment, it never reverts even to the donor. Then no part of these rights could be claimed or usurped by the respondents' ancestors who in fact were trustees. Hence for these reasons and for the reasons recorded by Mr. Justice Tiwana, even on merits, any claim to the disputed land by the respondents has no merit. Thus any claim over this disputed property by the respondents fails and is hereby rejected. We uphold the findings and orders passed by the Tribunal against which FAO No. 449 of 1978 and FAO No. 2 of 1980 was filed.

For the aforesaid reasons and in view of the findings which we have recorded, we hold that High Court committed a serious mistake of law in holding that the Guru Granth Sahib was not a juristic person and in allowing the claim over this property in favour of respondents. Accordingly, this appeal is allowed and the judgment and decree passed by the High Court dated 19-4-1985 and in FAO No. 449 of 1978 and FAO No. 2 of 1980 are hereby set aside. We uphold the orders passed by the Tribunal both under Section 10 of the said Act in Suit No. 449 of 1978. Appeal is, accordingly, allowed. Costs on the parties.

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# *Possession*[1]

## The idea of possession

Few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. Human life and human society, as we know them, would be impossible without the use and consumption of material things. We need food to eat, clothes to wear and tools to use in order to win a living from our environment. But to eat food, we must first get hold of it; to wear clothes, we must have them; and to use tools, we must possess them. Possession of material things then is essential to life; it is the most basic relationship between men and things.

Nor is it just the acquisition of possession that is essential. A society lacking all respect for individual possession would quite clearly be unviable. If a man could never be sure that the food before him, the coat on his back and the tool in his hand will not be snatched from him by his neighbour, then obviously life in society would be completely impracticable. Simple economics dictates that, as a minimum, some measure of uninterrupted enjoyment is a prerequisite to man's deriving any benefit or value from material objects and that such temporary possession must be respected by, and protected from, his neighbours.

For this reason, law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder. In so far therefore as a legal system aims to replace self-help and private defence by institutionalised protection of rights and maintenance of order, it must incorporate rules relating to possession.

But the concept of possession is as difficult to define as it is essential to protect. In the first place, possession is an abstract notion and involves the same sort of difficulties, which we have seen to arise with other abstract terms such as "law" and "rule". There is nothing which we can point at and identify as possession in the same way as we can do with concrete things such as tables and chairs. Moreover, it is an abstract term to which the traditional type of definition is as inappropriate as we saw it to be for the term "rule". Just as we could not locate the notion of a rule within some wider class of concepts, so too with possession we cannot define it by placing it in a wider class and then distinguishing it from other members of the class; for possession is, it would seem, in a class of its own.

A second cause of difficulty is the fact that possession is not purely a legal concept. Our discussion of ownership showed that possession differs from ownership in that the former is of temporary duration whereas the latter is of a more permanent, ultimate and residuary nature. But possession differs from ownership in another quite different respect. Ownership, as we saw, consists of a combination of legal rights, some or all of which may be present in

[1] P.J. Fitzgerald , ***Salmond on Jurisprudence*** 265-294 (1966).

any particular instance; and such rights imply the existence of legal rules and a system of law. With possession this is not so. A possessor is not so much one who has certain rights as one who actually *has* possession. Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all. The notion of possession has application in a pre-legal society, and even perhaps outside society altogether. Of course in so far as statements about possession are statements of law, then they imply the existence of that law, but the existence of possession is independent of, and prior to, that of law. Whereas ownership is strictly a legal concept, possession is both a legal and a non-legal concept.

Now with possession, as with all concepts that are used both inside and outside the law, we must remember that the legal and the ordinary meanings can diverge. There is indeed no logical compulsion for lay and legal usage to coincide. For it is always open to a system of law to adopt a word from ordinary language and to use it in some special restricted or extended sense for its own particular purposes. Some cases of actual possession the law may prefer to regard as something less than possession, since it may wish to refuse to these the protection which it normally affords. The borrower of a thing would usually be considered to be in possession of it. Yet Roman law looked on him as having something less, as having mere custody or *detentio* : he had possession in fact but not in law. Again, a person in possession of an envelope or bureau would ordinarily be taken to have possession of its contents. Yet English law has decided the contrary in certain larceny cases, where such persons have been held not to take possession of contents of which they were unaware until they discovered them and realised what they were. Equally a system of law may wish to afford the protection usually given to possessors to persons who in fact have sometimes less than possession; such persons are sometimes said by lawyers to have constructive possession.

This divergence between law and legal usage is not only possible; it is to be expected. Like many words in common use, “possession” is a word of open texture. Though there are cases where we can say “If this is not possession, then nothing is”, and others where we can assert that here is nothing remotely like possession, nevertheless there may always arise the marginal situation that leaves us doubtful whether to describe it as a case of possession or not. If X unknown to me leaves a wallet on the floor of my shop, is it now in my possession? To this sort of question common sense and ordinary language provides no clear or unqualified answer. Law, however, may have to provide just this, because upon the answer given may depend a determination as to whether the right to the wallet should inhere in me or in the customer who finds it.

To such problems each system of law is free to provide its own solution. No two systems are obliged to arrive at the same conclusion, but the answers given will depend on the policy which each legal system adopts and will affect the meaning of the legal concept of possession in each system. As policies and solutions may differ from system to system, so will the concept of possession. Moreover, even within the same system of law different policies may be seen at work in different areas of law. The English law of larceny, where the courts have been concerned to see that dishonesty should not escape conviction, has frequently found occasion to narrow the meaning of possession, as in the examples given above. By contrast, the law relating to landlord and tenant, where the courts have been anxious to give protection

to tenancies, has at times extended the connotation to cover situations that would hardly qualify in ordinary speech as cases of possession.

To look for a definition then that will summarise the meanings of the term "possession" in ordinary language, in all areas of law and in all legal systems, is to ask for the impossible. We may be tempted, therefore, to inquire instead into the sorts of factual criteria according to which each area of a system of law ascribes possessory rights to people and to investigate the nature of these rights. In other words we may prefer to ask "what are the facts on which legal possession is based, and what are the legal consequences?" In short we might feel that the term "possession" itself could just as well be omitted: there are facts and there are rights, but possession itself is merely a useful but unnecessary stepping-stone from one to the other.

However attractive it may seem, this is a misleading approach. In the first place, it is true that the rules in different systems, and in different parts of the same system of law, may not necessarily produce consistency : the concept of possession in larceny may be different from the concept of possession in the law of landlord and tenant. For in any case the normal order of things is that practical rules precede theoretical analysis. Nevertheless, a multitude of unrelated regulations becomes in due course not only intellectually unsatisfying but for practical purposes unmanageable. Practice itself then stands in need of theory and rationalisation. We must not expect to achieve a definition to which every use of the term "possession" will conform. That could be bought only at the price of distorting the rules of law themselves or lengthening the definition to a point beyond utility. What we can aim at is a definition of the normal or standard legal case of possession and an analysis of the factual notion underlying this concept.

Secondly, to seek only the criteria for the ascription of possessory rights together with a description of such rights, overlooks the importance to the legal concept of the notion of actual possession. Not only is actual possession the prime case where possessory rights are afforded; it is also true that one of these rights may well consist in the right to be restored to actual possession. Consequently we cannot avoid inquiring into the nature of actual possession itself. Further, to concentrate solely on the criteria and the rights, without regard to the underlying factual notion underlying the standard legal case is to miss the unifying force of existence of the term "possession". If facts $F_1$, $F_2$... $F_n$ are such that the existence of any one of them enables us to say in law that here is a case of possession; and if a possessor is entitled in law to any or all of the possessory rights $R_1$, $R_2$... $R_n$ nonetheless to restrict the description of the concept of possession to a description of the facts and the rights would be to distort the picture. Some of the facts may be more central than other; equally so may some of the rights. A mere catalogue of both will miss the pattern running through the whole.

The most fruitful approach is first to examine the ordinary or extra-legal meaning of possession, and then to discuss the ways in which a legal concept of possession any diverge from this on account of the factors which the law may want to take into consideration, remembering that while the factual concept underlies the legal concept, the latter may in turn affect our use of the former. The way that lawyers use "possession" may well have repercussions on its extra-legal use.

**Possession in fact**

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***Possession***

Possession, in fact, is a relationship between a person and a thing. I possess, roughly speaking, those things which I have: the things which I hold in my hand, the clothes which I wear, and the objects which I have by me. To possess them is to have them under my physical control. If I capture a wild animal, I get possession of it; if it escapes from my control, then I lose possession.

Things not in any way amenable to human control cannot form the subject-matter of possession. A man cannot be said to possess for example the sun, the moon or the stars. Indeed the expression "to possess the sun" is without application: if a man claimed to possess the sun, we should be at a loss to understand what he meant. In time, however, it is conceivable that means might be discovered of controlling such distant objects as the sun and in this event it might make sense to talk of possessing it; but this would be a very different world from the one we know and the one our language describes. Yet the fact that our ordinary language has no use for such expressions by no means rules out their employment in a legal system. We have seen that the legal concept of ownership could quite feasibly be applied to such objects as the sun and the same holds true of the legal concept of possession. We could, if we wanted, have laws specifying criteria according to which a man might be said to possess the sun. For legal concepts and ordinary concepts need not coincide.

Now to say that something is under my control is not to asset that I am continuously exercising control over it. I can have a thing in my control without actually holding or using it at every given moment of time. In the ordinary sense of the word, I retain possession of my coat even if I take it off and put it down beside me; and I continue in possession of it even though I fall asleep. All that is necessary is that I should be in such a position as to be able, in the normal course of events, to resume actual control if I want. At this point we may observe the influence of law and of the legal concept of possession on the idea of possession in fact. In a wholly primitive society utterly devoid of law and of legal protection for possession, there might well be little hope of resuming actual control over a thing once you had momentarily relinquished. In such a society men could only be said to possess those objects over which they were actually exercising control. By contrast, in a society in which possession is respected generally and is protected by law, we may expect that temporary relinquishment of actual control will not result in complete loss of the ability to resume it at will. So, by providing remedies against dispossession the law enlarges the number of situations in which a person may count on retaining his power of control; in other words it increases the number of cases where a man may be said to have possession.

Now whether in any given case I can be said to have sufficient control (whether actual or potential) to be in possession of an object will depend on a variety of factors. First there is the extent of my power entails complete lack of possession, but having possession does not involve having absolute power over the subject-matter; the amount of power that is necessary varies according to the nature of the object. The more amenable it is to control, the less likely am I to qualify as possessing it without being able to exercise a high degree of control. Possession of small objects may involve holding them or else having them near to hand; a fairly ungovernable object such as a wild animal is capable of being possessed by being confined in a cage, without the possessor's being able to lay hold of it himself; a large or

immovable object, such as a ship or a house, could be said to remain in my possession even though I am miles away and able to exercise very little control, if any.

Another factor relevant to the assessment of control is the power of excluding other people. Once actual control is abandoned, the possibility of resumption may well depend on the lack of outside interference. This may be due to the possessor's own physical power and influence; to his having kept secret the object's existence or whereabouts; to his neighbour's customary respect for possession, i.e. their unwillingness to interfere if the exercise of control has been interrupted; and finally to the law itself which may penalise any such interruption. Indeed, so important is the exclusion of others to the notion of possession that it is sometimes regarded as an essential part of the very concept: to possess anything, it is said, entails being able or intending to exclude others from it. That this is not so, however, can be seen from the fact that "possession" is a term apt to describe even situations involving only one person. If the sole inhabitant of a desert island catches a fish, he can quite correctly be described as getting possession of if it escapes. Here actual possession differs from ownership, which consists of rights and which therefore automatically involves the existence of persons against whom the owner can have those rights. But words are not used idly and "possession" is not just a term used to catalogue everything which a man happens to have at any one time. We should hardly attribute to the man on the island possession of his clothes, for example: there would be no point in our doing so; whereas the point in describing his relationship with the fish in terms of possession was to contrast his position with regard to this particular fish with this position with regard to those which he had not caught. Now the contrast we usually want to make is between those cases where we have exclusive control and those where we do not. The factor of exclusion, therefore, though not logically essential to possession, is, because of its effect on the ability to control and because of the kind of distinctions we wish to draw, a highly important feature; it is central in the sense that cases of possession without such exclusion are odd exceptions: the example of the man on the island is an unusual and marginal situation.

So far no distinction has been made between the mental and physical aspects of possession. Many jurists have distinguished two such elements (i) Salmond considered that possession consisted of a *corpus possessionis* and an *animus possidendi.*. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant. Moreover, it is doubtful whether in ordinary usage possession could be ascribed to a person utterly unable to form any intentions whatsoever: it would be odd to describe a day-old baby or a man in a protracted coma as actually (as opposed to legally) possessing anything at all. As against this, however, we may find counter-examples of possession unaccompanied by intention. I should normally be said to possess the coins in my pocket, even if unaware of their existence and so unable to form any intention in respect of them. Can we say then that what the possessor needs is at least a minimum intention, an intent to exclude others from whatever may be in his pocket? To this there are two replies. First, in its widest and loosest sense, the sense in which "possesses"

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simply means “has”, I can be said to possess such things as a fine head of hair, a stout heart or a good sense of humour - without any question of intent arising. Secondly, in the narrower sense, where the subject-matter of possession consists of material objects other than parts of the possessor’ own body, it is misleading to assert that the possessor must actually be intending anything at all. If I possess something, then it is true that if my possession is challenged or attacked. I shall probably display an intention of excluding such interference. But unless my possession is under attack-and in the normal course of events it is not; furthermore it would be highly unusual to find a man’s possession under constant attack-no question of, or need for, intent is involved.

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others. There will always, of course, be border-line cases. Suppose I become paralysed: am I still in possession of the coat by my side? Such questions need not detain us, for the ordinary concept of possession is not designed to cope with such marginal cases, while the existence of legal rules relating to legal possession will answer such questions and obviate the need for any decision in terms of possession in fact.

We have seen that the word “possess” is sometimes used in a very wide sense to mean “have”. Thus I can be said to possess a sense of humour. I can also be said to possess certain rights, and here the term can be used to draw a distinction between the ownership and the possession of a proprietary right, as discussed earlier. It may, on the other hand, mean nothing more than to say that I have the rights in question, and this is not restricted to legal rights; I can be said to possess a moral, or natural, right to privacy, whether or not this is accompanied by a legal right. In general, however, the extra-legal notion of possession is concerned with things of a material or physical character.

**Possession in law**

We have seen that in any society some protection of possession is essential. This being so, the law must needs provide such protection, and this it can do in two different ways. First, the possessor can be given certain legal rights, such as a right to continue in possession free from interference by others. This primary right *in rem* can then be supported by various sanctioning right *in personam* against those who violate the possessor’s primary right: he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him. Secondly, the law, can protect possession by prescribing criminal penalties for wrongful interference and for wrongful dispossession. By such civil and criminal remedies the law can safeguard a man’s *de facto* possession.

Now obviously whenever such remedies are invoked, it will be important to ascertain whether a person invoking them actually has any possession to be protected. It will be relevant to inquire whether a plaintiff complaining of interference actually possesses the object interfered with, or whether a plaintiff alleging wrongful dispossession was himself formerly in possession in fact. Consequently there will be a need for legal criteria to determine whether a person is in possession.

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***Possession***

A legal system could of course content itself with providing that in law the existence of possession should depend solely on the criteria of common sense. In this case possession in law would be identical with possession in fact; a man would in law possess only those things which in ordinary language he would be said to possess. Such a system of law, then, would concern itself only with actual possession. Even so, the concept of possession would not be free of difficulty. For possession in fact, as we saw, is not a wholly simple notion; the question whether I am in fact in possession of an article depends on such factors as the nature of the article itself and the attitudes and activities of other people. But the general outline of the concept of possession in fact, as given in the preceding section, would suffice for the purposes of a legal system that adopted this approach.

Even with such a legal system, however, there would no doubt arise borderline questions to which lay usage gave no answer but which the law would have to resolve : if A loses his golf-ball on B's golf-links and the ball is found by C, we cannot proceed with the matter of safeguarding possession until we know who in such a case actually has possession. Yet, at the moment when C has found the ball but has not yet picked it up, it is by no means clear which of these three parties would ordinarily, and outside the law, be held to be in possession. A legal system's solutions to such marginal problems would inevitably refine the notion of possession and produce divergences between the factual and the legal concepts.

Apart from this type of development however, the two concepts could quite easily coincide. Nor need such coincidence restrict legal protection to cases of actual possession. If A wrongfully takes possession of B's watch, the law can still afford all its possessory remedies to B, on the ground that B *did* originally have, and therefore *ought* to have, possession. The fact that the law regards as possessors only those who are not in possession but who in the general view of society ought to be. Indeed the protection of possession would be of little point if legal protection ceased the moment possession was lost: the protection of possession entails supporting the dispossessed against the dispossessor.

But when a system of law allows possessory rights and remedies to persons not in actual possession, it may do so, not by considering them simply as entitled to possession and its attendant rights, but by regarding them as being for legal purposes *in possession.* Thus we may find that one who is not actually a possessor is nevertheless considered as such in the eyes of the law; and conversely one who actually has possession may be looked on by law as a non-possessor. Accordingly the concept of legal possession parts company still further from the ordinary notion of possession, as law tends to invent instances of constructive possession, *i.e.,* cases where something less than possession in one person is deemed possession in law, and where conversely the actual possession of some other party is reduced to something less than legal possession.

The common law relating to the crime of larceny provides numerous examples of this tendency. This offence penalises the wrongful taking of possession, and in order to qualify as wrongful such taking must be without the possessor's consent and accompanied by an intent to deprive him permanently of the object stolen. But there are many cases where an unsuspecting owner allows the wrongdoer to get possession with his consent and where accordingly dishonesty would go scot-free but for the special provisions regarding possession in such cases. Where a man asks his companion to hold his luggage, or a shopkeeper allows a

customer to examine his goods, or a master instructs his servants to use his tools, or a host lets his guests use his table-ware-in all these cases actual possession might well be said to have been given by the first party to the second. Consequently if the companion, the customer, the servant or the guest absconded with the goods, they would not in ordinary language take possession against the rightful possessor's consent, since they would have already obtained it earlier with consent. The law, however, provides that in such cases possession remains in the first party, while the second is said to obtain mere custody of the article. Accordingly he does not acquire legal possession until he makes off with the article, but at this point he is acting without the rightful possessor's consent and so is guilty of a wrongful taking of possession.

It should be noted that there was nothing logically inevitable in this sort of development: in order to catch dishonesty which is outside the strict meaning of the definition of larceny, the law has extended the meaning of certain terms in the definition; it could equally well have extended the definition itself.

This indeed has been done to cope with the case of the dishonest bailee. In common law a bailee is one who is given possession of goods on the understanding that he is to deliver them *in specie* to the bailor or at the bailor's directions. Such a person acquires possession of the goods in law as well as in fact. Suppose then that he misappropriates them? Having already got possession, he cannot, it would seem, be guilty of larceny. First, the courts created a peculiar rule that the bailee only got possession of the container and not of its contents; if he subsequently "broke bulk" by opening the container and misappropriating the contents, he was now deemed to take possession of the contents for the first time, and because such taking was against the original possessor's consent, he became guilty of larceny. Later, however, legislation provided that if a bailee fraudulently misappropriated the goods bailed to him he would be guilty of stealing, thus providing that a bailee who has lawful possession can nevertheless commit larceny of the goods he possesses. Here then the definition of larceny was extended by extending the terms in the definition.

Similar to the problem of the bailee is that posed by the delivery by one person to another of an object which, unknown to either of them, contains inside it certain valuable items of property. A sells B a bureau, which, unknown to both, contains jewels in a secret drawer. Who has possession, A or B? Ordinarily perhaps we should consider that a person with possession of a container gets possession also of the contents, and that the buyer in the above example would simultaneously take possession of the bureau and the valuables. Common law, however, holds that in such a case, unless the deliverer intends the deliveree to obtain possession of the contents, the latter does not acquire legal possession of them until he discovers them and that if at this stage he decides dishonestly to misappropriate them, he accordingly becomes guilty of larceny [***Merry v. Green*** (1847) M. & W. 623. We may contrast with this the case of ***Maynes v. Coopper*** (1956) 1 Q.B. 439, where the deliveror intended the deliveree to take possession of the money in the wage packet, so that the deliveree acquired possession with consent and could not, therefore, commit larceny of the money later on].

In the above cases the physical possession of the accused is regarded as less than legal possession, because the accused is unaware that he has the object. Yet in common law possession does not always involve knowledge of the presence or existence of the subject-

matter. If A unknowingly takes something which is in B's possession, he nevertheless takes possession and commits a trespass against B. So in the famous case of ***R.* v. *Riley*** [(1853) Dears. C.C. 149] the accused was held to have taken possession of a sheep which belonged to the prosecutor and which he unknowingly drove with his own flock to market.

An occupier of land is held to be in possession of objects under or attached to the land whether he knows of them or not [***Elwes* v. *Brigg Gas Co***. (1886) 33 Ch. D. 562; ***South Staffordshire Water Co.* v. *Sharman*** (1896) 2 Q.B. 44]. So if X takes valuable rings embedded in the soil of Y's pool, he commits a trespass to goods which in law are in the possession of Y, despite Y's ignorance. For the purpose of larceny an occupier of land has been held to be in possession also of articles lying on the land though not attached to it. In ***Hibbert* v. *McKiernan*** (1948) 2 K.B. 142 balls lost on a golf-links and abandoned by the owner were held to have fallen into the possession of the secretary and members of the club. Whether things lying on but not attached to land are for civil purposes in the possession of the occupier is not settled (The uncertainty is largely due to the case of ***Bridges* v. *Hawkesworth***).

Normally, lost articles are deemed in law to remain in possession of the loser. So, if I lose my wallet, in law I retain possession of it. Even though in fact I might well be said to have lost possession. To lose not only the object but also legal possession of it, the law requires that I should terminate my intention to retain my rights over it, *e.g.,* by throwing it away deliberately. In most cases it is question of interference from the circumstances whether the loser has abandoned his legal possession, and this is a conclusion which the law is slow to draw [It is not unusual for the law to consider that a person has not relinquished all right to possess an object, although outside the law he might well be thought to have abandoned all right to possess. A person who had buried a diseased pig: ***R.* v. *Edwards*** (1877) 13 Cox C.C. 384; a householder who puts refuse in his dustbin has been held to retain possession of it until it is collected: ***Williams* v. *Phillips*** (1957) 41 Cr. App. R. 5. In these cases, however, the objects were on land in occupation of these persons, whose possession could, therefore, be also based on their right as occupiers].

We can see that sometimes possession is possible without knowledge of the subject-matter and that sometimes such knowledge is necessary requirement. We can also see, however, that in common law possession is a relative matter. The common law is not normally concerned with the question who has the *best* right to possess; it is concerned with the question which of the parties before the court has the *better* right to possess. If A momentarily hands his wallet to B, from whom it is stolen by C, who then loses it on D's property, where it is then found by E, the question who has the right to possess-which is often considered the same as the question who *has* legal possession-will depend on who brings action against whom.

Against all subsequent parties E's title would prevail, for finding confers a good title. In an action between D and E, however, it would seem that D would have the better right if he could show that the article was found on property from which he had a general intention to exclude other. ***Bridges* v. *Hawkesworth*** [(1851) 21 L.J.Q.B. 75] decided that notes found on the floor of a shop passed into the possession of the finder rather than of the shopkeeper. This case, which has been much criticised, was distinguished in ***South Staffordshire Water Co.* v.**

***Sharman*** [(1896) 2 Q.B. 44] on the ground that the notes were found in the public part of the shop, but would seem to have been followed in ***Hannah* v. *Peel*** [(1945) K.B. 609] where a soldier, who found a brooch in a requisitioned house, was held entitled to the brooch as against the owner of the house. Here, however, the owner had never been in possession of the house.

In the recent case of ***London Corporation* v. *Appleyard*** [(1963) 1 W.L.R. 982, ***Cf. Bird* v. *Fort Francis*** (1949) 2 D.L.R. 791, where the finder of money lost in a building was held to have obtained a good title to it, there being no claim on the part of the owner of the money or the occupier of the premises. *Cf.* also ***Grafstein* v. *Holme & Freeman*** (1958) 12 D.L.R. (2d) 727] money found on land was held to be in the possession of the occupier and not of the finder.

The occupier of land has possession in common law of articles under and attached to his land and also, perhaps of articles lying of his land, unless they are on a part of this land to which the public is admitted. Where the public is admitted, the rule in ***Bridges* v. *Hawkesworth*** may still hold good, *i.e.,* that the finder's right prevails. It is arguable that the occupier's right should always prevail, since the true owner will have more hope of recovering the article from the occupier of the place where it was lost than from a finder whose whereabouts may be unknown. Certain American jurisdictions draw a distinction between articles that are mislaid and articles that are lost. Where they are mislaid, *i.e.,* deliberately left somewhere but the owner has forgotten where, possession passes to the occupier. On the other hand, if there is no likelihood of the true owner's appearance to claim the property, perhaps the fairest course would be to treat the object as a windfall and to divide the proceeds of sale between finder and occupier equally.

To return to our example, neither D nor E would be said by law to have possession as against C. The latter, since he had possession, has a right good against all the world except the true owner. In an action by C against D and E, the latter would not be able to plead *jus tertii, i.e.,* to argue that the object belongs to someone other than C and that therefore C should not succeed against D or E. To allow anyone who could prove a defect in a possessor's title to dispossess him of the goods. This, however, is a right which common law allows only to the true owner and his agents.

As against A or B, however, C would have no defence. B could recover the wallet because he had actual possession of it. A could recover it from C because, although it was in B's hands, he had an immediate right to possess. So either A or B, which ever brought action against C, would be deemed to have possession as against C.

As between A and B, however, there is no doubt that in law A, the true owner, would succeed. In a civil action for conversion or detenue the question which party actually has possession need not arise, because A, having an immediate right to possession, is entitled to bring these actions; but if B were to be prosecuted fro larceny there is no doubt that he would be said to have had, not possession, but only custody of the wallet. This is to notwithstanding that he has possession as against C, who is guilty of stealing the wallet from B's possession. In *R.* v. *Harding (b),* for example, the accused was convicted of stealing a raincoat from a

servant, who, as against the master, had mere custody of the coat herself have been convicted of larceny had she dishonestly made off with it.

Of all the divergencies between legal and actual possession this is the most notable, *viz.,* that outside the law possession is used in an absolute sense whereas within the law possession is used in an absolute sense whereas within the law it is employed in a relative sense. Outside the law we do not speak of a person having possession as against someone else; we say that he either has or has not got possession. In law we talk rather of possession as something which one person has against another. If we overlook this, then decisions like ***R.* v. *Harding and London Corporation* v. *Appleyard*** are unnecessarily difficult. How could the servant in first case have possession of the coat and yet at the same time not have possession of it? If the law used possession in an absolute sense, then of course she could not. As it is, she had possession as against the thief but not as against her employer. Likewise the occupier of the land in the second case had possession of the notes as against the workmen who found them; he would not of course have had possession as against the true owner, had the latter advanced his claim.

It is said that English law has never worked out a consistent theory of possession. But although there are many other parts of English law which give rise to difficult problems concerning possession and which cannot be further discussed here, it would seem that underlying the concept of possession in English law is to be found the ordinary notion of factual possession; that this has been refined by extensions and restrictions in order to base the right to possess on actual possession; and that the equating of the right with the possession has resulted in an unnecessary and yet useful concept of relative possession. To provide a terse definition to apply to all instances of legal possession would, therefore, be impossible, but the basic strands in the concept are reasonably discernible.

**Immediate and mediate possession**

In law one person may possess a thing for and on account of some one else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed *mediate,* while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct.* If I go myself to purchase a book, I acquire direct possession of it; but if I send my servant to but it for me, I acquire mediate possession of it through him, until he has brought it to me, when my possession becomes immediate.

Of mediate possession there are three kinds. The first is that which I acquire through an agent or servant; that is to say, through someone who holds solely on my account and claims no interest of his own. In such a case I undoubtedly acquire or retain possession; as, for example, when I allow my servant to use my tools in his work, or when I send him to buy or borrow a chattel for me, or when I deposit goods with a warehouseman who holds them on my account, or when I send my boots to a shoemaker to be repaired. In all such cases, though the immediate possession is in the servant, warehouseman, or artisan, the mediate possession is in me; for the immediate possession is held on my account.

The second kind of mediate possession is that in which the direct possession is in one who holds both on my account and on his own, but who recognises my superior right to

obtain from him the direct possession whenever I choose to demand it. That is to say, it is the case of a borrower or tenant at will. I do not lose possession of a thing because I have lent it to someone who acknowledges my title to it and is prepared to return it to me on demand, and who in the meantime holds it and looks after it on my behalf. There is no difference in this respect between entrusting a thing to a servant or agent and entrusting it to a borrower. Through the one, as well as through the other, I retain as regards all other persons a due security for the use and enjoyment of my property. I myself possess whatever is possessed for me on those terms by another.

There is yet a third form of mediate possession, respecting which more doubt may exist, but which must be recognised by sound theory as true possession. It is the case in which the immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end: as for example when I lend a chattel to another for a fixed time, or deliver it as a pledge to be returned on the payment of a debt. Even in such a case I retain possession of the thing, so far as third persons are concerned.

The extent to which the above ideas are recognised in English law may be briefly noticed. An instance of mediate legal possession is to be found in the law of prescription. Title by prescription is based on long and continuous possession. But he who desires to acquire ownership in this way need not retain the *immediate* possession of the thing. He may let his land to a tenant for a term of years, and his possession will remain unaffected, and prescription will continue to run in his favour. If he desires to acquire a right of way by prescription, his tenant's use of it is equivalent to his own. For all the purposes of the law of prescription mediate possession in all its forms is as good as immediate. In ***Haig* v. *West*** it is said by Lindley, L.J.: "The vestry by their tenants occupied and enjoyed the lanes as land belonging to the parish...The parish have in our opinion gained a title to those parish lanes by the Statute of Limitations. The vestry have by their tenants occupied and enjoyed the lanes for more than a century."

In the case of chattels a further test of the legal recognition of mediate possession in all its forms is to be found in the law as to delivery by attornment. In ***Elmore* v. *Stone.*** A bought a horse from B, a livery stable keeper, and at the same time agreed that it should remain at livery with B. It was held that by this agreement the horse had been effectually delivered by B to A though it had remained continuously in the physical custody of B. That is to say, A had acquired mediate possession, through the direct possession which B held on his behalf. The case of *Marvin* v. *Wallace* goes still further. A bought a horse from B, and, without any change in the immediate possession, lent it to the seller to keep and use as a bailee for a month. It was held that the horse had been effectually delivered by B to A. This was mediate possession of the third kind, being acquired and retained through a bailee for a fixed term. Crompton, J., referring to ***Elmore* v. *Stone***, says: "In the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor; it would be dangerous to distinguish between such cases."

In larceny, where a chattel is stolen from a bailee, the "property", *i.e.,* the possession that has been violated, may be laid either in the bailor or in the bailee, at any rate where the bailment is revocable by the bailor at his pleasure either unconditionally or upon a condition that he may satisfy at will. A bailor at will can also bring a civil action of trespass where a chattel is taken from his bailee; but a bailor for a term cannot do so. Thus the third form of mediate possession is not recognised for the purpose of the action of trespass. Also, where land is let, whether for a term of years or at will, the landlord cannot bring trespass so long as he is out of immediate possession; but after re-entry he can recover damages in respect of acts done even while he was out of possession.

In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. If I deposit goods with an agent, he is in possession of them as well as I. He possesses for me, and I possess through him. A similar duplicate possession exits in the case of master and servant, landlord and tenant, bailor and bailee, pledgor and pledgee. There is, however, an important distinction to be noticed. For some purposes mediate possession exists as against third persons only, and not as against the immediate possessor. Immediate possession, on the other hand, is valid as against all the world, including the mediate possessor himself. Thus if I deposit goods with a warehouseman, I retain possession as against all other persons; because as against them I have the benefit of the warehouseman's custody. But as between the warehouseman and myself, he is in possession and not I. So in the case of a pledge, the debtor continues to possess *quoad* the world at large; but as between debtor and creditor, possession is in the latter. The debtor's possession is mediate and relative; the creditor's is immediate and absolute. So also with landlord and tenant, bailor and bailee, master and servant, principal and agent, and all other cases of mediate possession.

Here also we may find a test in the operation of prescription. As between landlord and tenant, prescription, if it runs at all, will run in favour of the tenant; but at the same time it may run in favour of the landlord as against the true owner of the property. Let us suppose, for example, that possession for twelve years will in all cases give a good title to land, and that A takes wrongful possession of land from X, holds it for six years, and then allows B to have the gratuitous use of it as tenant at will. In six years more A will have a good title as against X, for, as against him, A has been continuously in possession. But in yet another six years B, the tenant, will have a good title as against his landlord, A, for a between these two the possession has been for twelve years in B.

To put the matter in a general form, prescription runs in favour of the immediate against the mediate possessor, but in favour of the mediate possessor as against third persons.

On the other hand, the transfer of the mediate possession of goods is regarded as a "delivery" of the goods even as between the two parties to the transfer.

**Concurrent possession**

It was a maxim of the civil law that two persons could not be in possession of the same thing at the same time. *Plures eandem rem in solidum possidere non possunt.* As a general proposition this is true; for exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. Claims however, which

are not adverse, admit of concurrent realisation. Hence there are several possible cases of duplicate possession.

1. Mediate and immediate possession coexist in respect of the same thing as already explained.

2. Two or more persons may possess the same thing in common, just as they may it in common. This is called *compossessio* by the civilians.

**The acquisition of possession**

The modes of acquisition are two in number, namely Taking and Delivery. Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of some one else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor. It is of two kinds, distinguished by English lawyers as actual and constructive. Actual delivery is the transfer of *immediate* possession; it is such a physical dealing with the thing as transfers it from the hands of one person to those of another. It is of two kinds, according as the *mediate* possession is or is not retained by the transferor. The delivery of a chattel by way of sale is an example of delivery without any reservation of mediate possession; the delivery of a chattel by way of loan or deposit is an instance of the reservation of mediate possession on the transfer of immediate. Actual delivery may be either to the deliveree himself or to a servant or agent for him, and the delivery of the key of a warehouse is regarded in law as an actual delivery of the goods in the warehouse, because it gives access to the goods.

Constructive delivery, on the other hand, is all which is not actual, and it is of three kinds. The first is that which the Roman lawyers termed *traditio brevi manu,* but which has no recognised name in the language of English law. It consists in the surrender of the mediate possession of a thing to him who is already in immediate possession of it. If, for example, I lend a book to someone, and afterwards, while he still retains it, I agree with him to sell it to him in fulfilment of this sale or gift, by telling him that he may keep it. It is not necessary for him to go through the form of handing it back to me and receiving it a second time from my hands. For he has already the immediate possession of it, and all that is needed for delivery under the sale or gift is the destruction of the *animus* through which mediate possession is still retained by me.

The second form of constructive delivery is that which the commentators on the civil law have termed *constitutum possessorium* (that is to say, an agreement touching possession). This is the converse of *traditio breve manu.* It is the transfer of mediate possession, while the immediate possession remains in the transferor. Any thing may be effectually delivered by means of an agreement that the possessor of it shall for the future hold it no longer on his own account but on account of some one else. No physical dealing with the thing is requisite, because by the mere agreement mediate possession is acquired by the transfree, through the immediate possession retained by the transfer and held on the other's behalf. Therefore, if I buy goods from a ware-houseman, they are delivered to me so soon as he has agreed with me that he will hold them as ware houseman on my account. The position is then exactly the

same as if I had first taken actual delivery of them, and then brought them back to the warehouse, and deposited them there for safe custody.

The third form of constructive delivery is that which is known to English lawyers as attornment. This is the transfer of mediate possession, while the immediate possession remains outstanding in some third person. The mediate possessor of a thing may deliver it by procuring the immediate possessor to agree with the transferee to hold it for the future on his account, instead of on account of the transferor. Thus if I have goods in the warehouse of A and sell them to B, I have effectually delivered them to B so soon as A has agreed with B to hold them for him, and no longer for me. Neither in this nor in any other case of constructive delivery is any physical dealing with the thing required, the change in the *animus* of the persons concerned being adequate in itself.

**The continuance of possession**

We have seen that the acquisition of legal possession normally involves the occurrence of some event whereby the subject-matter falls under the control of the possessor. This can consist in the possessor's taking the thing or having it delivered to him; or it may consist in the object's coming on to the possessor's land. Such acquisition will also normally involve some intention so the part of the possessor to exercise control over the subject-matter and to exclude others from it.

The continuance of legal possession, however, does not necessitate the continuance of either of these factors. For example the furniture in my house remains in my legal possession even during my absence from the house, even though such absence may prevent me from exercising control over the furniture. Or again, if I lose my wallet in the street, I have now lost control over it together with any actual likelihood that others will not interfere with the wallet. Nevertheless, unless I have actually abandoned possession, the legal possession of the wallet remains in me. On the other hand if the subject-matter is particularly difficult to control, such as a wild animal, then escape from my control may well terminate my legal possession.

Nor does continuance of legal possession depend on continuance of intention on the part of the possessor. For even if I forget that I have the object, and so have no specific intention of still possessing it, I may still retain possession of it. I may have forgotten that I ever had the wallet, which I lost in the street, but in law this need not prevent me from still being in possession. But if I lose control of the subject-matter and give up all intention of resuming control, then I shall lose possession of it in law. If I go away from my house with no intention of ever returning or exercising any rights over it, I may be taken to have abandoned possession to anyone wishing to take it.

**Incorporeal possession**

Hitherto we have limited our attention, in the main, to the case of corporeal possession. We have now to consider incorporeal possession and to seek the generic conception which includes both these forms. For I may possess not the land itself, but a way over it, or the access of light from it, So also I may possess powers, privileges, immunities, liberties, offices, dignities, services, monopolies. All these things may be possessed as well as owned. They

may be possessed by one man, and owned by another. They may be owned and not possessed, or possessed and not owned.

Corporeal possession involves, as we have seen, the continuing exercise of exclusive control over a material object. Incorporeal possession is the continuing exercise of a claim to anything else. The thing so claimed may be either the non-exclusive use of a material object (for example, a way or other servitude over a piece of land) or some interest or advantage unconnected with the use of material objects (for example, a trade-mark, a patent, or an office of profit).

Corporeal possession, as we have seen, consists less in the actual exercise of exclusive control than in the existence of a legal right ot exercise such control. If I lose my watch, I retain possession, not because I have control over it or because I exercise a claim to exclusive control, but because in law I retain a right to exclusive control. Actual use of the subject-matter, therefore, is not essential. In the case of incorporeal possession, on the contrary, it may be thought that I must actually enjoy and exercise the right in order to possess it. Yet if I have an easement of way over another man's land, mere non-use will not extinguish it; at most this will only constitute evidence of abandonment, which consists of non-use together with an intention to give up the right. Moreover, my possession of various rights *in rem* such as the right to my reputation, my liberty to leave the country and so on is quite consistent with my never actually exercising them or seeking to enforce them.

Incorporeal possession is commonly called the possession of a *right*, and corporeal possession is distinguished from it as the possession of a *thing*. The Roman lawyers distinguish between *possessio juris* and *possessio corporis,* and the Germans between *Rechtsbesitz* and *Sachenbesitz.* But there is a sense in which possession of a right necessarily involves the exercise of the right in question. In this sense I can be said to possess a right where I exercise a claim as *if it were a right.* There may be no right in reality; and when there is a right, it may be vested in some other person, and not in the possessor. If I possess a way over another's land, it may or may not be a *right* of way; and even if it is a right of way, it may be owned by someone else, though possessed by me. Similarly a trade-mark or a patent which is possessed and exercised by me may or may not be legally valid; it may exist *de facto* and not also *de jure;* and even if legally valid, it may be legally vested not in me, but in another.

The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership. Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right.

**Possession and ownership**

We have already adverted to the chief differences between possession and ownership. Possession consists basically in a relationship between a person and an object within the context of the society in which he lives. It is therefore primarily a matter of fact; and the differences between legal and non-legal or actual possession result from the need to advance the policy of the law by regarding this relationship as existing where in fact it does not obtain; and this in turn may lead to the development of the notion that in law I may have possession

of an object as against one person while not having possession of it as against another. Ownership, on the other hand, consists not of a factual relationship but of certain legal rights, and is a matter not of fact but of law. These two concepts of ownership and possession, therefore, may be used to distinguish between the *de facto* possessor of an object and its de jure owner, between the man who actually has it and the man who ought to have it. They serve also to contrast the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature.

Speaking generally, ownership and possession have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned. This statement, however, is subject to important qualifications. There are claims which may be realised and exercised in fact without receiving any recognition or protection from the law, there being no right vested either in the claimant or in anyone else. In such cases there is possession without ownership. For example, men might possess copyrights, trade-marks, and other forms of monopoly, even though the law refused to defend those interests as legal rights. Claims to them might be realised *de facto,* and attain some measure pf security and value from the facts, without any possibility of support from the law.

Conversely there are many rights which can be owned, but which are not capable of being possessed. They are those which may be termed *transitory.* Rights which do not admit of continuing exercise do not admit of possession either. They cannot be exercised without being thereby wholly fulfilled and destroyed; therefore they cannot be possessed. A creditor, for example, does not possess the debt that is due to him; for this is a transitory right which in its very nature cannot survive its exercise. But a man may possess an easement over land, because its exercise and its continued existence are consistent with each other. It is for this reason that obligations generally (that is to say, rights *in personam* as opposed to rights *in rem*) do not admit of possession.

It is to be remembered, however, that *repeated* exercise is equivalent in this respect to *continuing* exercise. I may possess a right of way through repeated acts of use, just as I may possess a right of light or support through continuous enjoyment. Therefore even obligations admit of possession, provided that they are of such a nature as to involve a series of repeated acts of performance. We may say that a landlord is in possession of his rents, an annuitant of his annuity, a bondholder of his interest, or a master of the services of his servant.

We may note finally that, although incorporeal possession is possible in fact of all continuing rights, it by no means follows that the recognition of such possession or the attribution of legal consequences to it, is necessary or profitable in law. To what extent incorporeal possession exists in law, and what consequences flow from it, are questions which are not here relevant, but touch merely the details of the legal system.

**Possessory remedies**

In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it

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from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

Legal remedies thus appointed for the protection of possession even against ownership are called *possessory,* while those available for the protection of ownership itself may be distinguished as *proprietary.* In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit).

This duplication of remedies, with the resulting provisional protection of possession, has its beginnings in Roman law. It was taken up into the canon law, where it received considerable extensions, and through the canon law it became a prominent feature of medieval jurisprudence. It is still received in modern Continental systems; but although well known to the earlier law of England, it has been long since rejected by us as cumbrous and unnecessary.

There has been much discussion as to the reasons on which this provisional protection of possession is based. It would seem probable that the considerations of greatest weight are the three following:

1. The evils of violent self-help are deemed so serious that it must be discouraged by taking away all advantages which any one derives from it. He who helps himself by force even to that which is his own must restore it even to a thief. The law gives him a remedy, and with it he must be content. This reason, however, can be allowed as valid only in a condition of society in which the evils and dangers of forcible self-redress are much more formidable than they are at the present day. It has been found abundantly sufficient to punish violence in the ordinary way as a criminal offence, without compelling a rightful owner to deliver up to a trespasser property to which he has no manner of right, and which can be forthwith recovered from him by due course of law. In the case of chattels, indeed, our law has not found it needful to protect possession even to this extent. It seems that an owner who retakes a chattel by force acts within his legal rights. Forcible entry upon land, however, is a criminal offence.

2. A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies. The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient. The path of the claimant was strewn with pitfalls, and he was lucky if he reached his destination without disaster. The part of plaintiff in such an action was one of grave disadvantage and possession was nine points of the law. No man, therefore, could be suffered to procure for himself by violence the advantageous position of defendant, and to force his adversary by such means to assume the dangerous and difficult post of plaintiff. The original position of affairs must first be restored; possession must first be given to him who had it first; then, and not till then would the law consent to discuss the titles of the disputants to the property in question. Yet however cogent such considerations may have been in

earlier law, they are now of little weight. With a rational system of procedure the task of the plaintiff is as easy as that the defendant. The law shows no favour to one rather than to the other.

3. A third reason for possessory remedies, closely connected with the second, is the difficulty of the proof of ownership. It is easy to prove that one has been in possession of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the owner of it. Therefore it was considered unjust that a man should be allowed by violence to transfer the heavy burden of proof from his own shoulders to those of his opponent. Every man should bear his own burden. He who takes a thing by force must restore it to him from whom he has taken it; let him then prove, if he can, that he is the owner of it; and the law will then give to him what it will not suffer him to take for himself. But English law has long since discovered that it is possible to attain this end in a much more satisfactory and reasonable way. It adjusts the burden of proof of ownership with perfect equity, without recourse to any such anomaly as the protection of the possessor against the owner. This it does by the operation of the three following rules:

1. Prior possession is *prima facie* proof of title. Even in the ordinary proprietary action a claimant need do nothing more than prove that he had an older possession than that of the defendant; for the law will presume from this prior possession a better title. *Qui prior est tempore potior est jure.*

2. A defendant is always at liberty to rebut this presumption by proving that the better title is in himself.

3. A defendant who has violated the possession of the plaintiff is not allowed to set up the defence of *jus tertii,* as it is called, that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor he himself, but some third person, is the true owner. Let every man come and defend his own title. As between A and B the right of C is irrelevant. The only exceptions are (i) when the defendant defends the action on behalf and by the authority of the true owner; (ii) when he committed the act complained of by the authority of the true owner; and (iii) when he has already made satisfaction to the true owner by returning the property to him [Salmond, *Torts* (14th ed.), 161].

By the joint operation of these three rules the same purpose is effected as was sought in more cumbrous fashion by the early duplication of proprietary and possessory remedies.

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# *Ownership*

***A. M. Honore***

Ownership is one of the characteristic institutions of human society. A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than 'what I (or you) presently hold' would live in a world that is not our world. Yet to see why their world would be different, and to assess the plausibility of vaguely conceived schemes to replace 'ownership' by 'public administration', or of vaguely stated claims that the importance of ownership has declined or its character changed in the twentieth century, we need first to have a clear idea of what ownership is.

I propose, therefore, to begin by giving an account of the standard incidents of ownership: *i.e.* those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system. To do so will be to analyse the concept of ownership, by which I mean the 'liberal' concept of 'full' individual ownership, rather than any more restricted notion to which the same label may be attached in certain contexts….

If ownership is provisionally defined as the *greatest possible interest in a thing which a mature system of law recognizes,* then it follows that, since all mature systems admit the existence of 'interests' in 'things', all mature systems have, in a sense, a concept of ownership. Indeed, even primitive systems, like that of the Trobriand islanders, have rules by which certain persons, such as the 'owners' of canoes, have greater interests in certain things than anyone else.

For mature legal systems it is possible to make a larger claim. In them certain important legal incidents are found, which are common to different systems. If it were not so, 'He owns that umbrella', said in a purely English context, would mean something different from 'He owns that umbrella'. profferred as a translation of 'Ce parapluie est a lui'. Yet, as we know, they mean the same. There is indeed, a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China, and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or to knock over his vase. Ownership, *dominium, propriétd, Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems. It must surely be important to know what these common features are?

I now list what appear to be the standard incidents of ownership. They may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership, either of a primitive or sophisticated sort. But the listed incidents are not individually

necessary, though they may be together sufficient, conditions for the person of inherence to be designated ‘owner’ of a particular thing in a given system. As we have seen, the use of ‘owner’ will extend to cases in which not all the listed incidents are present.

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents; moreover, it is fashionable to speak of ownership as if it were just a bundle of rights, in which case at least two items in the list would have to be omitted.

No doubt the concentration in the same person of the right (liberty) of using as one wishes, the right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution. Yet it would be a distortion — and one of which the eighteenth century, with its over-emphasis on subjective rights, was patently guilty — to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner’s position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner’s choice, is an attempt to redress the balance.

**(1) The Right to Possess**

The right to possess, *viz,* to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, *viz,* the claim that others should not without permission, interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of the ownership of land, yet a largish number of Officials have the right of entering on private land without the owner’s consent, for some limited period and purpose. On the other hand, a general licence so to enter on the ‘property’ of others would put an end to the institution of landowning as we now know it.

The protection of the right to possess (still Using ‘possess’ in the convenient, though over-Simple, sense of ‘have exclusive physical con- trol’) should be sharply marked off from the protection of mere present possession. To exclude Others from what one presently holds is an instinct found in babies and even, as Holmes Points out, in animals, of which the seal gives a of Striking example. To sustain this instinct by legal rules is to protect possession but not, as such, to protect the right to possess and so not to protect ownership. If dispossession without the possessor’s consent is, in general, forbidden, the possessor is given a right *in rem* valid against persons generally, to remain undisturbed, but he has no *right to possess in rem* unless he is

entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over.

To have worked out the notion of 'having a right to' as distinct from merely 'having', or, if that is too subjective a way of putting it, of rules allocating things to people as opposed to rules merely forbidding forcible taking, was a major intellectual achievement. Without it society would have been impossible. Yet the distinction is apt to be overlooked by English lawyers, who are accustomed to the rule that every adverse possession is a root of title, *Le.* gives rise to a right to possess, or at least that *'de facto* possession is *prima facie* evidence of session in fee and right to possession'.

The owner, then, has characteristically a battery of remedies in order to obtain, keep and, if necessary, get back the thing owned. Remedies such as the actions for ejectment and wrongful detention and the *vindicatio* are designed to enable the plaintiff either to obtain or to get back a thing, or at least to put some pressure on the defendant to hand it over. Others, such as the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts are primarily directed towards enabling a present possessor to keep possession. Few of the remedies mentioned are confined to the owner; most of them are available also to persons with a right to possess falling short of ownership, and some to mere possessors. Conversely, there will be cases in which they are not available to the owner, for instance because he has voluntarily parted with possession for a temporary purpose, as by hiring the thing out. The availability of such remedies is clearly not a necessary and sufficient condition of owning a thing; what is necessary, in order that there may be ownership of things at all, is that such remedies shall be available to the owner in the usual case in which no other person has a right to exclude him from the thing.

**(2) The Right to Use**

The present incident and the next two overlap. On a wide interpretation of 'use', management and income fall within use. On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. On this interpretation it excludes management and income.

The right (liberty) to use at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance, since the standard limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

**(3) The Right to Manage**

The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers of licensing acts which would otherwise be unlawful and powers of contracting: the power to admit others to one's land, to permit others to use one's things, to define the limits of such permission, and to contract effectively in regard to the use (in the literal sense) and exploitation of the thing owned. An

owner may not merely sit in his own deck chair but may validly license others to sit in it, lend **it,** impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particulas way. This is the sphere of management in relation to a simple object like a deck chair. When we consider more complex cases, like the ownership of a business, the complex of powers which make up the right to manage seems still more prominent. The power to direct how resources are to be used and exploited is one of the cardinal types of economic and political power; the owner's legal powers of management are one, but only one possible basis for it. Many observers have drawn attention to the growth of managerial power divorced from legal ownership; in such cases it may be that we should speak of split ownership or redefine our notion of the thing owned. This does not affect the fact that the right to manage is an important element in the notion of ownership; indeed, the fact that we feel doubts in these cases whether the 'legal owner' *really* owns is a testimony to its importance.

**(4) The Right to the Income**

To use or occupy a thing may be regarded as the simplest way of deriving an income from it, of enjoying it. It is, for instance, expressly contemplated by the English income tax legislation that the rent-free use or occupation of a house is a form of income, and only the inconvenience of assessing and collecting the tax presumably prevents the extension of this principle to movables.

Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing personal use of a thing and allowing others to use **it** for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by other persons. Obviously the line to be drawn between the earned and unearned income from a thing cannot be firmly drawn.

**(5) The Right to the Capital**

The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of **it:** clearly **it** has an important economic aspect. The latter liberty need not be regarded as unrestricted; but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership....

An owner normally has both the power of disposition and the power of transferring title. Disposition on death is not permitted in many primitive societies but seems to form an essential element in the mature notion of ownership. The tenacity of the right of testation once it has been recognized is shown by the Soviet experience. The earliest writers were hostile to inheritance, but gradually Soviet law has come to admit that citizens may dispose freely of their 'personal property' on death, subject to limits not unlike those known elsewhere.

**(6) The Right to Security**

An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and be remains solvent. His right to do so may be

called the right to security. Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.

However, a general right to security, availing against others, is consistent with the existence of a power to expropriate or divest in the state or public authorities. From the point of view of security of property, it is important that when expropriation takes place, adequate compensation should be paid; but a general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it. Holmes' paradox, that where specific restitution of goods is not a normal remedy, expropriation and wrongful conversion are equivalent, obscures the vital distinction between acts which a legal system permits as rightful and those which it reprobates as wrongful: but if wrongful conversion were general and went unchecked, ownership as we know it would disappear, though damages were regularly paid.

In some systems, as *(semble)* English law, a private individual may destroy another's property without compensation when this is necessary in order to protect his own person or property from a greater danger. Such a rule is consistent with security of property only because of its exceptional character. Again, the state's (or local authority's) power of expropriation is usually limited to certain classes of thing and certain limited purposes. A general power to expropriate any property for any purpose would be inconsistent with the institution of ownership. If, under such a system, compensation were regularly paid, we might say either that ownership was not recognized in that system, or that money alone could be owned, 'money' here meaning a strictly fungible claim on the resources of the community. As we shall see, 'ownership' of such claims **LS** not identical with the ownership of material objects and simple claims.

**(7) The Incident of Transmissibility**

It is often said that one of the main characteristics of the owner's interest is its 'duration'. In England, at least, the doctrine of estates made lawyers familiar with the notion of the 'duration' of an interest and Maitland, in a luminous metaphor, spoke of estates as 'projected upon the plane of time'.

Yet this notion is by no means as simple as it seems. What is called 'unlimited' duration *(perpetuitI)* comprises at least two elements (i) that the interest can be transmitted to the holder's successors and so on *ad infinitum* (The fact that in medieval láhd law all interests were considered 'temporary' is one reason why the terminology of ownership failed to take root, with consequences which have endured long after the cause has disappeared); (ii) that it is not certain to determine at a future date. These two elements ay be called 'transmissibility' and 'absence of term' respectively. We are here concerned with the former.

No one, as Austin points out, can enjoy a thing after he is dead (except vicariously) so that, in a sense, no interest can outlast death. But an interest which is transmissible to the holder's successors (persons designated by or closely related to the holder who obtain the property after him) is more valuable than one which stops with his death. This is so both because on alienation

the alienee or, if transmissibility is generally recognized, the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing, and because, even if alienation were not recognized, the present holder would by the very fact of transmissibility be dispensed *pro tanto* from making provision for his intestate heirs. Hence, for example, the moment when the tenant in fee acquired a heritable (though not yet fully alienable) right was a crucial moment in the evolution of the fee simple. Heritability by the state would not, of course, amount to transinissibiity in the present sense: it is assumed that the transmission is in some sense *advantageous* to the transmitter.

Transmissibility can, of course, be admitted, yet stop short at the first, second or third generation of trausmittees. The owner's interest is characterized by *indefinite* transmissibility, no Limit being placed on the possible number of transmissions, though the nature of the thing may well limit the actual number.

In deference to the conventional view that the exercise of a right must depend on the choice of the holder, I have refrained from calling transmissibility a right. It is, however, clearly something in which the holder has an economic interest, and it may be that the notion of a right requires revision in order to take account of incidents not depending on the holder's choice which are nevertheless of value to him.

**(8) The Incident of Absence of Term**

This is the second part of what is vaguely called 'duration'. The rules of a legal system usually seem to provide for determinate, indeterminate and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live forever, he would, in the ordinary way, be able to continue in the enjoyment of them forever. Since human beings are mortal, he will in practice only be able to enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, since human beings are mortal, interests for life, whether of the holder or another, must be regarded as determinate. The notion of an indeterminate interest, in the full sense, therefore requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later.

**(9) The Prohibition of Harmful Use**

An owner's liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden. There may, indeed, be much dispute over what is to count as 'harm' and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated. Nevertheless, at least for material objects, one can always point to abuses which a legal system will not allow. Imay use my car freely but not in order to run my neighbour down, or to

demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour's house. These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them 'ownership' would be a destructive force.

**(10) Liability to Execution**

Of a somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution of a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and own ership would, again, be an instrument by which the owner could defraud his creditors. This incident, therefore, which may be called *executability,* seems to constitute one of the standard ingredients of the liberal idea of ownership.

**(11) Residuary Character**

A legal system might recognize interests in things less than ownership and might have a rule that, on the determination of such interests, the rights in question lapsed and could be exercised by no one, or by the first person to exercise them after their lapse. There might be leases and easements; yet, on their extinction, no one would be entitled to exercise rights similar to those of the former lessee or of the holder of the easement. This would be unlike any system known to us and I think we should be driven to say that in such a system the institution of ownership did not extend to any thing in which limited interests existed. In such things there would, paradoxically, be interests less than ownership but no ownership.

This *fantasy* is intended to bring out the point that it is characteristic of ownership that an owner has a residuary right in the thing owned. In practice, legal systems have rules providing that on the lapse of an interest rights, including liberties, analogous to the rights formerly vested in the holder of the interest, vest in or are exercisable by someone else, who may be said to acquire the 'corresponding rights'. Of course, the 'corresponding rights' are not the same rights as were formerly vested in the holder of the interest. The easement holder had a right to exclude the owner; now the owner has a right to exclude the easement holder. The latter right is not identical with, but corresponds to, the former.

It is true that corresponding rights do not always arise when an interest is determined. Sometimes, when ownership is abandoned, no corresponding right vests in another; the thing is simply *res derelicta.* Sometimes, on the other hand, when ownership is abandoned, a new ownership vests in the state, as is the case in South Africa when land has been abandoned.

It seems, however, a safe generalization that, whenever an interest less than ownership terminates, legal systems always provide for corresponding rights to vest in another. When easements terminate, the 'owner' can exercise the corresponding rights, and when bailments terminate, the same is true. It looks as if we have found a simple explanation of the usage we are

investigating, but this turns out to be but another deceptive short cut. For it is not a sufficient condition of A's being the owner of a thing that, on the determination of *B's* interests in it, corresponding rights vest in or are exercisable by *A*. On the determination of a sub-lease, the rights in question become exercisable by the lessee, not by the 'owner' of the property.

Can we then say that the 'owner' is the ultimate residuary? When the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the 'owner's' interest the state may acquire the corresponding rights; is the state's interest ownership or a mere expectancy?

A warning is here necessary. We are approaching the troubled waters of split ownership. Puzzles about the location of ownership are often generated by the fact that an ultimate residuary right is not coupled with present alienability or with the other standard incidents we have listed....

We are of course here concerned not with the puzzles of split ownership but with simple cases in which the existence of B's lesser interest in a thing is clearly consistent with *A's* owning it. To explain the usage in such cases it is helpful to point out that it is a necessary but not sufficient condition of *A's* being owner that, either immediately or ultimately, the extinction of other interests would enure for his benefit. In the end, it turns out that residuarity is merely one of the standard incidents of ownership, important no doubt, but not entitled to any special status.

## Notes and Questions

### JOHN LOCKE, from *Second Treatise of Civil Government*

1. John Locke's basic project here is to show how private property can be justified, even if we start with the basic assumption that all people intrinsically are, or at least originally were, equally entitled to the land and fruits of the earth. Or as Locke might have put it, we are all the children of God. Locke uses religious-sounding language, but all religious references can easily be translated into the language of objective morality. Do not be fooled by the style: That is the way people talked in seventeenth-century England. Nothing in Locke's argument depends on a religious claim. It relies only on reason. Three conditions have to be true for Locke to be right: (1) Morality is objective— that is, there is such a thing as right and wrong; (2) we can figure out what is moral, or right and wrong, by the use of reason; and (3) Locke's analysis is the one supported or compelled by reason.

# OWNERSHIP OF AGRICULTURAL LAND IN ANCIENT INDIA

BY

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The various theories on the subject [1]) may be broadly divided into three, according to whether they emphasise the claim of the community, the king or the peasant as the owner of the soil.

V. A. Smith [2]) and, following him, J. N. Samaddar [3]) express the view that the soil was the property of the king. Others who support this theory are B. Breloer [4]), Shamasastry [5]), Hopkins [6]) and Bühler [7]). Maine [8]) is the chief propounder of the view that agricultural land was owned and cultivated by men grouped in village communities. The theory of individual ownership has been advocated among others by Baden-Powell [9]), K. P. Jayaswal [10]) and P. N. Banerjee [11]).

Here we do not discuss the communal ownership of land, which is little referred to in classical Hindu legal texts. We hope to consider this at length in a later publication. For the present the claims of peasant and king are evaluated.

We have some evidence which points to the existence of private ownership of cultivated land even in the Vedic period [12]). Firstly, we

1) *Report of the Indian Taxation Enquiry Committee* (1924-25), Vol. II. Appendix IV.
2) *Early History of India*, p. 137 ff.; *Oxford History of India*, p. 90.
3) *Economic Condition in Ancient India*, p. 168.
4) See U. N. Ghoshal, *Hindu Revenue System*, p. 168.
5) *Kauṭilya's Arthaśāstra* (tr.) p. 144n.
6) *India, Old and New*, p. 223.
7) *S.B.E.* XXV, p. 259 — note on *Manu* VIII. 39.
8) *Village Communities of the East and West*, pp. 76 f., 103, 107, 113, 160, 226 f.
9) *Indian Village Communities*, pp. 2 f., 36 ff., 98-139.
10) *Hindu Polity*, p. 343 ff.
11) *Public Administration in Ancient India*, p. 179.
12) Competent authorities like Schrader (*Prehistoric Antiquities*, p. 289) and Macdonell and Keith (*Vedic Index*, I. 210 f.) admit that the idea of individual ownership was recognised even as early as the Vedic Age. Bandyopadhyaya — *Economic Life and Progress in Ancient India*, p. 114 f.; Cf. U. N. Ghoshal — *Hindu Public Life*, Part I, p. 60.

have references to the measuring of fields [1]) and to their being separated by strips (*khilya*) [2]). Again, we find expressions meaning 'lord of a field' and 'the winning of a field' (*urvarāsā*, *urvarāpati*, *urvarājit*, *kṣetrasā*, *kṣetrapati*) [3]). The reference by Apālā [4]) to her father's field and the hair on his head as personal possessions, coupled with prayers [5]) for fertile fields and for worthy sons and grandsons, indicates private proprietorship. In the *Atharvaveda* [6]), the *Taittirīya Saṁhitā* [7]) and the *Chāndogya Upaniṣad* [8]) the sense of separate and individual fields is more clear.

The Pāli canonical works, reflecting the practice in the Age of the Buddha, show a developed sense of individual ownership, when peasant proprietors called *khettapati*, *khettasāmika* or *vatthupati* cultivated the arable land. There cannot be any doubt that the conception of ownership in land had developed [9]). Boundaries were set up to distinguish the plots of land possessed by different owners [10]). The canonical literature [11]) reveals that land was classed with cattle and other movable and immovable property as the personal property of a householder. The sale and mortgage etc. of land are also referred to [12]). Besides the donation of parks by Anāthapiṇḍika, Ambapāli and Jīvaka, there are some other instances of gifts of lands [13]). The *Cullavagga* [14]) describes a law-suit relating to the Jetavana, a significant instance illustrating individual ownership of land. The stealing of another's plot is referred to in the *Dīghanikāya* [15]).

1) *R.V.* I. 110.5.
2) Pischel q. by *Vedic Index* I, p. 100.
3) *Vedic Index* I, p. 99. Also *R.V.* IV. 38.1; VI. 20.1.
4) *R.V.* VIII. 91.5.
5) *R.V.* IV. 41.6.
6) IV. 18.5; V. 31.4; X.i. 18; XI. 1.22.
7) II. 2.1.2.
8) VIII. 42.2.
9) *Jātaka* III. 301 f.; *Dīgha* XII. 7; *Mbh.* V. 36.5.
10) *Jātaka* IV. 281; *Dīgha* XXVII. 18.
11) *Mahāvagga* III. 11.4 ff. *Suttanipāta* IV. 10.11; *Kāmasutta* IV. 1, *Theragāthā* 957.
12) *Jātaka* III. 293; *Vinaya* II. 158, 159.
13) *Jātaka* 484; IV. 281.
14) VI. 4.9.
15) XXVII. 19.

In this connection no study has been made of the evidence supplied by the Jain canon. The *Uttarādhyayana Sūtra* [1]) mentions land (*khetta*) along with cattle, gold, dwelling places etc. as means of obtaining pleasure. According to the *Bṛhatkalpa Bhāṣya* [2]) agricultural land or *khetta* is considered among the ten kinds of external possessions, others being buildings, gold, conveyances, furniture etc. There are many references [3]) showing that lands and houses formed the main possessions of a householder.

There are indications in the *Arthaśāstra* too which show private ownership of land. Firstly, Kauṭilya uses the word *svāmyam* or ownership while dealing with disputes about the sale of land [4]) and about a person driving cattle through a field without informing the owner [5]). The fields of the different holders were demarcated by boundaries, an encroachment upon which was an offence. The *Arthaśāstra* [6]) deals with boundary disputes between individuals. The private ownership of land is further clear from the rules [7]) relating to the construction of irrigation-works on another cultivator's plot. The cultivator had the right of alienating his field. He could lease it to others for cultivation. The land could also be sold by the cultivator. Dispossessing a person of his fields was a penal offence. Kauṭilya gives detailed rules regarding all these points [8]). Making improvements on another's plot did not create any right of ownership [9]). An important evidence in favour of private ownership is the rule [10]) that a person who steals images of

1) 3.17.
2) I. 825.
3) *Uttarādhyayana*, XIII. 24; IX. 49; *Ācārāṅga* I. 2.3. 3; II. 7.2.4-6; *Ovāiya* 1. Almost all passages in the Jain Canonical works having a bearing on agricultural tenure seem to suggest the existence of separate cultivation by farmers — *I.H.Q.*, X. 291.
4) *Artha* III. 9 — *Aswāmi-pratikroṣe caturviṁśatipaṇo daṇḍaḥ; praṇaṣṭasvāmikaṁca yathopakāraṁ vā vibhajet.*
5) *Artha* III. 10 — *Svāminaścānivedya cārayato dvādaśapaṇo daṇḍaḥ.*
6) III. 9.
7) *Artha* III. 18.
8) *Artha* III. 9.
9) *Artha* III. 10.
10) IV. 10 cf. *Artha* III. 17 — *mahāpaśumanuṣyakṣetragṛhahiraṇyasuvarṇasūkṣmavastrādīnāṁ sthūlakadravyāṇāṁ dviśatāvaraḥ pañcāśataparaḥ.*

gods or of animals, abducts men, or takes possession of the fields, houses, gold, gold coins, precious stones or crops of others, shall be beheaded or compelled to pay the highest amercement. At another place the *Arthaśāstra* [1]) discusses the question of the fatherhood of a child: whether it belongs to the husband or to him from whom the seed is received? The analogy on which the two alternative claims are based is that of the ownership of the crop: does it belong to the owner of the field or to the person who sows the seed in the field?

The traditional Indian point of view on the question of the ownership of land is best reflected in the legal texts.

It has been maintained by some that the Indian legal system had no distinct notion of ownership [2]). But, as has been rightly shown by Jolly [3]), there was a clear distinction between the concepts of ownership and possession. The pronoun *svam* and its derivatives are used to express ownership, while the derivatives of the root *bhuj* indicate mere possession or enjoyment. Later works basing their conclusions on earlier Smṛtis define ownership (*svatva*) as property capable of being disposed of as one likes [4]). There is also a discussion about the nature of ownership, as to whether it is a separate category (*padārtha*) or a capacity [5]). Likewise the commentaries and digests discuss in minute detail whether ownership is to be apprehended from Śāstra alone or is a matter of worldly usage [6]). In the Dharmasūtras and Smṛtis the different modes of acquiring ownership [7]) have been noted in detail.

Indian legal works clearly distinguish between possession and legitimate title, the two constituents of ownership, and emphasise their due importance in determining it [8]). Bṛhaspati [9]) says that posses-

1) III. 7.

2) Moreland — *Agrarian system of Moslem India*, p. 4.

3) *Hindu Law and Custom*, p. 196.

4) Kane — *History of Dharmaśāstra* III, p. 555. Also see *infra* p. 247, n. 1.

5) *Ibid*, p. 547.

6) *Ibid*, p. 548 ff.; also Jolly—*Hindu Law and Custom*, p. 198 f.

7) *Gautama* X. 39-41; *Vasiṣṭha* XVI. 16; *Bṛhaspati* IX. 2; *Nārada* q. by *Smṛticandrikā* II p. 70.

8) *Smṛticandrikā* (ed. Gharpure) II p. 70 ff.: *Mitākṣarā* on *Yājña* II. 27.

9) IX. 3. Later on *Bṛhaspati* IX. 22 elaborates his statement and says that it is not by mere force of possession that land becomes a man's property; a legitimate title

sion coupled with a legitimate title constitutes proprietary right. Yājñavalkya[1]) makes the relative importance of the two factors quite clear. In his opinion even title, if not accompanied by some slight possession, has no strength; while title is stronger than possession not handed down hereditarily. Nārada[2]) also regards as a thief the man who enjoys a property even for hundreds of years without title. The abiding claim of ownership of an individual over his arable land is apparent best from a set of rules in Nārada[3]) to the effect that if the owner of a field is unable to cultivate it, is dead, or is not heard of, and a stranger cultivates the field without objection from anybody, the stranger shall enjoy the produce of the field; if the owner or his son returns while the field is being tilled by a stranger, he can get his field back on repayment to the stranger of all the money expended on making the land ready for crops; if the owner is unable to return the expenses, the stranger may retain seven-eighth of the produce every year for eight years, giving one-eighth to the owner every year, and should hand over the field to the owner when the eighth year arrives.

But the second factor of enjoyment was not less important in determining ownership, particularly in the case of immovable property[4]). Nārada[5]) and Kātyāyana[6]) state that possession needs to be supported by title only in cases within human memory, but in cases beyond the memory of man possession extending over three generations is proof of ownership even in the absence of a document or other title. The Smṛtikāras seem to be divided on the minimum period of adverse enjoyment amounting to ownership. The earlier writers, such as Gautama[7]) and Manu[8]), appear to regard ten years' adverse enjoy-

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also having been proved it is converted into property by both possession and title, but not otherwise. See also *Yājña* II. 29; *Nārada* I. 85-86.

1) II. 27.
2) I. 87.
3) XI. 23-25.
4) *Nārada* I. 77.
5) I. 89.
6) 321.
7) XII. 37.
8) VIII. 147-148.

ment of land as sufficient to create ownership. Yājñavalkya [1]) extends the period to twenty years. But later writers like Bṛhaspati [2]), Viṣṇu [3]), Kātyāyana [4]) and Nārada [5]) require a period of sixty years. An attempt to reconcile this conflict in the precepts of the legal texts was made by later writers of commentaries and digests [6]). However, the Smṛtis tried to safeguard the rights of the owner of land in certain cases, even when the period of adverse enjoyment would have deprived him of it [7]).

Land, like other objects of private ownership, was a subject of legal dispute. Kātyāyana gives six causes of land disputes: claiming more land, claiming that another person is entitled to less than he possesses, claiming a share, denying a share, seizing possession when previously there was none, and, lastly, boundaries [8]).

The prevalence of peasant proprietorship follows from many other rules relating to legal problems connected with agricultural land. Manu, while treating the question of a right over crops, says that if a man sows his seed in another's field [9]), or when the seed is carried by water or wind and germinates there [10]), he has no right over the crop, which belongs to the owner of the field. Then there was the question of the settlement of boundary disputes. The Smṛtis give elaborate rules on this point. Manu [11]) refers to boundary disputes regarding fields, wells, tanks, gardens and houses. Nārada [12]) uses the expression boundary dispute to refer to a dispute in regard to landed property, whether it is a dike or bridge, a field, a tilled piece of land, or waste.

1) II. 24.
2) IX. 26-31.
3) V. 187.
4) 318, 327.
5) I. 91; XI. 27.
6) Kane—*History of Dharmaśāstra*, II p. 322 ff.
7) *Vasiṣṭha* XVI. 18; *Manu* VIII. 149; *Kātyāyana* 330-335; *Bṛhaspati* IX. 11, 12; *Nārada* I. 81, 83, IV. 7-10.
8) 732.
9) IX. 49.
10) IX. 54; also *Nārada* XII. 56.
11) VIII. 262.
12) XI. 1.

Yājñavalkya [1]) prescribes punishment for making breaches in the boundary between two or more fields and for ploughing a field beyond the boundary of one's own field. In Viṣṇu the fine for transgressing the whole of the boundary of a field is 1008 *paṇas* [2]). How keen was the sense of ownership is again shown by the rules regarding the right to enjoy the fruits and flowers of trees that grow on the boundary between two fields [3]).

The rules about dispossession of a cultivator's plot by another person also imply a recognition of the claims of the owner of a field. Manu [4]) places a field in the category of other immovable properties which were undoubted objects of private ownership, such as a house, a tank, a garden or a field, and prescribes a heavy fine for a person who by intimidation possesses himself of these objects belonging to another man. Yājñavalkya [5]) also treats dispossession of another's field as a penal offence. The fear of religion was also brought to bear on the question. Theft of land was viewed as one of the four great sins [6]). Hell is mentioned as the punishment for this sin [7]), and lunar penance has been prescribed to expunge its guilt [8]). The proprietary right of a cultivator over his field is again manifested by the rules [9]) prescribing the compensation to be paid to the owner of agricultural land for damage caused to his field by a negligent herdsman in charge of cattle.

The right of cultivators to do with their fields as they liked establishes full individual right over agricultural land. According to Indian tradition itself, as recorded in late medieval commentaries and digests, ownership implies the quality of the object owned to be used by the

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1) II. 155.
2) V. 172; also *Manu* IX. 291.
3) *Nārada* XI. 13-14; *Kātyāyana* 760-761.
4) VIII. 264; *Matsya Purāṇa* CCXXVII. 30.
5) II. 155.
6) *Manu* XI. 58; *Viṣṇu* XXVI. 13.
7) *Gautama* XIII. 17.
8) *Manu* XI. 163, *Viṣṇu* LII. 6.
9) *Manu* VIII. 240-41; *Nārada* XI. 28-29, 34; *Yājña* II. 159-161; *Kātyāyana* 664-665, 667.

owner according to his pleasure [1]). This test of ownership, when applied to agricultural land, proves it also to have been an object of private proprietorship. The *Āpastamba Dharmasūtra* [2]) grants to cultivators the right to lease their fields against half or any other fixed share of the produce. Vyāsa and Bṛhaspati [3]) also refer to the leasing of fields [4]). Further a cultivator had the right to use his field as a pledge. Manu [5]) and Nārada [6]) place lands, houses etc. in the category of pledges which can be used. Bhāradvāja gives a list of a debtor's possessions, by selling which a creditor is to be paid if the debtor has no cash; these properties in order are: grain, gold, iron, cattle, clothes, land, slaves, and conveyances, in the absence of his fields his garden, and lastly his house [7]). An epigraphic corroboration of this is found in the Jaunpur brick inscription of 1217 A.D. which records a certain Gaṅgadeva borrowing an amount of 2,250 *drammas* from two bankers and as security for this sum giving in pledge the cultivated land which was his own share [8]). Likewise, though certain restrictions were imposed, land could be sold. The rules of ownership and sale in earlier works [9]) were motivated by many considerations, into the details of which we need not enter. However, they in no way deprived a cultivator of his right to dispose of the land as he liked. Moreover, even these restrictions were gradually removed. We see later Smṛtis like

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1) Jīmūtavāhana, Nīlakaṇṭha and Mitramiśra quoted by U. N. Ghoshal—*Agrarian system in ancient India*, p. 85 f. A similar view has been expressed by *Vyavasthācandrikā* (ed. S. C. Sircar) I(i) cl. 51 and *Smṛticandrikā* I cl. 25.

2) I. 6.18; II. 11.28; II. 21.1; II. 28.1.

3) q. by *Vyavahāramayūkha* of Bhaṭṭa Nīlakaṇṭha, Notes p. 226.

4) Cf. reference to *ardhasītikas-Gautama* XVII. 6; *Manu* IV. 253; *Viṣṇu* LVII. 16; *Yājña* I. 166; *Parāśara* XI. 19. According to *Manu* (IX. 52-53), if by a special contract land is made over to another for sowing, the owner of the seed and the owner of the soil both are considered as sharers of the crops; if, however, no agreement has been made the benefit clearly belongs to the owner of the field. A rule in *Yājñavalkya* (II. 158) provides for the case where a person does not cultivate a field leased to him.

5) VIII. 143.

6) I. 125.

7) q. by *Parāśaramādhavīya*, III. p. 259.

8) *JUPHS*, XVIII p. 196 ff.

9) cf. *Gautama* VII. 15.

Bṛhaspati and Nārada[1]) allowing immovable property as an article of trade. The right to sell one's land is implied by Bṛhaspati[2]); two out of the seven classes of legal documents mentioned by him are concerned with the sale and mortgage of landed property. Kātyāyana says: 'what is decided by the neighbours assembled together, who know (the land etc. and its value) and who are afraid of committing sin, as the price of fields, gardens, houses and the like, of bipeds and quadrupeds, is declared to be the proper price; a price which is less or more than it by one-eighth is declared to be improper; what is sold for an improper price may be annulled even after a hundred years[3])'. This same authority allows a period of ten days for repentance to sellers and purchasers in case of land; when *sapiṇḍas* are parties in the sale the period of repentance is twelve days; in other cases the period is even shorter[4]). Kātyāyana also contains rules on an *uktalābha* sale[5]) which has been defined by Bhāradvāja[6]) as a conditional sale, where the seller borrows only a portion of the proper price of a plot of land, promising to repay the borrowed money on a certain day, failing which his ownership over the land will come to an end. A right similar in nature is that of giving away land as charity[7]). Even the Dharmaśāstras[8]) permit such a practice. Manu[9]) also refers to the practice of the gift of land to Brāhmaṇas. Bṛhaspati's[10]) description of a deed of gift also implies a right to grant one's landed property. Viṣṇu[11]) says that by giving land one obtains heaven, by giving it to the extent of a bull's hide only one is purified from every sin. Manu

1) q. *by Vivādaratnākara*, p. 189.
2) VIII. 7-8.
3) 705-706.
4) 685.
5) 711-712.
6) q. by *Vyavahāranirṇaya*, p. 351.
7) Cf. sale of land to be clothed in the formalities of a gift—Kane—*History of Dharmaśāstra*, III. p. 567, no. 1063.
8) *Gautama* XIX. 17; *Baudhāyana* III. 10. 15.
9) X. 114.
10) VIII. 6.
11) XCII. 3-4. Cf. *Purāṇa Index*, S. V. Pañcalāṅgalakam.

also refers to the merit of land gifts [1]). Thus we find that Indian legal texts grant a peasant all the rights of sale, gift, mortgage etc., which form ownership [2]).

The best treatment of the question of the proprietary claims of cultivators and the State is found in the Mīmāṁsā works [3]). The Mīmāṁsā writers anticipate the points that a modern writer on the subject discusses. The discussion starts on the injunction that in the Viśvajit sacrifice a votary should give away all his belongings to the officiating priests. The natural question is: 'What can a man legally give as his own [4])?' Jaimini [5]) initiates the dicussion by stating that land is not to be transferred, for it belongs equally to all. Śabarasvāmin [6]) explains the aphorism thus: 'Land is not to be given because men are found enjoying lordship over fields, and not over the whole earth. It is said that then he who is the sovereign lord gives it. Even he cannot give the land because in the case of fields of which he is the lord by actual enjoyment there is no speciality in him. The difference due to his paramountcy is in this that by virtue of his protecting the rice and other crops that grow on the earth he is entitled to a share of them as his remuneration, but not to the lordship of the soil'. Two points which stand out in this discussion are: first, a distinction between the entire territory of the state and private fields, the former being incapable of individual ownership; and second, a recognition that a king receives taxes not because of a title of ownership but through his function of protection as sovereign. This discussion has been carried into greater detail by subsequent writers. Mādhava [7]) and Khaṇḍa-

1) IV. 230. Cf. *Mbh.* XIII. 34.67—one should make a gift of land even after purchasing it.

2) Cf. Jolly—*Tagore Law Lectures*, p. 88 f.

3) Colebrooke (*Miscellaneous Essays* I p. 320 f.) drew the attention of the scholars to this important source. K. P. Jayaswal (*Hindu Polity*, p. 344 ff.) was the first to assess its value. Cf. also A. S. Nataraja Ayyar—*The Kings's Right to the Soil*—Lecture II delivered at the Faculty of Law, Delhi University—*Vyavahāra Nirṇaya* Vol. IV no. 1.

4) *Mīmāṁsā Sūtra* VI. 7.1-2.

5) VI. 7.3.

6) *Mīmāṁsā-Darśana* (B.I.) VI. 7.3.

7) *Nyāyamālāvistara* (A.S.S.). p. 358.

deva [1]), belonging respectively to the fourteenth and the seventeenth centuries, are two important Mīmāṁsā commentators whose discussions bring into relief the functional nature of sovereignty and the distinction of private and common property. The testimony of these later commentators is further remarkable as showing that the earlier view of Jaimini as explained by Śabara held ground as authoritative throughout the period. Mādhava argues thus: 'A king cannot give away the State territory. It may, however, be claimed that, according to the Smṛti injunction, a king is the lord of (the property of) all excepting Brāhmaṇas, and land is the property of the paramount ruler. But the purport of the Smṛti text is that the king's lordship is for the purpose of correcting the wicked and supporting the virtuous. Land is not the property of the king but is the common property of all beings enjoying the fruit of their labour on it. Therefore, although there can be a gift of private (*asādhāraṇa*) land, there can be no gift of the State land.' Khaṇḍadeva also declares that even a paramount sovereign has no proprietary right over the land, for even conquest produces proprietary right only with regard to the personal property, houses, fields, etc. of the enemy; the conquest of land merely produces the title of sovereignty, which is limited to protecting the kingdom and eradicating evil, and for that purpose only the realization of taxes from cultivators and of fines from offenders is legitimate, but no proprietary right on the land arises therefrom. Houses, fields, etc., acquired by purchase and so forth, may, however, become objects of gift.

This Mīmāṁsā standpoint on the subject has been accepted as authoritative by later commentators on legal works. Medhātithi [2]) repeats the Mīmāṁsā arguments. Nīlakaṇṭha in his *Vyavahāramayūkha* [3]) quotes Jaimini with approval and follows the discussion of the proprietary rights af a conqueror as found in Khaṇḍadeva.

It may be claimed by the opposite group of scholars, though not with much justification, that the legal texts only lay down a norm or

1) *Bhaṭṭadīpikā* on *Pūrvamīmāṁsā Darśana* (Mysore) II. p. 317.
2) On *Manu* VIII. 99.
3) p. 91.

ideal. So we have to substantiate our study of the question with a thorough examination of the epigraphic evidence, which cannot be accused of being unfaithful in reflecting the practice of a particular period. The inscriptions, however, only corroborate the testimony of the Smrti literature and reveal that arable land was divided into plots over which farmers had proprietary rights. A Nasik cave inscription [1]) records the gift of a field for providing clothes for certain ascetics living in one of the Nasik caves. The Junnar inscriptions supply significant instances of private transfers of land and of the gift of small units of agricultural land, owned by individual proprietors [2]). The evidence of the two Kangra inscriptions of 804 A.D. [3]) may also be profitably utilised here. These record, among many donations by private individuals to a Śiva temple, the gift of agricultural land. This evidence provides an example of the ownership of land by merchants, and thus shows that land was owned even by classes other than those to whom grants or assignments of lands were generally made by the State. This is also supported by some later inscriptions [4]) mentioning pieces of agricultural land owned by corporate bodies.

A large number of inscriptions attest to the practice of kings' assigning villages to brāhmaṇas. On a superficial view such grants would appear to be infringing the proprietary right of individual cultivators. But a careful perusal does not warrant this view. Really what was assigned as gifts in such cases was the revenue which the State received from the village and often certain other rights, but not the agricultural

1) *E.I.* VIII. 8 (No. 9).

2) Lüders 1163, 1166, 1167. One inscription records the gift ot a field measuring fifteen *nivartanas* in the Puvānada village by a certain Palapa (*A.S.W.I.* IV p. 96. No. 20). According to another inscription from Junnar, Āḍuthuma, the Śaka, invested the income of two fields measuring twenty and nine *nivartanas* respectively with a guild at Koṇācika (Lüders 1162). Another record again from Junnar mentions the gift of a field by a certain Vāhata Vaceḍuka (*ibid.*, 1164).

3) *E.I.* I. 16 (No. I and II). Cf. Mulgund inscription dated 902 A.D.—*E.I.* XIII. 15 (K). It records three donations (a) a field measuring 1000 betel-creepers by a merchant who bought it for a very great sum from three persons (b) a field measuring 1000 betel-creepers by four headmen of certain guilds and (c) a field measuring 1000 betel-creepers by a Brāhmaṇa family.

4) *E.I.* I. 20 (No. II); I. 21.

land in the village. The earlier inscriptions on the subject are brief and so do not throw any light on the problem, but those later in date are full of details and show that such grants of villages did not imply a transfer of the proprietary rights over fields. These inscriptions, often addressed to the villagers, require them simply to give to the donee the revenue and other dues, which they owed to the State [1]). There is nothing whatever in the inscriptions to show that cultivators were to transfer to the donee their ownership over the land. They were affected only to the extent that the person to whom they paid their dues was now changed. Likewise, the lists of the rights of a donee include only the different taxes and dues which he was to receive from the village. Here also we do not find any expression which may suggest that he acquired even a limited proprietary right in the agricultural land. Further, where the land-grants, in addressing future officers and kings, require them not to interfere with the donee's right over the village [2]), any reference to his right to occupy the agricultural land of the village is conspicuous by its absence. It may, however, be objected that the use of the terms *kṛṣataḥ karṣayataḥ* in the expression "*bhuñjataḥ kṛṣataḥ karṣayataḥ pradiśato vā*" in some grants implies the donee's proprietary rights over village fields. But as cultivation of land requires attention and time, it would really have been adding to the burdens of a learned brāhmaṇa if the land granted by the king as a favour was required to be cultivated by him. This was even more relevant in the case of religious institutions like temples and monasteries. The difficulty can further be realised in cases where the donees lived in villages, towns

1) *Yuṣmābhirasyājñāśravaṇavidheyairbhavitavyaṁ samucitāśca pratyāyāḥ meyahiraṇyādayo deyāḥ—E.I.* II. 30. Also *E.I.* XXVIII. 47, IV. 16, XII. 1, XXVI. 18, XXIII. 3, IX. 21, 39. *Gupta Ins.* 40, 26, *E.I.* III. 21; XXI. 5; XXII. 22; XXVIII. 2; XII. 17; XXVIII. 39; XXIII. 9; XV. 4.

2) *Putrapautrānugāmī bhuñjato na kenacid vyāghātaḥ karttavyaḥ sarvvakriyābhissaṁrakṣitavyaḥ parivarddhayitavyaśca yaścāsmacchāsanamaganayamānassvalpāmapi paribādhāṁ kuryāt kārayedvā tasya brāhmaṇaiḥ veditasya sadaṇḍaṁ nigrahaṁ kuryyāma—E.I.* XXII. 27; XXIII. 14; XXVI. 21. *Taṅgrāmamasau brāhmaṇaḥ putrapautrānukrameṇopabhuñjāno na kaiścitkiñcidvaktavyaḥ—E.I.* XIII. 6 (p. 105); *Gupta Inscriptions* 56. *Ye cāsmadvaṁśotpadyamānakarājānaḥ tairiyaṁ dattirnna vilopyānumodanīyā samucitarājābhāvyakarapratyāyā na grāhyāḥ—ibid.* 26. *Brāhmaṇena cātmanograhāraḥ putrapautrikamupabhujyamāno na kaiścidvallabhadurllabhairupahantavyaḥ—E.I.* XXIII. 9.

or districts situated at a great distance from the village granted [1]). As we have already seen the grants contemplate in passages addressed to villagers, state officials or future kings a right to the enjoyment of revenue payable by the villagers to the king. The terms in question, therefore, may be taken to refer to the cultivatory rights of a donee to fields which hitherto had been under the ownership of the donor king (in later usage called *sīr*), and also included ownerless lands reverting to him. From I-tsing we learn how the monasteries managed to get the fields owned by them cultivated, by leasing them to monastic servants or other families [2]). The evidence of the inscriptions would suggest that such pieces of land were cultivated by men who received half the produce [3]).

That the grant of a village did not amount to an assignment of the proprietary rights over arable land in the village is further evident from inscriptions [4]) which mention the grant of a village together with some particular tract in that very village or elsewhere. If the State had proprietary right over all the agricultural land in the village the grant of the village would have implied that of the particular tract as well. It seems that what was granted in the case of villages was a right to revenue, whereas in the case of a particular field it was the proprietary right over it. The State had proprietary right only over certain fields. Agricultural land in general belonged to him who cultivated it. There are besides instances in which kings grant small plots of cultivable lands of various sizes situated in different parts of a village or even in different villages [5]). If the State owned all the land in a village,

1) *E.I.* XV. 11 (B), 12; XVII. 7 (B); XIX. 20; XI p. 108; IX. 45; III. 3; V. 16 (A); XVIII. 15, 27, 31; XIV. 8; I. 13; VIII. 20 (A). Cf. *Artha* III. 10—*akaradāḥ paratra vasanto bhogamupajīveyuḥ.*

2) Takakusu pp. 61-62.

3) Cf. *addhiyamanussāṇaṁ* in the Plates of Śālaṅkāyana Vijaya Devavarman — *E.I.* IX. 7; *addhikā* in Hirahadagalli plates of Pallava Śivaskandavarman—*Select Inscriptions*, p. 440. Cf. also *kṛṣikarmānuṣṭhāna* in Talesvara plates of Dyutivarman—*E.I.* XIII. 7 (A).

4) *E.I.* VI 4; VII. p. 203; XXVI. 23, 47; III. 8.; XXVIII. 1,3; *I.A.* VII p. 301; IX p. 102.

5) *E.I.* III. 46; IV. 8; XI. 5 (p. 83 f.), 9 (p. 108); XXI. 30 (B), 36; XVII. 7 (B) and XIX. 20; XV. 12; *I.A.* IX p. 238; also *E.I.* 27 (p. 279); Sanjan Plates of Buddha-

we cannot explain the necessity of granting tracts scattered over a large area, situated at a distance from one another. It could very well have granted a field of requisite area consolidated in a particular part of the village. This would have been more convenient both for the donor and the donee. It appears, therefore, that the State did not own all the arable land in a village. The fields generally belonged to peasants, though there were some tracts owned by the State, which alone it could grant.

It thus follows that the references to the grant of a single field [1]) as against a village really amount to a grant of the field which the king owned in that village. Such tracts were known as the Royal land (*rājakam khettam* [2]). In the Nasik Cave Inscription of Gautamīputra Sātakarṇi [3]) the king mentions a field in a village as 'my own land' (*amba-satakam*). The Chendallur plates [4]) of Pallava Kumāraviṣṇu II mention that in the village of Chaṇḍalūra in Kavacakarabhoga subdivision of the district of Kammaṅka-rāṣṭra, the king's domain in the four directions amounts to eight hundred *paṭṭikās*, and that out of this a field amounting altogether to four hundred and thirty-two *paṭṭikās* has been given as a *brahmadeya*. These grants do not imply that the State had a right to eject a tenant and lease the field to another. When the State had no land of its own in a particular village, before making a grant it had first to purchase land from some cultivator. The Nasik Cave Inscription of Uṣavadāta [5]) records that he gave a field which he had bought of a Brāhmaṇa named Aśvibhūti for the price of four thousand

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varṣa—*E.I.* XIV. 8; Dayyamdinne Plates of Vinayāditya Satyāśraya—*E.I.* XXII. 7 Dudia Plates of Vākāṭaka Pravarasena—*E.I.* III. 35; Sankheda grants of Dadda IV Praśāntarāga—*E.I.* V. 5 (No. I and II); Devageri Plates of Kadamba Mṛgeśvara-varman—*I.A.* VII. p. 35; Banpur grant of Śailodbhava Dharmarāja Mānabhīta—*E.I.* XXIX. 5 (B); Mulgund Inscription of Kanna—*J.B.B.R. A.S.*, X p. 119.

1) *E.I.* XXIII. 10; VIII. 20 (A and B); XXVIII. 34 (B); IX. 7,45; II. 4 (I); III. 20; VI. 2 (A); XVIII. 31; VI. 16 (A); *I.A.* VI. pp. 28, 29.

2) *E.I.* VIII. 8 (no. 3). Cf. *rājakīyakṣetram* in the Dabok inscription dated 813 A.D.—*E.I.* XX. 13.

3) *E.I.* VIII. 8 (No. 5).

4) *E.I.* VIII. 23. Cf. Fa-hsien (p. 67)—Several le north-east from the city was the king's field.

5) *E.I.* VIII. 8 (No. 10).

*kārṣāpaṇas*. The inscription very significantly adds that Aśvibhūti had received this field from his father. A late inscription from Tirukkoyalur, dated 961 [1]) A.D., mentioning a Vaidumba king purchasing 3 *velis* of land from the local assembly in order to grant it to a temple, shows that throughout the period of our study there was no fundamental change in the position as regards the ownership of agricultural land.

Our survey would, however, remain incomplete if we did not consider the opposite view and did not give it its due meed.

Firstly, it is claimed that a king had the right to confiscate land and, in certain cases, to transfer it from one person to another. To support this argument two passages from the *Arthaśāstra* [2]) and a statement of Bṛhaspati [3]) have been cited. An often-quoted passage in the *Arthaśāstra* is: 'lands may be confiscated from those who do not cultivate them, and given to others [4])'. It has been taken to imply State ownership of land. A thorough investigation would not support this view. The *Arthaśāstra* implies two distinct types of land: one may be called the royal farm while the other is revenue-paying land in general. The difference is indicated by the *Arthaśāstra* employing two separate terms for incomes derived from the two types [5]). *Sītā* denotes the various incomes from the first category of land. *Bhāga* stands for revenue from lands other than State farms. The *Arthaśāstra* uses the term *sītā* to include all kinds of crops that are brought in by the superintendent of agriculture [6]). An analysis of the chapter dealing with the duties of this officer clearly shows that he got the royal farms cultivated either directly by state officers or through tenants under his supervision [7]). Moreover, the reference to the right of the State to confiscate lands does

1) *S.I.I.* III. pp. 104-6.

2) II. 1—*akṛṣatāmācchidyānyebhyaḥ prayacchet*; 1.14— . . . . *paryāttabhūmiḥ* . . . . . *iti bhītavargaḥ*.

3) XIX. 16-18.

4) II. 1.

5) II. 3—items under the income group *rāṣṭra*; II. 15—incomes looked after by the superintendent of store-house.

6) II. 15—*sītādhyakṣopanītaḥ saṣyavarṇakassītā*.

7) II. 24; Ghoshal—*Hindu Revenue System*, p. 29 ff.

not apply to private fields [1]). The passage occurs in the chapter dealing with the formation of villages and refers to the newly settled or colonised lands, which were obviously ownerless and to which the State had full proprietary rights. An analysis of the passage in the context in which it appears also shows that it cannot be taken to describe the position of the cultivators of non-crown lands. At first provision is made for *brahmadeya* lands and assignments to some of the state officers. Next, there are rules about revenue-paying cultivators. Fields, prepared obviously at State expense, are to be allotted to tax-payers only for the life of immediate settlers. Unprepared lands are not to be taken away from cultivators who have made them fit for cultivation. But the fields of those who do not cultivate them properly should be confiscated and given to others, or such fields may be cultivated by village labourers and petty traders (*vaidehikas*). Later in the text rules are given for concessions and remissions of taxes, granted on the occasion of opening new settlements or on any other emergent occasion. The rules show that the State had not a limitless right to do with the land what it willed. In disposing of new lands under schemes of colonisation the king had the right to limit the grant of a field to a cultivator's life only in case of prepared lands. He could evict tenants only when they neglected plots assigned to them. The rule, guaranteeing against eviction, or in other words giving the right of hereditary possession to cultivators who prepared plots of newly colonised lands at their own expense, implies that hereditary occupation of fields was the rule in the case of settled villages. The second passage from the *Arthaśāstra* [2]) too goes against State landlordism, for it warns that if the king sometimes confiscated land, it caused resentment and alarm. It is clear that such cases only go to show the proprietary right of the cultivator to his land. Bṛhaspati [3]) also implies private ownership and says that the king had no right to dispossess a rightful owner. If he does

1) Cf. K. T. Shah—*Ancient foundations of Economics in India*, pp. 79-82; A. N. Bose—*Social and Rural Economy*, p. 32, n. 1.
2) I. 14.
3) XIX. 16-18.

so, it is not considered valid. Bṛhaspati [1]), in the next passage, explains himself: 'when land is taken from any man by a king actuated by avarice, or using a fraudulent pretext, and bestowed on a different person as a mark of his favour, such a gift is not valid.' The rule in question evidently applies to cases where the king takes away land from one possessing it without a title and gives it to another of superior merit. But what, continues Bṛhaspati, is taken away by the king from one possessing it without a title and is given to another of superior merit cannot be rescinded [2]). In this context we may add an illuminating verse from the *Nārada Smṛti*: 'A householder's house and his field are considered as the two fundamentals of his existence. Therefore let not the king upset either of them; for that is the root of householders [3])'.

There are, however, certain verses which attribute to the king the lordship of all the land. First, there is a verse in the *Manusmṛti* [4]) to the effect that of ancient treasure troves found underneath the ground and of the produce of mines the king is entitled to a share, because he affords protection and because he is lord of the earth. Next, Bhaṭṭasvāmin, commenting on a passage in the *Arthaśāstra* [5]), quotes a verse meaning that those who are well-versed in the sacred books declare the king to be the lord of land as well as water; the householders have the right of ownership over all other things except these two [6]). According to Kātyāyana [7]), who is also quoted to support state landlordism, the king has always been declared to be the lord of the soil and not of other things, for otherwise, he would not receive one-sixth of the produce; since creatures inhabit the land, the king is also declared to be their lord, and thus he acquires the right to the agricultural tax. But we do not see how all these verses can be taken to justify the

1) XIX. 22.
2) XIX. 23.
3) XI. 42.
4) VIII. 39.
5) II. 24.
6) *J.B.O.R.S.*, XII p. 138.
7) 16-17.

theory that agricultural land belonged to the State [1]). U. N. Ghoshal [2]) has very correctly pointed out the mistake in basing a theory of State landlordism on these verses. According to him, 'the statements are laid down not as definite heads of law, but as arguments for justifying or explaining the king's right to levy specific branches of the revenue from land. They are, in other words, essentially of the nature of legal maxims in whose general and comprehensive character they fully share.' These extracts, however, undoubtedly contain a statement of the sovereignty of the king implying his general lordship over everything in his kingdom [3]). This does not amount to the king being the universal landlord. The king does not dispute the right af a cultivator to ownership; the view of peasant proprietorship of land holds ground.

It has, however, to be admitted that, of the three passages referred to above, the one quoted in the commentary of Bhaṭṭasvāmin expressly refers to the State ownership of land. The importance of its testimony lies in giving evidence of a period when a group of thinkers supporting State landlordism undoubtedly existed. But then it is difficult to determine the date of Bhaṭṭasvāmin [4]) and still more difficult in the case of the unknown authority quoted by him.

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1) The laborious efforts of K. P. Jayaswal (*Hindu Polity*, pp. 343, 348, 350) to revise the text of these verses to suit individual ownership of land are without any justification (U. N. Ghoshal, *Beginnings of Indian Historiography*, p. 158 f.). We have already seen that legal works propound the theory of peasant proprietorship over land. It may again be pointed out that Manu at least among the authors quoted here does not seem to subscribe to the view of State Landlordism, as is clear from his other verses dealing with this question. P. V. Kane—*History of Dharmaśāstra*, II p. 867.

2) *Agrarian system in Ancient India*, pp. 98-99.

3) It seems that the overlordship of the king over all property in the State was first advocated clearly in the *Mahābhārata*, which reters to this view in a number of passages. A passage speaks of the Vedic utterance that the king is the owner of the wealth of all save the priest (*Mbh.* XII. 77.2). Another passage, which says that all the wealth of the earth is the Kṣatriyas' and no one else's (*Mbh.* XII. 136.3), evidently refers to the king's sovereign right. Elsewhere Daśaratha (*Mbh.* III. 275.23) is reported as claiming that all property in his domain, excepting that of Brāhmaṇas, belongs to him. The Smṛti literature also makes statements voicing the overlordship of the king. Thus *Gautama* (XI. 1) states that the king is master of all, with the exception of Brāhmaṇas.

4) Cf. P. K. Gode—*Studies in Indian Literary History*, Vol. I, p. 144 ff.—*Manuscripts of commentaries on the Kauṭilīya Arthaśāstra*. One indication about the date

Thus, though the general opinion of legal authorities favoured the theory of peasant proprietorship, it would be wrong to suppose that there was no dissenting voice. It appears that a group of thinkers, not considerable in number, advocated State landlordism. The treatment of the point in Mīmāṁsā works indicates that the question was not free from some amount of controversy and discussion.

This standpoint on the problem quite easily explains the account of the agrarian system as given by foreign writers. The earlier advocates of peasant proprietorship used to discard the statement of Megasthenes [1]) as incredible. B. Breloer [2]) has, however, explained the so-called contradiction in his statement. Of the two versions in which the statement of Megasthenes has reached us Strabo [3]) evidently describes the condition of the crown lands while Diodorus [4]) refers to non-crown lands. It appears that Megasthenes took the theory of the overlordship of the king over all sorts of property in his realm as meaning the actual State ownership of land [5]). The two Chinese travellers, Fa-hsien [6]) and Hsüan Tsang [7]), while describing land-tenure in India, used the expression 'royal land' for the whole territory of the State. Dr. U. N. Ghoshal has shown that the use of this expression

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of Bhaṭṭasvāmin is his quoting Bṛhaspati several times on the blemishes of diamonds and on *prakāśa-taskaras*. (Kane—*History of Dharmaśāstra*, I p. 104). His reference to the treatises on agriculture by Vṛddha-Parāśara and others is also significant (On *Artha* II. 24; *J.B.O.R.S.* XII, p. 134—*Kṛṣitantraṁ Vṛddha-Parāśarādipraṇītaṁ kṛṣi-śāstram*). That a considerable period elapsed between Kauṭilya and Bhaṭṭasvāmin would appear from many previous commentators whose words he quotes. (Kane—*loc. cit.*). He seems to have been followed by the Tamil-Malayalam Commentary of an unknown author (P. K. Gode, *loc. cit.*, p. 145 f.).

1) Frag. I (McCrindle p. 42); Frag. XXXIII (McCrindle p. 84).

2) *Kauṭalīya Studien* I. p. 52 ff. q. by U. N. Ghoshal—*Hindu Revenue System*, p. 168 f.

3) XV. 1.40.

4) II. 40.

5) It is remarkable that Kauṭilya, the Mauryan Minister, does not assert royal ownership of all land. K.A.N. Sastri suggests that the *Arthaśāstra* stretches the right of regulation to its utmost limit and that the detailed rules of supervision and control made agriculture a vast State regulated enterprise which to Hellenistic eyes implied that the king was the owner of the soil (*Age of Nandas and Mauryas*, p. 177).

6) pp. 42-43.

7) *Si-yu-ki* I p. 176.

indicates that the Chinese travellers believed the soil in India to be State-owned, as in contemporary China [1]). However, in view of the express statement to the contrary by authoritative Indian sources, we cannot accept their testimony as correct. It is just possible that the foreign travellers could not appreciate the fine points of the agrarian system and read their own native customs in the things they described, or interpreted the general theoretical claim of the king to all the property in his kingdom as proof of his ownership in practice. The possibility, however, cannot be ruled out that they were influenced by those Indian thinkers who believed in State landlordism. These foreign accounts, because of the ambiguity and confusion associated with them, are not such that any great reliance can be placed upon them in matters of this kind.

It has been claimed that 'the king had certain transcendent authority over all land which prevented untrammelled disposal or enjoyment of land by private owners [2]).' To prove this contention the rule of Nārada [3]), that immovable property held for three generations is incapable of being alienated without the king's sanction, has been cited. But this rule only shows that enjoyment of an immovable property for three consecutive generations creates in the person enjoying it a proprietary right which can be set aside only if the king decides a land-suit in favour of a person having a title of greater merit. The rule of the intestate and ownerless land reverting to the king [4]), which has been quoted in support of this view, does not amount to the proprietary right of the State but only implies that a king had a general claim over all property in his realm. Such an explanation finds support from Bṛhaspati [5]) who, while discussing the law of inheritance, propounds the rule of escheat and in its justification adds the expression: 'for he is the lord of all; except in the case of a Brāhmaṇa.'

The right of a king to revenue has also been taken to support the

1) *Hindu Revenue System*, pp. 167-170, 191-2, 225-6.
2) A. N. Bose—*Social and Rural Economy*, p. 31.
3) XI. 27.
4) *Artha* III. 9; *Vyavasthā Candrikā* (Ed. S. C. Sircar) VII. Cl. 173-5.
5) XXV. 67-8.

regal claims over agricultural land. The cultivators' right to the free enjoyment of his land was no doubt restricted to some extent by rules which were the logical extension of the royal right to land revenue. Of these two are significant. The first is the rule regarding the imposition of a fine on a cultivator who negligently destroys his crops [1]). The fine was in respect of the loss sustained by the king as a result of the action of the cultivator [2]). Allied to it is the rule about the sale of land by the State in case of non-payment of land revenue [3]). But the details of these rules themselves show that no abiding claim of the king to ownership was recognised. Kātyāyana, for example, says that if such a sale is inequitable it may be set aside within ten years, and a compromise or exchange may be set aside within three generations [4]). Prajāpati [5]) remarks that the original owner could get back his property sold for the royal dues by paying the full price to the purchaser up to three generations. The statement in the *Arthaśāstra* [6]) that the king could prevail upon the peasantry to raise a second crop was applicable only in emergencies when the State, according to the *Arthaśāstra* itself, might assume very wide powers; and so it would not be safe to base any theory on it.

But these rights of the State in no way imply a proprietary right. It is not clear how A. N. Bose [7]) could take the 'fiscal term *bhāga* or *rājabhāga* which denotes king's regular and legitimate share as opposed to controversial and additional imposts on land produce' to 'indicate a partnership of title between the peasant and the king'. Such a view, it is submitted, reveals a gross misunderstanding of the Indian theory of taxation. According to Indian thought the revenue received by the

1) *Manu* VIII. 243.

2) The rule in the *Arthaśāstra* (III. 10) that a tax-payer and an owner of a *Brahmadeya* should sell or mortgage his field to his own class was intended to check the decrease in the income of the State which otherwise would have resulted.

3) These provisions have been elaborately dealt with in the *Vyavahāranirṇaya* p. 348 ff. Also *Sarasvatīvilāsa*, p. 324.

4) 704.

5) q. by *Vyavahāranirṇaya*, p. 350.

6) V. 2.

7) *Social and Rural Economy*, p. 32.

king is his wages for his affording protection to the subject [1]). Even the late *Śukranīti*, which generally favours an increase in the control of the State over agriculture and other industries, acquiesces in such a view and states [2]) that the ruler has been made by Brahmā a servant of the people, getting his revenue as remuneration, and his sovereignty is only for protection. The theory was so deep-rooted that even literary works refer to it without implying any scope for doubt or discussion [3]). In the earlier stages of the development of society people made quasi-voluntary contributions to the king for his services, but with the passage of time, as institutions were standardized, the revenue became fixed and compulsory [4]).

Thus our investigation shows that the peasant was the proprietor of the land in every sense of the term. The king, as the universal sovereign of every thing in his State, had, no doubt, some claim over the land. He received revenue from the peasant as the wages for the protection he afforded to the people; but this in no way amounted to a proprietary right over the land. But the question was not entirely free from discussion even in ancient times, and supporters could be found for the not much favoured view of State ownership of land.

These are the facts; they may be labelled by any convenient modern phrase or theory that suits them [5]).

It has been contended [6]) that Indian theory combines universal land-

1) *Baudhāyana* I. 10.1; *Gautama* X. 28-29; *Manu* VII. 128, VIII. 306-308; *Nārada* XV. 48; *Artha* I. 13; *Bhāgavata Purāṇa* I. 13.40-41; *Brahmāṇḍa Purāṇa* II. 31.48; *Vāyu Purāṇa* LVIII. 48; *Mārkaṇḍeya Purāṇa* XVIII. 6-7.

2) I. 375.

3) *Raghu* II. 66—*ṣaṣṭhāṁśam urvyāḥ iva rakṣitāyāḥ*; *Śākuntala* II. 14—*rakṣāyogāt ayam api tapaḥ pratyahaṁ saṃcinoti*. Also *Raghu* 1.18; XVII. 65; *Śākuntala* p. 76.

4) That the proprietary right of the sovereign derives no warrant from the ancient laws or institutions of the Hindus had been demonstrated earlier by Chief Justice Sir Michael Westropp (Vyakunta Bapuji vs. Govt. of Bombay 12 *Bom. H.C.R.* pp. 30-53 Appendix) as also by Wilkes—*History of Mysore* Vol. I. Ch. v. pp. 65-138.

5) Prof. K. V. R. Aiyangar accepts individual ownership of a permanent character (*Ancient Indian Economic Thought*, p. 104) and maintains that the cameral feeling of an implied partnership of the state in all wealth-producing activities when carried to extreme practice and theory and under secular influence urged the theory of State property in land etc. (*Indian Cameralism*, p. 160).

6) M. H. Gopal—*Mauryan Public Finance*, p. 62; F. W. Thomas—*Cambridge History of India*, Vol. I. p. 475.

lordism of the king and peasant proprietorship, and that the agrarian system meant a sort of perpetual lease held on the annual performance of an obligation. No authoritative text belonging to our period combines the facts of the agrarian system in a theory resembling this view. The originality of the theory is the chief argument against it. The only passage which we have been able to find in its support is by the commentator of the *Narasiṁha Purāṇa*. 'By conquest, the earth became the property of the holy Paraśurāma; by gift, the property of the sage Kaśyapa; and committed by him to Kṣatriyas for the sake of protection, became their protective property successively held by powerful conquerors and not by subjects cultivating the soil. But an annual property is acquired by subjects on payment of annual revenue: and the king cannot lawfully give, sell or dispose of the land to another for that year. But if the agreement be in the form "you shall enjoy it for years", for as many years as the property is granted, during so many years the king should never give, sell or dispose of it to another. Yet if the subjects do not pay the revenue, the grant, being conditional, is annulled by the breach of the condition and the king may grant it to another' [1]).

1) q. by M. A. Buch—*Economic life in ancient India* II p. 24 f. (quoting from Lees—*Land and Labour of India*, pp. 111-114). Also Sen—*Hindu Jurisprudence* p. 52 f.

# KAUTILYA ON ADMINISTRATION OF JUSTICE DURING THE FOURTH CENTURY B.C.

BY
BALBIR S. SIHAG

> "It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next" (Kautilya, p. 77).

Vishnugupta Chanakya Kautilya wrote a treatise called *The Arthashastra*, which means "science of wealth."[1] It contains three parts, which deal with issues related to economic development, administration of justice, and foreign relations. It has 150 chapters, which are distributed into fifteen books. Book three, which has twenty chapters and book four, which has thirteen chapters, are devoted to the administration of justice. Kautilya's Judicial System called "Dandaniti," "the science of law enforcement" is an important part of *The Arthashastra*. Kautilya codified, modified, and created new laws related to: loans, deposits, pledges, mortgages etc., sale and purchase of property, inheritance and partition of ancestral property, labor contracts, partnership,[2] defamation and assault, theft and violent robbery, and sexual offenses. He dealt with law and justice issues relating to both the civil law and the criminal law. He offered a truly comprehensive system of justice, which not only incorporated all the salient elements of a twenty-first century system but also contained a few additional invaluable insights.

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[1]A. K. Sen (1987, p. 5) believes that Kautilya's *Arthashastra* is the first book on economics. He states:

> The "engineering" approach also connects with those studies of economics which developed from the technique-oriented analyses of statecraft. Indeed, in what was almost certainly the first book ever written with anything like the title "Economics," namely, Kautilya's *Arthashastra* (translated from Sanskrit, this would stand for something like "instructions on material prosperity"), the logistic approach to statecraft, including economic policy, is prominent.

[2]Joseph J. Spengler (1971) makes a special note of legal rules regarding partnership. He (p. 79) writes: "Rules for the distribution of remuneration when work was done jointly not only were laid out by Kautilya but also found expression in commercial arithmetic. When workmen, guild members, or others engage in cooperative undertakings, they shall divide the wages as agreed upon or in equal proportions" (3.14.18).

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Kautilya's *Arthashastra* discusses many issues that are currently the subject of intense research.[3] His contributions relating to law and order issues may be classified under three headings:

(a) *Importance of the Rule of Law:* According to Kautilya, the existence of law and order was a pre-requisite for economic growth.[4] He (p. 108) believed, "The progress of this world depends on the maintenance of order and the [proper functioning of] government (1.4)." He continued, "Unprotected, the small fish will be swallowed up by the big fish. In the presence of a king maintaining just law, the weak can resist the powerful (1.4)." Kautilya argued that corruption retarded economic growth by siphoning-off resources and by adversely affecting law and order. He (p. 286) listed corruption and greed among the causes of loss in tax revenue, implying a lower provision of public infrastructure, which was essential to economic growth.[5]

(b) *Laws must be clear, consistent and in a written form:* Kautilya (p. 213) stated, "The rule of kings depends primarily on [written] orders; even peace and war have their roots in them [2.10]." There are at least two reasons why Kautilya codified the laws[6] First, many of the traditional laws were outdated or were insufficient to deal with the new situation. As Charles Drekmeier (1962, p. 260) explains:

> By the fifth and fourth centuries B. C. the ancient tribal institutions had lost their ability to regulate society effectively. New modes of production, new types of social relationships, new salvation theologies were changing the old ways. Kautilya was the theorist who most clearly saw the need for expanded state authority to fill the ever-widening gaps left by the declining authority of tradition.

Second, Kautilya was quite concerned about the possibility of green justice, that is, judges accepting bribes in exchange for rendering favorable verdicts. He codified the laws and introduced material incentives, such as efficiency wages, to complement the existing moral incentives to resolve the principal-agent problem. Recently, Edward L. Glaeser and Andrei Shleifer (2002, p. 1196) assert:

> Codification emerges in our model as an efficient attempt by the sovereign to control judges as his knowledge of individual disputes deteriorates (as it did when the states

[3]Since Gary S. Becker's (1968) seminal work, hundreds of articles have appeared dealing with many aspects of law enforcement. These works analyze various aspects of law enforcement and deterrence. These may be classified as: (i) rent-seeking behavior or corruption by the enforcers and its impact on economic growth and crime deterrence, (ii) judicial fairness and the minimization of legal errors in the disposition of criminal cases, (iii) the form of punishment that whether it should be monetary or non-monetary, and (iv) the time inconsistency or the credibility problems, that is, the society may not find it optimal to carry out the punishment once the crime has been committed, and the related issue of judicial discretion.

[4]Only recently has this issue drawn attention from economists. Pranab Bardhan (1997) reviews the issues related to corruption and economic growth.

[5]Kautilya's contribution is discussed in Sihag (2005, 2007a).

[6]Early Roman law derived from custom and statutes, but the emperor asserted his authority as the ultimate source of law. His edicts, judgments, administrative instructions, and responses to petitions were collected with the comments of legal scholars. As one 3rd-century jurist said, "What pleases the emperor has the force of law." As the law and scholarly commentaries on it expanded, the need grew to codify and to regularize conflicting opinions. It was not until much later in the 6th century AD that the emperor Justinian I, who ruled over the Byzantine Empire in the east, began to publish a comprehensive code of laws, collectively known as the Corpus Juris Civils, but more familiarly as the Justinian Code." http://www.crystalinks.com/romelaw.html.

> and the economies developed). The simplicity of bright line rules, and the possibility of verifying their violation, enables the king to use them to structure incentives contracts for judges.[7]

It is difficult, however, to put any specific label to Kautilya's views since he combined elements of historical, metaphysical, imperative, and sociological schools of jurisprudence.

(c) *Administration of Justice*: His insights into the administration of justice are the focus of the current study. According to Kautilya, effective law enforcement depended on three factors. (i) *Honesty of the Law Enforcers*: Kautilya emphasized that the law enforcers themselves including the king must be honest and law-abiding.[8] This is presented in section II. (ii) *Importance of Judicial Fairness*: Similarly, he emphasized the standard of proof, prompt trials, minimization of Type I error, and implicitly the minimization of type II error (since the king was required to compensate the victim if the crime was not solved). These issues, which come under the rubric of judicial fairness, are presented in Section III. (iii) *Impartiality, proportionality and certainty of punishment:* Kautilya's utmost emphasis on impartiality, certainty, and proportionality of punishment and discretion in sentencing are provided in section IV. Kautilya preferred monetary fines to non-monetary punishment and making sure that fines were paid-off. This and some other related issues are collected in section V. Section I contains a brief introduction to Kautilya and a justification for considering administration of justice as a worthy topic in the history of economic thought.

## I. AN INTRODUCTION TO KAUTILYA AND THE CONTENTS OF *ARTHASHASTRA*

Some time during the last quarter of the fourth century BC, Vishnugupta Chanakya Kautilya wrote *The Arthashastra*: *The Science of Wealth and Welfare*. He has been credited with toppling the tyrant Nandas and installing Chandragupta Maurya (321

[7]Additional analysis on this issue is provided in Sihag (2004).

[8]A. Mitchell Polinsky and Steven Shavell (2000), pp. 72–73 survey the field on law enforcement. In the last section of their article, under the sub-heading "future research" they recommend:

> The behavior and compensation of enforcement agents have not been examined in this article, but this topic is important and should be studied for two reasons. First, the incentive of enforcement agents to discover violations is affected by the structure of their payments. Secondly, enforcement agents may be corrupted: they may accept bribes, or demand payments, in exchange for not reporting violations. Corruption tends to reduce deterrence, and therefore its presence obviously will affect the theory of optimal law enforcement.

> In the light of Kautilya's contribution their suggestion amounts to: "going back to the future." Similarly, David D. Friedman (1999, p. 5261) describes the various elements of an efficient system of criminal punishment, which includes "penal slavery for criminals who can produce more than it costs to guard and feed them." He summarizes his findings as: "Hence imprisonment is always dominated by execution and both are dominated by fines and other alternatives. Modern legal systems do not fit that pattern. One possible explanation is that the ability of enforcers to profit by convictions can produce costly rent seeking." Friedman believes that the real reason for the existence of inefficient system is to curb the possibility of rent seeking on the part of the enforcers.

BC-297 BC) on the throne. However, there is no reference to the emperor Chandragupta or to his kingdom Magadha (state of Bihar, India) in *The Arthashastra* since, as mentioned above, it was meant to be a theoretical treatise.[9] He was the prime minister (adviser) to Chandragupta Maurya but he was an independent thinker. Jawaharlal Nehru (1946, p 123) describes Kautilya as follows: "He sat with the reins of empire in his hands and looked upon the emperor more as a loved pupil than as a master. Simple and austere in his life, uninterested in the pomp and pageantry of high position."

### *Date and Authorship of The Arthashastra*

There has been a lot of controversy about the date and authorship of *The Arthashastra*. Sihag (2004) provides a brief discussion on the available evidence on this issue and concludes, "Today, there exists no direct evidence against Kautilya being the sole author of *The Arthashastra*, nor evidence that it was not written during the 4$^{th}$ century B.C. The indirect evidence such as the writing style of various segments of *The Arthashastra*, is insufficient to challenge either the date of its writing or Kautilya as the sole author."

### *Administration of Justice as a Part of History of Economic Thought*

There are two arguments for including legal issues into the history of economic thought. First, Robert Dorfman (1991) notes, "*Wealth of Nations* was primarily a treatise on economic development." Adam Smith attached a significant role to the administration of justice as a prerequisite to economic growth in *The Wealth of Nations*. Smith wrote:

> Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government (Bk. V, Ch. III, p. 445).

The inclusion of administration of justice in *The Wealth of Nations* is a sufficient justification to consider this topic as a part of the history of economic thought; for example, Dani Rodrik, Arvind Subramanian, and Francesco Trebbi (2004) begin their paper with the above quote. Steven G. Medema (2007) brings out Sidgwick's neglected but important contribution to this field. Glaeser and Shleifer (2002) provide a theoretical explanation for the differences between British and French legal systems (resulting in different outcomes, such as development of financial markets), which originated in the twelfth and thirteenth centuries. Somehow, many authors decided to

[9]Charles Drekmeier (1962, p. 167) observes: "The administrative organization and regulations of Kautilya are generally taken to be a description of the Mauryan system. However, Kautilya never purports to give an account of a specific polity. It is a theoretical work, and any attempt to deduce more than the broad outlines of the Mauryan administrative system from it must bear this in mind." It is a well-established fact that the *Arthashastra* is a theoretical treatise.

Pushpendra Kumar (1989, p. xxv) also notes: "Thus he stands out as the foremost theorist of ancient India and the first to prepare a scientific treatise on state-craft with economics as the basic factor."

publish in journals which are not classified as history of economic thought journals, but clearly their contributions belong to the history of economic thought.

Second, according to Henry W. Spiegel (1991), the trend of broadening the scope of economics started with Wicksteed. He states, "His (Wicksteed's) reference to the 'the purposeful selection between alternative applications of resources' was to resound later in Robbin's definition of economics as the science that treats of the allocation of scarce resources among different uses" (p. 528). He adds, "The elevation of the logic of choice to an all-encompassing rule guiding human behavior in all its aspects has encouraged later writers to claim for economics a far wider scope than is conventionally accorded to it." Similarly, both George J. Stigler (1984) and Edward P. Lazear (2000) label economics as an imperial science because of its colonization of other disciplines such as sociology, history, political science, and law. Paul A. Samuelson (1968) describes the current scope of economics quite aptly when comparing, "Harriet Martineau, who made fairy tales out of economics" with modern economists "who make economics out of fairy tales." Thus, according to the current scope of economics, any analysis related to the administration of justice is a part of economics, implying that it automatically becomes a part of history of economic thought also.[10]

Finally, Warren J. Samuels (2005, p. 404) explains it very elegantly and succinctly: "Smith's system of social science with the three spheres of moral rules, market, and law, and so on, neither component of a dichotomy or trichotomy is self-sufficient and independent of each other. They not only interact; they help change each other." That is, "moral rules, market and law" are endogenous variables and therefore, administration of justice is an integral part of any meaningful economic analysis including that of the history of economic thought. Moreover, if a study of eugenics can be recognized as a part of history of economic thought (Leonard 2005), administration of justice should also be a part of history of economic thought since it has an equal if not a higher standing.

*The Arthashastra* was written in Sanskrit but now its translations in English are available. The interpretations, to a large extent, are based on L. N. Rangarajan's translation of *The Arthashastra* but in a few cases are based on R. P Kangle's translation and only these are explicitly indicated. Kautilya, popularly known as Chanakya (the son of Chanaka), also completed two other works: *Chanakya-Sutras* (Rules of Science) and *Chanakya-Rajanitisastra* (Science of Government Policies).

## II. KAUTILYA ON CORRUPTION OF ENFORCERS AND CRIME DETERRENCE

### *King as a Role Model*

Kautilya (p. 121) stated, "A king endowed with the ideal personal qualities enriches the other elements when they are less than perfect (6.1)." He (p. 123) added,

[10]Hal R. Varian (1993, p. 162) notes: "When Markowitz defended his dissertation at the University of Chicago, Milton Friedman gave him a hard time, arguing that portfolio theory was not a part of economics, and therefore that Markowitz should not receive a Ph.D. in economics. Markowitz (1991) says, 'this point I am now willing to concede: at the time I defended my dissertation, portfolio theory was not part of Economics. But now it is'."

"Whatever character the king has, the other elements also come to have the same (8.1)." Kautilya expected a king to be like a sage. He (p. 145) explained a sage king:

> A rajarishi [a king, wise like a sage] is one who: has self-control, having conquered the [inimical temptations] of the senses, cultivates the intellect by association with elders, is ever active in promoting the security and welfare of the people, endears himself to his people by enriching them and doing good to them and avoids daydreaming, capriciousness, falsehood and extravagance (1.7).

### *Protection of Private Property Rights*

According to Kautilya (p. 121), "The wealth of the state shall be one acquired lawfully either by inheritance or by the king's efforts (6.10)." He (p. 231) wrote, "Water works such as reservoirs, embankments and tanks can be privately owned and the owner shall be free to sell or mortgage them (3.9)."

### *A Justification for Bureaucracy*

Kautilya (p. 177) observed, "A king can reign only with the help of others; one wheel alone does not move a chariot. Therefore, a king should appoint advisers as councilors and ministers and listen to their advice (1.7)." He (p. 196) added, "Because the work of the government is diversified and is carried on simultaneously in many different places, the king cannot do it all himself; he, therefore, has to appoint ministers who will implement it at the right time and place (1.9)."

### *Principal-Agent Problem*

Adolf A. Berle and Gardiner C. Means (1932) observed that there was a separation of ownership and control in public corporations and suggested that incentives were required to induce the CEO, the agent, to adhere to the objective of the shareholders, the principal. Since then a considerable amount of effort has been devoted to explore a whole set of mechanisms to resolve the principal-agent problem.[11]

According to Sihag (2007b), Kautilya "Recognized the principal-agent problem and suggested various mechanisms to induce the agents to supply optimum effort, and also not to collude, quarrel, steal or desert the king." Kautilya recommended the payment of an efficient wage (8000 panas, a square-shaped silver coin, which was a medium of exchange and unit of account, whereas the lowest wage was 60 panas) to the judges to encourage honesty and efficiency. More than half a century ago, Frank H. Knight (1947, p. 62) observed, "In the liberal view, the individuals who implement state action do not act as individuals, but are the agents of law, and the law is the creation of society as a whole, of the 'sovereign people,' and not of individuals." Knight makes two important points: (i) the enforcers are just the agents of the state (he notes the principal-agent problem), and (ii) the whole society consisting of

[11]Joseph E. Stiglitz (1987, p. 966) credits Stephen Ross (1973) for coining the term principal-agent.

"sovereign" people creates the law. Kautilya understood the principal-agent problem but the public did not directly create the law, although Drekmeier (1962, p. 25) notes that "we may say that early Indian kingship was broadly contractual, conceived of as a trust, subject to popular approval, and, most important, subject to higher law and certain other restraints, normative and practical. It was basically a secular institution."

### *Kautilya's Insistence on Honest Enforcers as a Prerequisite for Effective Law Enforcement*

Kautilya was acutely aware of the possibility that some law enforcers might resort to extortion. He believed that honesty on the part of law enforcers was a prerequisite for effective law enforcement. He (pp. 493–94) asserted, "Thus, the king shall first reform the administration, by punishing appropriately those officers who deal in wealth; they, duly corrected, shall use the right punishments to ensure the good conduct of the people of the towns and the countryside (4.9)." He (p. 221) pointed out:

> There are thirteen types of undesirable persons who amass wealth secretly by causing injury to the population. [These are: corrupt judges and magistrates, heads of villages or departments who extort money from the public, perjurers and procurers of perjury, those who practice witchcraft, black magic or sorcery, poisoners, narcotic dealers, counterfeiters and adulterators of precious metals.] When they are exposed by secret agents, they shall either be exiled or made to pay adequate compensation proportionate to the gravity of the offense (4.4).

He labeled them as "anti-social elements" and recommended their elimination. Interestingly, corrupt judges were in the list of the "undesirable persons."

### *Guidelines on Judicial Conduct*

Kangle (Part III, p. 215) notes that, "The judges are called dharmasthas, a name which apparently refers to the dharma or law, by which they are to be guided in their work." Kautilya provided a detailed set of guidelines to ensure the judicial process would be fair and impartial. According to him (p. 381),

> A judge shall not: threaten, intimidate, drive away or unjustly silence any litigant; abuse any person coming before the court; fail to put relevant and necessary questions or ask unnecessary or irrelevant questions; leave out [of considerations] answers relevant to his own questions; give instructions [on how to answer a question]; remind [one of a fact]; draw attention to an earlier statement; fail to call for relevant evidence; call for irrelevant evidence; decide on a case without calling any evidence; dismiss a case under some pretext; make someone abandon a case by making them tired of undue delays; misrepresent a statement made in a particular context; coach witnesses; or rehear a case which had been completed and judgment pronounced. All these are punishable offenses; in case the offense is repeated, the judge shall be fined double and removed from office (4.9).

Kautilya offered a comprehensive list of ways in which a judge could affect the outcome of a case. He believed that a judge must be competent and not compromise

with the judicial process to ensure impartiality. It is obvious that the judges themselves were not above the law. Kangle (Part III, pp. 221–22) observes, "Such treatment expected to be meted out to members of the judiciary strikes us today as being very strange. If judges are themselves to be fined, the dignity that is expected to be attached to their office is bound to disappear. The judges, in the scheme of this context, occupy a position subordinate to the executive and are far from being independent of it." However, there was no other practical way to remove them since there did not exist any legislative body to have hearings for the removal of corrupt judges.

In fact, there were guidelines even for the judge's clerk. Kautilya (p. 382) wrote, "The clerks [who record statements made before the court] shall: record the evidence correctly; not add to the record statements not made; hide the ambiguity or confusion in evidence badly given; make unambiguous statements appear confused; or change, in any way, the sense of the evidence as presented. All these are punishable offenses (4.9)."

Similarly, Kautilya was concerned about the dishonesty of other government officials. For example, he (p. 284) argued against an overzealous tax collector, "He who produces double the [anticipated] revenue eats up the janapada [the countryside and its people, by leaving inadequate resources for survival and future production] (2.9)." He (p. 181) suggested to the king, "He shall protect agriculture from being harassed by [onerous]) fines, taxes and demands of labor (2.1)." He advised the king to compensate the victims and punish the corrupt officials. He (p. 297) recommended, "A proclamation shall then be issued calling on all those who had suffered at the hands of the [dishonest] official to inform [the investigating officer]. All those who respond to the proclamation shall be compensated according to their loss (2.8)." He (p. 742) suggested, "Any official who incurs the displeasure of the people shall either be removed from his post or transferred to a dangerous region (13.5)."

## III. KAUTILYA ON JUDICIAL FAIRNESS AND MINIMIZATION OF LEGAL ERRORS

Current discussion on issues related to judicial fairness is focused primarily on the standard of proof and minimization of legal errors.[12] Kautilya's judicial system incorporated all the essential ingredients of fairness in resolving disputes. These are explained below.

### *Expedient Trials*

The judicial trials were initiated very promptly, perhaps not to adhere to the dictum that "justice delayed is justice denied" but due to the belief of an increasing unreliability of evidence as time passed. Kautilya (p. 462) argued, "Because interrogation after some days is inadmissible [unreliable?], no one shall be arrested on suspicion of having committed theft or burglary if three nights have elapsed since the crime,

[12]For example, Thomas J. Miceli (1990) remarks that, "For instance, an important question of fairness relates to the incidence of errors by the criminal process."

unless he is caught with the tools of the crime (4.8)." However, he (p. 472) did state, "An offender shall not go scot-free [just because of passage of time] (3.19)." He (p. 386) suggested, "The maximum time allowed for a defendant to file his defense shall be three fortnights (3.1)."

### *Standard of Proof*

According to Kautilya (p. 386), "[In any case before the judges] admission [by the defendant of the claim against him] is the best. If the claim is not admitted, then the judgment shall be based on the evidence of trustworthy witnesses, who shall be persons known for their honesty or those approved by the Court. [Normally,] there shall be at least three witnesses (3.11)." He (p. 388) added:

> In determining a suit in favor of one or the other party, the following shall be taken as strengthening a party's case: statements of eyewitnesses, voluntary admissions, straightforwardness in answering questions and evidence tendered on oath. The following shall go against a party: contradiction between earlier or later statements, unreliable witnesses or being brought to court by secret agents after absconding (3.1).

A few remarks are in order. First, Kautilya's goal was to prevent the incidence of crimes and to ensure judicial fairness if a crime occurred. His conceptual framework offers a reference point. For example, there was no jury, or a team of prosecutors or of defense lawyers at that time. The simple question is: has this institutional change improved upon the delivery of justice? According to Kautilya, judicial fairness depended on the amount of evidence and its reliability. Obviously non-availability of statistical methods at that time was not a big handicap in measuring the reliability of the evidence. Since objective measures of probabilities regarding the accuracy of evidence were not available during the fourth century BC, nor are they available now. Most likely the judge formed some subjective measure of reliability and similarly; even today every judge or juror has to form some subjective measure of reliability of evidence. That is why a concerted effort is made both by defense and prosecution to appeal to the juror's emotions to influence his/her subjective measure of reliability. Second, Kautilya considered the "number of witnesses," that is, the amount of evidence also in deciding a case. These days the prosecutor stresses the "mountain" of evidence whereas the defense questions its reliability—that is, tries to create a reasonable doubt. According to Kautilya, witnesses must be independent and known for their honesty, implying that the current practice of allowing testimonies of biased and paid expert witnesses or of convicted jailhouse inmates may be helpful in convicting the innocent or setting the guilty free (such as in committing legal errors) but not necessarily in the delivery of justice.

Kautilya (p. 462) recommended, "Anyone arrested [on suspicion of having committed a theft of burglary] shall be interrogated in the presence of the accuser as well as witnesses from inside and outside [the house of the accuser] (4.8)." He (p. 463) asserted, "A suspect may admit to being a thief, as Ani-Mandavya did, for fear of the pain of torture. Therefore, conclusive proof is essential before a person is sentenced (4.8)." Kautilya insisted on solid evidence for conviction (although the above story is told a little differently in the Epic Mahabharata, that a sage did not

want to break his vow of silence to declare his innocence, but the implication is the same). Kautilya (pp. 464–65) offered a detailed discussion on forensic evidence for establishing the cause of death. However, he (pp. 466–67) did recommend torture to elicit confession but only in those cases (excluding the sick, the minors, the aged, the debilitated, the insane, those suffering from hunger, thirst or fatigue after a long journey and a pregnant woman) where there was a strong suspicion of guilt. He (p. 467) cautioned, "A person can be tortured only on alternative days and only once on the permitted days. Torture shall not result in death; if it does so, the person responsible shall be punished (4.8)." It may be noted that the accused was to be questioned in front of the accuser implying that Kautilya would not have approved the current practice of giving a choice to the accused whether to take the witness stand or not.

### *Punishment for Perjury*

Perjury was a punishable offense. Kautilya (p. 388) stated, "Witnesses are obliged to tell the truth. For not doing so, the fine shall be 24 panas and half for refusal to testify (3.11)."

### *Futility of Witness Tampering*

Kautilya (p. 389) added that if a party to a suit "conspires with witnesses by talking to them in secret when such conversation is prohibited (3.1)" would be an adequate ground against the party.

### *Cost of Type I Error*

Kautilya (p. 493) wrote, "An innocent man who does not deserve to be penalized shall not be punished, for the sin of inflicting unjust punishment is visited on the king. He shall be freed of the sin only if he offers thirty times the unjust fine (4.13)." According to Kautilya, convicting an innocent person was a "sin," that is, an ethical lapse and also a huge monetary loss ("thirty times") for the State.

### *Cost of Type II Error*

Kautilya (p. 437) suggested, "If a King is unable to apprehend a thief or recover stolen property, the victim of the theft shall be reimbursed from the Treasury (i.e. the king's own resources). Property [unjustly] appropriated shall be recovered [and returned to the owner]; otherwise, the victim shall be paid its value (3.16)." Two remarks are in order. First, a much broader and more relevant definition of Type II error is discernible from Kautilya's statement. He did not make a distinction between the guilty who were arrested but not convicted and those guilty defendants who had evaded arrest (this is explained below), whereas the commonly advanced definition of Type II error is confined only to the guilty defendants who are arrested but not convicted due to lack of sufficient evidence against them. Second, at that time, no private insurance policies (a case of missing markets) were available against the possibility of loss

**Table 1a.** A Numerical Example to Calculate Type I and Type II Errors

| | | Guilty | Not Guilty | Total |
|---|---|---|---|---|
| Arrested | | 100 | 10 | 110 |
| | Convicted | 80 | 5 | |
| | Not Convicted | 20 | 5 | |
| Not Arrested | | 900 | 98990 | 99890 |
| Total | | 1000 | 99000 | 100,000 |

caused by theft and burglary and the king was asked to fulfill this role. Consequently, there was a built-in incentive to prevent crimes from happening and solving them if they happened; otherwise, the king had to compensate for the loss. Certainly a market for insuring such losses has been created, which is a good thing, but in the process the built-in incentive to prevent and solve such crimes has been lost. The above numerical table 1a may be used to make Kautilya's definitions of Type I and Type II errors explicit.[13]

[13]Becker (1968) discussed only the prevention of crimes but did not suggest anything if a crime was committed. Miceli (1991) proposes a comprehensive model of fairness and deterrence, which presumably combines Becker's crime prevention model and Miceli's (1990) fairness model. However, Kautilya implicitly provided a more comprehensive approach with many additional insights. The following table 1b captures Kautilya's conceptual framework.

**Table 1b**. Kautilya's Conceptual Framework for Defining Type I and Type II Errors.

| | | Truly Guilty (G) | Innocent ($G_c$) | |
|---|---|---|---|---|
| Arrested (A) | Convicted (C) | $P(A \cap G)$ $P(C \cap A \cap G)$ (Correct Decision) | $P(A \cap G_c)$ $P(C \cap A \cap G_c)$ (Type I Legal Error) | $P(A)$ |
| | Not convicted ($C_c$) | $P(C_c \cap A \cap G)$ (Type II Legal Error) | $P(C_c \cap A \cap G_c)$ (Correct Decision) | |
| Not arrested ($A_c$) | | $P(A_c \cap G)$ | $P(A_c \cap G_c)$ | $P(A_c)$ |
| | | $P(G)$ | $P(G_c)$ | 1 |

Let G = the number of guilty and $G_c$ = the number of innocent. Let $P_a = P(A/G) = [P(A \cap G) / P(G)] =$ probability of arresting a guilty person, $P_c = [P(C \cap A \cap G)/ P(A \cap G)] =$ probability of convicting a guilty person who has been arrested, $\pi = P_a P_c = P(C \cap A \cap G)/ P(G) =$ probability of arresting and convicting a guilty person. Kautilya's implicit definition of Type II error includes defendants (a) who actually committed crimes and were arrested but did not get convicted and, (b) who were not even arrested, that is who were still at large. According to Kautilya, the king was supposed to compensate the victims under both the possibilities, implying that if the defendant did not get convicted his arrest alone was not sufficient in reducing the king's liabilities. So Kautilya's approach implicitly defined the probability of Type II error as, $\beta = (1 - P_a P_c) = (1 - \pi) =$ probability of a guilty person not convicted, and the probability of Type I error as, $\alpha = P(C \cap A \cap G_c) / P(G_c) =$ probability of arresting and convicting an innocent person.

*Kautilya's Definitions*

Probability of Type I error $= (1 - \delta)\ P_i\ (A/\ G_c) = 5/99000$. It may be noted that given other things constant, the probability of Type I error increases as the number of arrests increases. In actuality as the number of arrests increase, the police may get over-burdened and courts get crowded and, consequently, both $\delta$ and $P_i$ are adversely affected. The probability of arresting and convicting the criminal is $\pi = \delta\ P_g\ A/G = 80/1000$, and this is relevant if the goal is the prevention of crimes. That is precisely the definition Gary S. Becker considers for preventing crimes. As mentioned above, Kautilya did not make a distinction between those defendants who were arrested but not convicted and those guilty defendants who were not even arrested. Since the king was asked to compensate for all the unresolved cases, according to Kautilya, the Type II error probability is $= 1 - \pi\ = 920/1000$. It may be noted that given other things equal, the probability of Type II error decreases as the arrests increase.[14]

Of course, Kautilya's goals were to avoid the arrest of an innocent person and if an innocent person is arrested, not to convict him—that is, if possible to achieve, $\delta = 1$, or $P_i = 0$. However, if $\delta = 1 - \delta$ or $P_g = P_i$, that is, if the probabilities of arrest or conviction were the same for the guilty and the innocent, there would be a chaos. Kautilya was quite concerned about the possibility of such a situation.

[14]A judicial process is initiated to find the guilt or innocence of a person arrested for an alleged crime. For example, Miceli (1991) defines the probabilities of legal errors as follows: He sets $\delta =\ P\ (G/A) = [P\ (A \cap G)/P\ (A)]$ = probability that an arrested person is guilty; $P_g = [P(C \cap A \cap G)/\ P\ (A \cap G)]$ = probability of convicting a guilty person (i.e., $(1 - P_g)$ is the probability of not convicting a guilty person); probability that an arrested person is guilty and is convicted $=\ \delta P_g = P\ (C \cap A \cap G)/\ P\ (A)$. Type II legal error probability $= \delta\ (1 - P_g)$. Probability of convicting an innocent person $= P_i = P\ (C \cap A \cap G_c)/\ P\ (A \cap G_c)$, and Type I legal error probability $= (1 - \delta)\ P_i = P\ (C \cap A \cap G_c)\ /\ P\ (A)$ = probability of arresting and convicting an innocent person.

Miceli's definitions based on the numbers: Type I error probability $= 5/110$ and type II error probability $= 20/110$. If the objective is to assess the performance of the judiciary only, Miceli's definitions are sufficient since his analysis is confined only to those who have been arrested. However, his definitions are not relevant if the objective is to deter crimes. For example, if the enforcement authorities arrest just one criminal person (out of the 1000) and convict him, that is, $\delta = 1$ and $P_g = 1$. According to Miceli's definition, the probability of conviction $= \delta\ P_g = 1$. But that cannot be correct since the probability of conviction of a guilty person would be $= 1/1000\ (= \delta\ P_g\ A/G = A/G)$, which is very small to deter any crime. It means that Miceli's model did not achieve its goal of combining prevention of crimes and judicial fairness.

Polinsky and Shavell (2000) do not define the various probabilities explicitly. It seems that they define the legal errors in the following way. Let the probability of detection, P be defined as $P =\ A/G = 110/\ 1000$, the Type I error probability (they call it Type II error), $\varepsilon_2 = (1 - \delta)\ A/G = 10/1000$; and Type II error probability, $\varepsilon_1 = \delta\ (1 - P_g)\ A/G = 20/1000$. That means in the presence of legal errors, the effective probability of detection $= P\ (1 - \varepsilon_1 - \varepsilon_2) = \delta\ P_g\ A/G = 80/1000$. This is precisely, the probability of arresting and convicting a guilty person and is relevant for deterring crimes.

They present an alternative insightful interpretation of these errors. They consider the negative impact of Type I error (contrary to tradition, they call it Type II error) on crime deterrence, and they note, "The second type of error, mistaken liability, also lowers deterrence because it reduces the difference between the expected fine from violating the law and not violating it. In other words, the greater is $\varepsilon_2$, the smaller the increase in the expected fine if one violates the law, making a violation less costly to the individual."

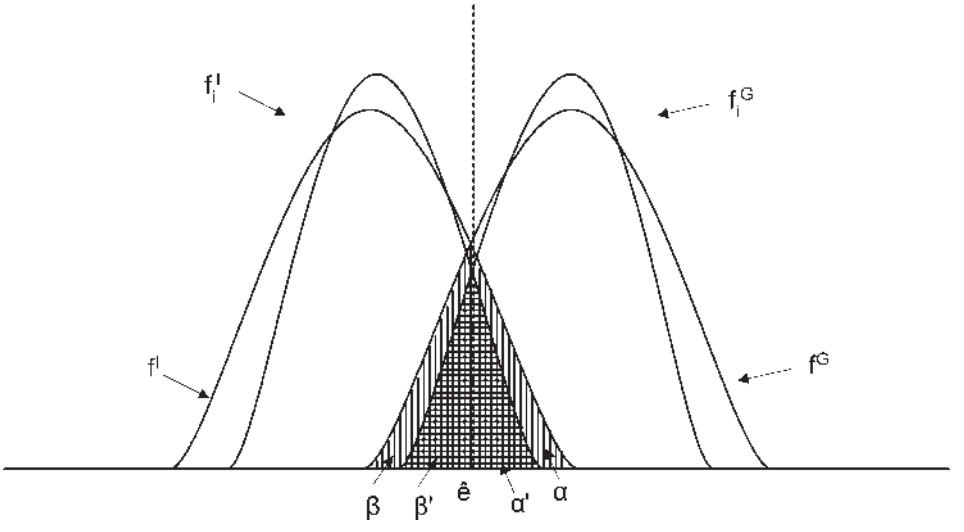


**Figure 1.** ($f^I$) and ($f^G$) indicate the initial probability distributions of evidence against an innocent person and a guilty person respectively. $f_i^I$ and $f_i^G$ are the respective probability distributions with reduced variances of evidence against an innocent person and a guilty person and $\alpha'$ and $\beta'$ are the reduced respective probabilities of Type I and Type Ii errors due to the availability of additional evidence.

### *Reduction of Errors through Additional Evidence*

Kautilya (p. 389) explained, "If there is a conflict in the evidence given by different witnesses, the judgment shall take into account the number of witnesses, their reliability and the [opinion of the court on their] disinterestedness (3.11)." It is significant to note that according to Kautilya, additional evidence, such as the number of witnesses, was assumed to reduce the magnitudes of both the Type I and Type II errors.[15] The above figure 1 may be used to explain Kautilya's insight.

The probability distribution of evidence against an innocent person is indicated by ($f^I$) and that against a guilty person by ($f^G$). Kautilya's analysis implied that the probability distributions shrank as the amount of evidence increased. The probability distribution for the innocent shrank from $f^I$ to $f_i^I$ and the probability distribution for the guilty shrank from $f^G$ to $f_i^G$. Consequently the Type I error was reduced[16] from $\alpha$ to $\alpha^1$ and the Type II error was reduced from $\beta$ to $\beta^1$.

## IV. KAUTILYA ON THE OPTIMUM LEVEL OF PUNISHMENT

### *Role of the Judge*

In the absence of a jury, a defense lawyer, and a prosecutor, there was a very heavy burden on the judges and magistrates to keep legal errors to the minimum. Kautilya

[15]See Thomas H. Wonnacott and Ronald J. Wonnacott (1977, pp. 259–60).

[16]On the other hand, Miceli (1990) assumes that an increase in efforts by the prosecutor to collect more evidence shifts the distributions to the right implying an increase in the probability of Type I error. He notes that prosecutors generally try to shift the distributions to the right. That is clearly against the collective sense of justice.

(p. 377) expected, "Judges shall discharge their duties objectively and impartially so that they may earn the trust and affection of the people (3.2)." And in return, as mentioned above, Kautilya recommended a decent salary of 8,000 panas for a judge (magistrate).

### *Guidelines on Sentencing*

Kautilya recommended a set of guidelines relating to sentencing. It is obvious that fairness is not a modern notion since mankind has been concerned with it for a long time.[17] It is considered one of the pillars on which human civilization rests. Kautilya (p. 377) wrote:

> A king who observes his duty of protecting his people justly and according to law will go to heaven, whereas one who does not protect them or inflicts unjust punishment will not. It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next. (3.1).

The above statement indicates that Kautilya emphasized the critical role of punishment in deterring crimes and understood that to be effective, the punishment must be certain, impartial and in proportion to the severity of the crimes. Kautilya (p. 108) elaborated on this theme,

> Some teachers say: "Those who seek to maintain order shall always hold ready the threat of punishment. For, there is no better instrument of control than coercion." Kautilya disagrees [for the following reasons]. A severe king [meting out unjust punishment] is hated by the people he terrorizes while one who is too lenient is held in contempt by his own people. Whoever imposes just and deserved punishment is respected and honored. A well-considered and just punishment makes the people devoted to *dharma, artha* and *kama* [righteousness, wealth and enjoyment]. Unjust punishment, whether awarded in greed, anger or ignorance, excites the fury of even [those who have renounced all worldly attachments like] forest recluses and ascetics, not to speak of householders. When, [conversely,] no punishment is awarded [through misplaced leniency and no law prevails], then there is only the law of fish [that is, the law of the jungle] (1.4).

According to Kautilya, punishment up to a point helped the law and order situation, but beyond a certain level it was likely to hurt it. He believed that judicial fairness was absolutely essential to the survival of a state. It means that the implication of Becker's model that "catch a few and hang them" may not reduce crimes. Almost all the studies on crime and punishment assume that social and political stability are unaffected by the level of punishment. However, both Kautilya and Adam Smith questioned this assumption.

[17]Drekmeier (1962, p 254) remarks, "Kautilya: holds that danda must be applied with justice if authority is to have the respect of the people—which amounts to saying that justice is what transforms power into "authority." *Danda* means punishment.

Adam Smith holds a similar view. He states, "Justice is the main pillar that upholds the whole edifice, if it is removed, the great, the immense fabric of human society must in a moment crumble into atoms."

### *Kautilya on Balance between Rules and Discretion*

Kautilya provided a detailed list of sanctions matching the severity of different crimes. However, the judges were permitted some discretion. He (p. 493) suggested, "The special circumstances of the person convicted and of the particular offense shall be taken into account in determining the actual penalty to be imposed (3.2). Fines shall be fixed taking into account the customs (of the region and the community) and the nature of the offense (2.22). Leniency shall be shown in imposing punishments on the following: a pilgrim, an ascetic, anyone suffering from illness, hunger, thirst, poverty, fatigue from a journey, suffering from an earlier punishment, a foreigner or one from the countryside (3.20)." According to Kautilya, a judge should take into consideration both the mitigating and the aggravating (egregious) circumstances and the characteristics of the defendants in the determination of the punishment.

The current debate on rules versus discretion is mostly about the polar cases, that is, whether to have rules or to have discretion. In Kautilya's scheme of things, rules were like focal points (or guide posts) around which discretion had to be tailored. Too many rules and strict adherence to them might deny gains from changed circumstances or other unexpected opportunities and similarly, too much discretion might lead to substantial abuses[18] and opportune behavior that might result in erosion of credibility.

## V. KAUTILYA ON OTHER RELATED ISSUES

### *Kautilya's Preference for a Monetary Punishment*

Kautilya recommended monetary punishment over non-monetary ones as well as the "penal slavery." In fact, at that time imprisonment as a punishment did not exist. Prisons were used simply to hold the defendants temporarily for the duration of the trial. Kautilya proposed long lists of different kinds of physical punishments or monetary fines. However, if the convicted person wished, he could substitute monetary fines for the physical punishments prescribed for non-serious crimes. For example, according to Kautilya (p. 495), a convicted person could pay 54 panas to spare the mutilation of his thumb and forefinger or the tip of his nose. Kautilya (p. 490) suggested that convicted persons were released from prison only "if they had paid off, by their work,[19] the amount owed by them" or "after receiving a payment for redemption" or redeemed by charitable persons (2.36).

[18]Recently, Jennifer F. Reinganum (2000, p. 63) discusses the establishment of the United States Sentencing Commission to develop the sentencing guidelines for achieving certain social goals. These are very similar, as mentioned above, to those specified by Kautilya. She states

> The motivation for such guidelines included at least the following arguments. First, the then-current system of indeterminate sentencing with parole made it difficult for either the offender or the state to form a reasonable estimate of the actual sentence; definitive sentencing guidelines were believed to provide honesty in sentencing. Secondly, the sentencing guidelines were intended to reduce observed disparity in sentencing across apparently similar cases. Finally, the sentencing guidelines would build in proportionality in sentencing by conditioning the prescribed sentence on offense and offender characteristics.

[19]Becker (1968) reaches the conclusion that monetary fines are merely transfers and do not use real resources and, therefore, are preferable. However, Becker's suggestion has been found to be impractical and the society has to

### *Crime Deterrence through Parading the Thieves*

Kautilya (p. 221) recommended:

> When thieves and robbers are arrested, the Chancellor shall parade them before people of the city or the countryside [as the case may be] and proclaim that the criminals were caught under the instructions of the King, an expert in detecting thieves. The people shall be warned to keep under control any relative with criminal tendencies, because all thieves were bound to be caught [like the ones paraded before them]. Likewise, the Chancellor shall parade before the people forest bandits and [criminal] tribes caught with stolen goods as proof of the King's omniscience (4.5).

Clearly, the policy of parading the thieves was intended by Kautilya to increase the perceived probability of catching them.[20] It is interesting to note that in the case of government officials who stole property of any private individual (other than that of the King), Kautilya (pp. 302–303) recommends "shaming" in lieu of monetary fines as punishment. He suggested "smearing with cow dung in public," "smearing with cow dung and ashes in public," "parading with a belt of broken pots and exile" or "shaving off the head and exile" as the amounts of thefts increased in lieu of the monetary fines of 3 panas, 6 panas, 12 panas or 24 panas, respectively. One wonders how he calculated the equivalence between the magnitude of a fine and a particular method of shaming. In any case, Kautilya was clearly aware of the deterrent role of shaming as a punishment.

### *The Four Strikes and You are Out Rule*

Kautilya (p. 493) recommended, "In all cases, the punishment prescribed shall be imposed for the first offense; it shall be doubled for the second and trebled for the third. If the offense is repeated a fourth time, any punishment, as the king pleases, may be awarded (2.27)."

### *Protection of Whistle Blowers*

Kautilya (p. 298) suggested, "Any informant, to whom an assurance against punishment has been given [even if he had participated in the fraud], shall, if the case is

incur some cost in the collection of fines. Based on an empirical study, Robert W. Gillespie (1988-89) finds "The relatively low enforcement success achieved for large fines, particularly drug fines larger than $1000." Gillespie casts doubt on "the use of fines as a criminal sanction in terms of lower social costs of punishment."

[20]Polinsky and Shavell (2000, p. 68) remark: "The implications of injurers' imperfect knowledge are straightforward. First, to predict how individuals behave, what is relevant, of course, is not the actual probability and magnitude of a sanction, but the perceived levels or distributions of these variables." David M. Levy (1999) points out that approbation and disapprobation figure very prominently in Adam Smith's *Moral Sentiments* and these could have a significant effect on the behavior of potential thieves. (Incidentally, Adam Smith's Katallactic model as presented by Levy might provide a more convincing explanation of the kink in the loss-aversion function than in Amos Tversky and Daniel Kahneman (1991)). On the other hand, in recent years, the U.S. public has been demanding (from their respective state governments) the right to know if any sex offender lives in their neighborhood. This may serve as a warning to the parents so that they keep a close watch on their children. Recently, some states have passed legislation requiring the registration of sex offenders. Doron Teichman (2004, abstract) argues "That such policies have limited preventative value, yet they might be justified as an efficient way to sanction sex offenders."

proved, receive [as reward] one-sixth of the amount involved; if the informant is a state servant, one-twelfth. If the case is proved, the informant [shall be permitted to escape the wrath of the guilty and] may either remain in hiding or attribute the information to someone else (2.8)."

### *State Representation of the Helpless*

Kautilya did show compassion for the helpless. He (p. 385) stated, "The judges themselves shall take charge of the affairs of gods, Brahmins, ascetics, women, minors, old people, the sick and those that are helpless [e.g, orphans], [even] when they do not approach the court. No suit of theirs shall be dismissed for want of jurisdiction, passage of time or adverse possession (3.2)." Thus we find that he proposed a very comprehensive and balanced approach to handle crime and punishment. Kangle (Part III, p. 230) concludes it quite aptly, "This very brief review of the law found in Kautilya will, it is hoped, show how it has been treated by him in the most systematic manner. The treatment is also as full as possible."

## VI. CONCLUSION

Kautilya's goal was to attain a crime-free society but the "the removal of thorns" was to be achieved only by resorting to legal means. He proposed a judicial system, which had built-in-fairness and crime deterrence. If a crime was not solved, the king had to compensate the victim. So there was an incentive to prevent a crime from happening and to solve it if it was committed. Similarly, there was an incentive not to commit a Type I error in solving the crime since the king had to pay thirty times the amount of fine imposed on the innocent. Thus there was a built-in incentive to minimize the costly errors of omission and commission. According to Kautilya, monetary punishments imposed in lieu of physical punishments must be collected.

Kautilya pointed out that excessive punishment due to "anger, greed or ignorance" was counterproductive since people lost respect for the law. He believed that fairness was essential for political stability, which was a prerequisite for prosperity. Recently, A. Mitchell Polinsky, and Steven Shavell (2000, p. 45) assert, "The earliest economically oriented writing on the subject of law enforcement dates from the eighteenth century contributions of Montesquieu (1748), Cesare Becceria (1767) and especially, Jeremy Bentham (1789), whose analysis of deterrence was sophisticated and expansive." In light of the above presentation of Kautilya's ideas on crime and punishment, their conclusion needs modification, because, as described above, Kautilya's judicial system was quite advanced and comprehensive—and by two thousand years.

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# Searching for Substantive Justice: Lessons from Lon Fuller's Natural Law

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## ABSTRACT

The goal of this essay is to provide some perspective in the search for substantive justice, especially the endeavor to say something positive about the substantive content of justice. The method employed has been to share the insights generated in the life-long exploration of natural law carried out by Lon Fuller. His outlook can be better understood by exploring the state of legal thinking that the young Fuller found as he embarked on his academic career. That setting explains why Fuller turned to natural law, as well as the distinctive perspective he developed. More specifically, his approach to natural law largely avoided its substantive side for three reasons. First, many claims of natural law turned out to be a competing form of positive law. Second, when looked at in historical perspective, substantive natural law often became dated. Finally, he found some claims of substantive natural law to be shocking in their claim to absolute truth.

In place of those blind alleys, Fuller looked for the foundations of justice in the realm of procedure--in the largest sense of that word. Building upon Aristotle's classic analysis of distributive and corrective justice, he advocated exploring the principles of social order. That work produced many insights, including his distinction between law and managerial direction and the consequent limits on the judgments of justice we are able to make. In a positive direction, he began the work of showing us how the principles of social order offer an evolutionary path toward a greater understanding of justice. Finally, that evolutionary theme culminates in his statement of faith in the possibility of moral progress.

Even so, moral progress is merely a possibility. Having confronted the horrors of the Second World War as he did, Fuller could not embrace unbridled optimism. Nonetheless, he was still able to believe in the possibility of positive work toward the achievement of greater knowledge of substantive justice. Progress toward that goal comes only through employment of real communication, however; not the easy communication with those who hold similar views. Rather, Fuller anticipated the challenging kind of communication with those who have quite different views. For him, this postulate was no mere academic idea. He put it into work in his path-breaking efforts with the Polish officials who were then viewed as being imprisoned behind an impenetrable Iron Curtain. His effort shows us what communication can achieve. At the same time, we must not allow ourselves to forget that there are many roadblocks to successful communication, just as there are many whose efforts to protect their own dogmas will happily strive to obstruct our quest for justice.

## ESSAY

My project in this essay is to provide some perspective in our search for substantive justice. As Professor Ehrenreich has made very clear in her introductory essay, our search is one that is

renewed. Why? Because there have been many views of justice over the centuries. Sometimes those articulations have been quite elaborate. However, belief that the project held any real prospects for success has been scant in recent decades. Now, she challenges us, has the time not come to reexamine those assumptions? Can we endeavor to say at least something positive about the substantive content of justice? My modest suggestion in response to that very worthwhile challenge is to offer some background and insight that may aid in the search. Finally, I suggest a project for further study in our ongoing quest for a better understanding of justice.

More specifically, I have surveyed the work of Lon Fuller, the late Carter Professor of General Jurisprudence in Harvard Law School, in an effort to glean the insights he generated over many decades of thought about natural law and what its content might be. His outlook can be better understood by exploring the state of legal thinking that the young Fuller found as he embarked on his academic career. That setting explains why Fuller turned to natural law, as well as the distinctive perspective he developed. His approach to natural law avoided, for the most part, its substantive side. Hence, he appears to be a skeptic regarding the possibility of finding some lasting content for substantive justice.

He did, however, undertake a thoroughgoing exploration of the procedural aspects of justice. He started by building upon Aristotle's classic analysis of distributive and corrective justice. That led him to an exploration of the principles of social order. That investigation led him to perceive an evolutionary path toward a greater understanding of justice and even toward a belief in the possibility of moral progress. However, that progress depends upon our engagement in real communication, a requirement not easily met. Consequently, I conclude that Fuller did find some more subtle, yet critically important, clues to the content of justice and how we might discover even more of its meanings.

## I. Fuller and Natural Law

### A. The State of Legal Thought Encountered by Fuller

I find it helpful to understand Fuller's thought by examining the world of legal thought he encountered as a young scholar. At the time Fuller first entered the world of legal education, thinking about law in both England and America was almost completely dominated by various forms of legal positivism. In England, the classical positivism of John Austin[1] prevailed, kept alive by Holland,[2] Amos[3] and others.[4] In the United States, the American version of positivism was still strong in the influential works of Oliver Wendell Holmes Jr.[5] and John Chipman Gray.[6]

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[1] Austin, The Province of Jurisprudence Determined (2d ed. 1861, repr. 1970).
[2] Holland, Jurisprudence (1880).
[3] Amos, The Science of Law (5th ed. 1881).
[4] See, e.g., Markby, Elements of Law (5th ed. 1896).
[5] Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897).
[6] Gray, The Nature and Sources of the Law (1st ed. 1909).

Holmes' significance, in particular, prevailed because of his central role in framing the philosophy of judicial restraint during his long tenure on the Supreme Court of the United States.[7]

The next generation of legal thinkers, influenced both by the sociological jurisprudence of Roscoe Pound[8] and the judicial skepticism of Holmes and Gray, was dominated by what Fuller named American Legal Realism.[9] Somewhat surprisingly, the legal realists turned out to be, in their method, legal positivists.[10] The surprise is due to the fact that, by taking Holmes' skepticism to its logical culmination, they disrespected the importance of rules, as Austin termed them, general commands.[11] Instead, by focusing on the law as "what officials of the law do in fact,"[12] they allowed particular commands to constitute the corpus of what they accepted as law.[13]

Fuller examined this field of thought carefully. He welcomed the sociological/anthropological insights brought to bear on law both by Pound and by Fuller's friend Karl Llewellyn. He also noticed three things missing from the picture. One was the too easy embrace of Holmesian skepticism both of law and of the importance of the search for justice, views that Fuller felt ignored social reality, as he demonstrated in his demolition of Holmes' "bad man" in his first book, *The Law in Quest of Itself*.[14] Also missing in Fuller's eyes was an appreciation of the social foundations that made possible the order for which legal positivists yearned.[15] Finally, he noted the absence of the creative force that had characterized legal and judicial thinking in the earlier part of the nineteenth century in the United States. It is notable that, in his mature work *The Common Law Tradition: Deciding Appeals*,[16] Llewellyn migrated to a position roughly compatible with that of his old friend Fuller, when he urged a return to the creative judicial thinking that was at the center of what Llewellyn called "the Grand Style" of judicial decision making.[17]

Significantly, that early American thinking was founded on the natural law approach of William Blackstone. Blackstone supplied the backbone of then available legal information by virtue of

[7] See, e.g., Christie, Jurisprudence 647 (1973). See also Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989); Collier, Law As Interpretation, 76 Chicago-Kent Law Review 779 (2000). Holmes was almost certainly influenced in this regard by the influential article of his Harvard colleague, James Thayer. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).
[8] An early, highly influential, statement of his position is Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908). See also Pound, The Spirit of the Common Law (1921).
[9] See Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429 (1934).
[10] This argument is offered in Moffat, The Perils of Positivism, 10 Harv. J. Pub. Pol'y 295, 321-25 (1987). The positivist assumptions made by legal realism are explicated at greater length in Brian Leiter, Legal Realism and Legal Positivism Reconsidered, 111 Ethics 278 (2001).
[11] Austin, The Province of Jurisprudence Determined 10-15 (2d ed. 1861, repr. 1970).
[12] Llewellyn, The Bramble Bush 12 (1930, repr. 1960) ("*What these officials do about disputes is, to my mind, the law itself.*") (Italics in original).
[13] See Perils, supra at 324.
[14] Fuller, The Law in Quest of Itself 92-95 (1940).
[15] Fuller, The Problems of Jurisprudence 103-14 (temp. ed. 1949); Fuller, The Morality of Law 193 (rev. ed. 1969).
[16] Llewellyn, The Common Law Tradition: Deciding Appeals (1960).
[17] E.g., id. at 36, 421.

the fact that his *Commentaries on the Laws of England* [18] would fit into the saddlebags[19] of the lawyers and judges who continued to press westward in an attempt to bring law to a disorderly American frontier. In addition, Blackstone's approach was kept alive in the work of once famous Americans like James C. Carter.[20] Moreover, Blackstone's mission to show the natural logic of the developing law was carried on by the American encylopedists who produced highly influential compendia, such as the works of Chancellor James Kent,[21] Justice Joseph Story,[22] and Professor Thomas Cooley.[23]

All three of these fundamental questions regarding how we think about law could be answered by the use of a natural law method. Natural law abjures the skepticism of Holmes, and Holmes specifically recognized that fact in his famous diatribe against *Natural Law*.[24] Natural law provided the foundation for the judicial creativity of England's two most noteworthy judges, Sir Edward Coke[25] and Lord Mansfield,[26] each of whom receives especial praise from Fuller,[27] and both of whom strongly influenced Blackstone.[28] Most importantly, natural law provides a method of thinking that embraces the importance both of the social underpinnings of law and of the quest for what Fuller termed "the principles of social order." In retrospect, it seems inevitable that Fuller would have turned to natural law as a remedy for the defects he saw in the existing state of legal thought.

B. Lon Fuller's Distinctive Perspective on Natural Law

The search for substantive justice is not something new, of course. It is a quest that has been undertaken for at least 2500 years in the Western tradition, almost always in the guise of one of the many forms of natural law. For the reasons outlined above, Lon Fuller adopted the method of natural law. As I also noted above, in *The Law in Quest of Itself*, Fuller belittled Holmes, the dedicated enemy of natural law. In addition, he spoke favorably of the work of "Saint Thomas Aquinas."[29] Needless to say, he excited all the adherents of traditional natural law who worked at the fringes of mainstream legal thinking, primarily in the Thomist tradition in Roman Catholic universities. They looked on Fuller as a savior, because they thought that he was going to legitimize them by bringing natural law into the mainstream of legal thinking. Moreover, because Fuller held the Carter Chair of General Jurisprudence at Harvard, he had the instant

[18] Wm. Blackstone, Commentaries on the Laws of England (3d American ed. 1890).
[19] On Blackstone's influence in America, see McKnight, Blackstone, Quasi-jurisprudent, 13 Sw. L.J. 399, 401 (1959).
[20] James C. Carter, Law: Its Origin, Growth, and Function (1907).
[21] Kent, Commentaries on American Law (four volumes, 1826-1830).
[22] Story, Commentaries on the Constitution of the United States (3 vols., 1833); id., Commentaries on the Conflict of Laws (1834); id., Commentaries on Equity Jurisprudence (2 vols., 1835-1836); and many others.
[23] His best known work is Cooley, Treatise on Constitutional Limitations (1908).
[24] Holmes, Natural Law, 32 Harv. L. Rev. 40 (1918).
[25] See Fuller, The Morality of Law 99-101 (rev. ed. 1969).
[26] See Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 668 (1958).
[27] Fuller discusses Coke in The Morality of Law 99-101 (rev. ed. 1969). Fuller quotes Mansfield approvingly in Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 668n.39 (1958).
[28] See McKnight, supra note 19, at 400 n.10.
[29] Fuller, The Law in Quest of Itself 101 (1940).

caché provided by the most prestigious post in American legal philosophy. As a result, he became the best known American advocate of natural law in the twentieth century.[30]

Almost a quarter century after the publication of his first book, his second finally appeared. In *The Morality of Law*, Fuller distinguishes between what he calls the internal and external moralities of law.[31] The internal is an application of the principles of social order to the legal process.[32] It is represented by his unprecedented exploration of the principles of legality as "the morality that makes law possible."[33] The external morality of law, on the other hand, is the goodness—or lack thereof—of the substantive law.[34] What is notable is Fuller's extensive development of the internal or procedural aspects of law, as well as the lack of development of substantive natural law.[35] The yearning for justice is still important, but its specific content receives short shrift from Fuller.

His very slight treatment of substantive justice certainly disappointed the devotees of traditional natural law who had waited so long and so expectantly for much more than Fuller delivered. Not surprisingly, there were a number of disappointed reviews of *The Morality of Law* from natural lawyers.[36] They lamented Fuller's failure to produce anything they recognized as natural law. Inevitably, they were looking for substantive natural law, a substantive content of justice. However, Fuller's neglect of substantive natural law was not casual. He had thought about the subject long and deeply. Although he might appear to be a skeptic about the possibility of substantive justice, such a conclusion would be inaccurate. Consequently, I believe he has a contribution to make to this Symposium's search for substantive justice. For that reason, it will be useful to review the reasons that Fuller seemed to be so reticent in his development of substantive natural law. In the course of examining those reasons, we will also discover that there is more substance to Fuller's position than initially appears.

## II. Substantive Natural Law and the Search for Justice

### A. Confusing Natural Law and Positive Law

One of the first points Fuller wishes us to understand is that much that claims to be natural law is in reality only a competing form of positive law. For example, in the course of his response to H.L.A. Hart in the famous debate in the 1958 *Harvard Law Review*, he commented about the then current claims by the papacy and those speaking for the papacy about the duties of Roman

[30] Summers, Lon L. Fuller 62 (1984).
[31] Compare chapters 2 and 4 of The Morality of Law (rev. ed. 1969).
[32] See Summers, Lon L. Fuller 73 (1984).
[33] That is in fact the title he gives the second chapter of The Morality of Law 33-94.
[34] He purports to address such questions in the fourth chapter: "The Substantive Aims of Law." The Morality of Law 152-86.
[35] See text accompanying notes 51-67 infra.
[36] A.P. D'Entreves, The Case for Natural Law Re-examined, 1 Nat. L.F. 3, 31-33 (1956) (calling Fuller's natural law "technological"); J. Witherspoon, The Relation of Philosophy to Jurisprudence, 3 Nat. L.F. 105, 110 (1958) (accusing Fuller of "a limitation upon the scope of jurisprudence"); Savarese, Book Review, 53 Geo. L.J. 250 (1964) (finding Fuller's substantive natural law very disappointing).

Catholic judges in divorce cases. Fuller's comment was that, though these claims pretend to be natural law, they are nothing more than a competing version of positive law.

> This identification of natural law with a law that is above human law seems in fact to be demanded by any doctrine that asserts the possibility of an authoritative pronouncement of the demands of natural law. In those areas affected by such pronouncements as have so far been issued, the conflict between Roman Catholic doctrine and opposing views seems to me to be a conflict between two forms of positivism. [37]

For anyone not familiar with Fuller's work, his declaration that the claims were simply a form of positivism was definitely not a compliment in his eyes.

Although Fuller's comment is now more than 50 years old, its timeliness continues to the present day. In Spain at the present time, their government is about to adopt an expansion of legal access to abortion. The Spanish bishops have responded by threatening to excommunicate anyone who votes in favor of the legislation as well as anyone who seizes upon the opportunity to terminate a problem pregnancy.[38] As we might expect, their claim is that the proposed legislation violates a higher law of which they see themselves as custodians. Fuller's timeless response would be that we see a conflict between two competing systems of positive law. Although the bishops would deny it, their attempted deduction from natural law has failed to employ the fundamental method of natural law identified by Fuller. That method, as we will see below, is the "collaborative articulation of shared purposes" in pursuit of new principles of ordering social life. In other words, the bishops have skipped the middle step in the process. They have assumed that they can declare by fiat what the institutional process is, so that they can jump to the substantive conclusion they favor.

Thus, we can understand that one of the important reasons Fuller was skeptical about promoting some kind of substantive content for justice was that he saw various versions of substantive natural law that had been promulgated previously end up as nothing more than alternate systems of positive law, competing with the existing domestic systems of positive law. Not only do you end up with parallel legal systems, you also end up with static claims of what substantive justice requires. As Professor Ehrenreich points out in her introductory essay, more static claims are not going to advance us very far in our quest for substantive justice.

B. What is the Shelf-life of Natural Law?

Another reason why Fuller believed that trying to develop a system of substantive natural law would be futile was the inherent limits of human knowledge. As a result, figuring out the specific content of substantive justice would be a thankless and often absurd task. Indeed, he studied the natural law writers of previous centuries, names long forgotten. What he observed quite uniformly was that many of their claims regarding the substance of natural law looked

[37] Fuller, Positivism and Fidelity to Law--A Reply to Professor Hart, 71 Harv. L. Rev**.** 630, 660 (1958).
[38] "Bishop Camino said those who participated in abortion would be immediately excommunicated." Graham Keeley, Spain's Catholic Church fights Socialists' abortion law reforms, The Times (London), June 22, 2009, http://www.timesonline.co.uk/tol/comment/faith/article6550355.ece

quite dated.[39] Let me provide one example from my own reading. The great Swiss theologian Emil Brunner, a colleague of Karl Barth, authored a book on justice just at the end of World War II.[40] He has many good things to say in it, but he was persuaded that natural law had ordained a special but submissive role for women in the world.[41] His book *Gerechtigkeit* was just published in 1943,[42] showing how few decades it has taken to make his view obsolete, at least in the Western world. Ideas that were propounded at one point as clear deductions from some supposed principle of natural law can in hindsight appear quite clearly wrong.

C. Relativism and Absolutes in the Search for Justice

Fuller was justifiably famous for his hypothetical cases. In *The Case of the Contract Signed on Book Day*,[43] his alter ego Mr. Justice Foster talks about the problem of changing notions of what justice requires. Does that mean that the quest for justice has no meaning at all? Speaking through Mr. Justice Foster, Fuller shares his conviction that the search for justice in any society reflects, not only the external conditions under which the society lives, but the state of knowledge and belief within that particular society. He addresses that issue at some length:

> Skeptics who deny the truths I have just asserted are fond of adducing illustrations drawn from history and ethnology for the purpose of showing that in the realm of human organization all is relative and contingent. Societies have in fact been organized on the most fantastic principles, -- principles that seem to us to violate the most elementary demands of justice and rationality. Hereditary castes and totemic clans are beyond the pale of reason for us because we do not share the beliefs on which they are founded. But if men mistakenly believe, or have been brought by the fraud of their rulers to believe, that every human must pass through a hierarchy of castes in successive reincarnations, then an organization in hereditary castes may, for men entertaining such beliefs, be eminently fair and reasonable. The quest for justice in any society reflects not only the external conditions under which the society lives, but the state of knowledge and belief within the society. If the Speluncean explorers had believed in the efficacy of auguries, it might have been a rational procedure for them to ask their rescuers above ground to watch the flight of birds for guidance in their predicament. The fact is that they did not believe in auguries, and the resort to this method of resolving their problem would, for them, have been an irrational one. The citizens of our Commonwealth do not believe that they are the blood cousins of bears and owls, or that they are destined to become mosquitoes in some future existence. Our citizens must seek justice in the light of their own knowledge. They should not be deterred from their quest by proof that other men in other ages and other places have entertained very different beliefs and have, in the light of their beliefs, tolerated or encouraged social organizations that seem to us clearly irrational and unjust.[44]

As we see, Mr. Justice Foster mentions the Speluncean explorers, and the deep dilemma they faced in deciding how they could survive their ordeal, trapped deep in the cave without food. He

[39] See. e.g., Fuller, The Law in Quest of Itself 102 (1940).
[40] E. Brunner, Justice and the Social Order (transl. M. Hottinger 1945).
[41] Id. at 66.
[42] The original German *Gerechtigkeit* was published in 1943.
[43] Mr Justice Foster in *The Case of the Contract Signed on Book Day*, in Lon Fuller, The Problems of Jurisprudence 71 (temp. ed. 1949).
[44] Id. at 84-85.

is referring to another of Fuller's hypothetical cases, *The Case of the Speluncean Explorers*,[45] Fuller's most widely known writing. Notably, the reference to the case serves the purpose of illustrating the way in which cultural assumptions provide the setting for techniques of decision. As it turns out, even the application of the principles of social order depends upon their particular cultural setting and their historical milieu.

We might accept that declaration of the central place of culture at face value and conclude that Fuller was merely a cultural relativist. That would be misleading. Proponents of moral absolutes would fear that Fuller fell into the dangerous ethical swamp of absolute cultural relativism. But Fuller would agree regarding the danger of such a cultural morass. True cultural relativists, for example, may dismiss the current situation in Iran as the actions of people who merely hold values different from ours.[46] However, there is no way that Fuller would feel moral ambivalence regarding the murderous actions of the Iranian mullahs against their own people. Why? He could quickly point out that their attempts to steal the election violate the most fundamental principles of reciprocity, a foundation upon which Fuller built his conception of moral duty.[47]

Clearly, Fuller was not an adherent of full-fledged cultural relativism. Rather, his view was more subtle than that. Indeed, he addresses that very question when he writes about the cavalier way in which the terms relative and absolute are thrown around:

> I have to confess I have no clear idea what an "absolute" is. . . . If an "absolute" is taken to mean a moral imperative that yields a clear principle of decision under all circumstances then, again, I know of no "absolute.". . . So far as I can see, the expressions "absolute" and "relative" as they are employed in current discussions about natural law are simply unanalyzed terms of censure and praise.[48]

Fuller's rejection of absolutes arises from his distinctive perspective on the nature of natural law. We have already seen his condemnation of the competing positivism of the Roman Catholic edicts on divorce. Indeed, he had previously made it quite clear in his debate with the philosopher Ernest Nagle that he rejected any notions of natural law as "an authoritative pronouncement," or as "like a written code."[49] In short, he does not accept natural law as a higher law that can invalidate human law. As we will see in the following section, Fuller prefers Aristotle's method, including his conception of the "law of nature."[50]

## III. Searching for the Foundations of Justice

### A. Privileging Procedure over Substance: Remembering Aristotle

[45] Fuller, The Case of the Speluncean Explorers*,* 62 Harv. L. Rev. 616 (1949).
[46] For one condemnation of this view, see Andrew Klavan, Iran and the Tragedy of Bad Ideas, *The Wall St. J*., June 22, 2009, page A13.
[47] Fuller, The Morality of Law 19-24 (rev. ed. 1969).
[48] Fuller, *American Legal Philosophy at Mid-Century,* 6 J. Legal Educ. 457, 467 (1954).
[49] Fuller, A Rejoinder to Professor Nagel, 3 Nat. L.F. 83, 84 (1958).
[50] Id. (expressing admiration for Aristotle's version of natural law).

If substantive natural law does not succeed in producing as much insight into justice as we desire, what alternatives remain? Fuller put his intellectual energies into what he called procedural natural law.[51] He was most interested in exploring the principles of social ordering, the institutions by which we organize social life. He noted how those forms of social organization had developed through human history. More importantly, he saw how we are presented with the challenge of imagining new and improved institutions of social ordering. In that endeavor, he found Aristotle's distinction between distributive and corrective justice to be a helpful starting point:

> The essential lesson of Aristotle's distinction is that we will get along better if we do one thing at a time and by the methods appropriate to the job at hand. A jury may be a useful device for determining how much A should pay for B's broken leg, but it does not follow that it would be equally useful in allocating newsprint, as was once suggested in England. Arbitration functions reasonably well in determining whether a man has been wrongfully discharged, but is unsuited to setting the wages of industry as a whole. Discretion, in the sense of proceeding with only the guidance of general standards, may be useful when applied to some problems of corrective justice, but dangerous when applied to problems of distributive justice.[52]

His reference to the suggestion regarding the allocation of newsprint was based on a proposal actually made during World War II in England. Not surprisingly during wartime, they experienced a serious shortage of newsprint, and somebody proposed having a court decide how much should be allocated to the *Manchester Guardian*, *The Times*, and the rest. As we will see below, Fuller was convinced of the complete unsuitability of adjudicative procedures to such allocative decisions.

Moreover, when Fuller mentions arbitration, he speaks from experience, because he was a very active labor arbitrator.[53] When he declares arbitration to be unsuited to setting the wages of industry as a whole, he speaks from an extensive base of personal experience and reflection. A contemporary example of his point would be to consider the catastrophe he did not foresee: how arbitration of wages in baseball has almost destroyed the American national pastime. Mandatory wage arbitration provides an even more dramatic example, because it has bankrupted quite a number of municipal governments.[54]

So far as Aristotle is concerned, I think it is telling to reflect on the fact that the two most important thinkers about legal theory in the English language in the twentieth century, H.L.A. Hart and Fuller, both considered Aristotle the person who had something important to say about justice. In *The Concept of Law*, Hart begins his chapter on justice by explicating the distinction between corrective and distributive justice from Aristotle.[55] The topic was certainly familiar to him, since he had studied it intensively during his undergraduate study of the classics, known as

[51] See Fuller, The Morality of Law 96-97 (rev. ed. 1969).
[52] Fuller, Some Reflections on Legal and Economic Freedoms--A Review of Robert L. Hale's "Freedom Through Law," 54 Colum. L. Rev. 70, 81-82 (1954).
[53] Summers, Lon L. Fuller 7 (1984).
[54] For an impressive list of instances, see Shikla Dalmia, The 'Free Choice' Act and Binding Arbitration, *The Wall St. J.*, July 11-12, 2009, page A11.
[55] H.L.A. Hart, the Concept of Law 157-67 (2d ed. 1994).

"Greats," at Oxford.[56] Fuller likewise considered Aristotle's distinction so important that, for his *The Problems of Jurisprudence* in 1949, he did his own very loose translation of chapter 5 of the *Nichomachean Ethics*.[57] Thus, some 2500 years later, Aristotle's distinction between corrective and distributive justice still stands as foundational to our understanding of how to think about justice. A skeptic might complain that we have not made as much progress as we would like to think we have. Fuller, in contrast, would point out that Aristotle's distinction has stood the test of time precisely because it is procedural in nature, and thereby has avoided substantive conclusions that would become outmoded with the passage of time.

B. Managerial Direction and the Limits of Justice

In the final Chapter of the original edition of *The Morality of Law*, Fuller implies that he intends to address the question of the external morality of law.[58] That project promises that we will finally be treated to his views on the content of justice. As we read through the chapter, however, we discover that he has assembled a litany of failures to achieve justice because of errors of a procedural nature.[59] Among these we find a prominent presentation of Judge Henry Friendly's study of the operations of Federal Administrative Agencies, including the Civil Aeronautics Board and the Federal Communications Commission.[60] Judge Friendly's conclusion was that, despite valiant effort, these administrative agencies had failed completely to develop anything recognizable as a system of rules by which to govern their operations. Fuller's observation was that the reason that the agencies had not developed any law was because they were engaged in decisions in which they were making allocations, and allocative decisions by their nature are particular and are therefore not susceptible to governance by general rule.[61] The newsprint example mentioned above provides a good example of a proposed misuse of the adjudicative process. As Fuller endeavored to make very clear, adjudication assumes a body of general rules which can be applied by a decision maker to the facts in evidence.[62]

The point carried so much significance for Fuller that he expanded it in the Chapter Five "Reply to Critics" that he added to his original volume to constitute the Revised Edition of his book.[63] There he developed the notion of "managerial direction" as a contrast to law as the governance of human behavior by rules.[64] Managerial direction includes the many allocative and directorial functions carried out both by private enterprises as well as by governmental institutions. Not all of these functions are susceptible to governance by rule because of the nature of the tasks

[56] Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream 22, 28 (2004).
[57] Fuller, The Problems of Jurisprudence 28 (temp. ed. 1949).
[58] He titles the chapter "The Substantive Aims of Law." Fuller, The Morality of Law 152 (rev. ed. 1969).
[59] He addresses such topics as efficacy, id. at 155-57, effective legal action, id. at 168-70, and institutional design, id. at 177-81.
[60] Id. at 172-76. See Henry Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards (1962).
[61] Fuller states: "The attempt to accomplish such tasks [of economic allocation] through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusions, and frustration." The Morality of Law 173.
[62] "A judge is one who applies some principle to the decision of the case; if there are no principles, then the decider cannot be a judge—the case is not justiciable." Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc. L. Rev. 3, 28.
[63] The Morality of Law 187-242 (rev. ed 1969).
[64] Id. at 207.

undertaken. Indeed, Fuller shows us that only five of the eight canons of the internal morality of law can apply to managerial direction.[65]

Managerial direction requires a "rule-free response to changing conditions."[66] Decisions as to who "should perform a particular task when" or who "will get how much of what" are the stuff of managerial direction. Those decisions will call for the exercise of discretion by the decision maker, a discretionary power of distributive justice not suitable for governance by general rule. Intuitions about fairness may give us feelings of injustice regarding such exercises of discretion that make judgments of an aspirational nature.[67] We think of such decisions as applying to which person merits receipt of a Nobel Prize. However, a similar exercise of discretion is involved in awarding "Employee of the Month." In this way, Fuller shows us that the limits of Aristotle's conceptions of procedural justice allow us to make judgments of justice only when there are general rules which we can actually apply to situations. The absence of rules implies an inability to make judgments of justice.

## IV. Evolving Toward Justice

### A. Principles of Social Order

In a more positive direction, Fuller's exploration of the implications of Aristotle's analysis of justice led to his unprecedented development of the forms of social decision making. In an early statement of his stand on what at that time he referred to as "the principles of social order," he linked them to his understanding of the central truth about natural law.

> On the affirmative side, I discern, and share, one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common. It is an acceptance of the possibility of "discovery" in the moral realm that seems to me to distinguish all the theories of natural law from opposing views. In varying measure, it is assumed in all theories of natural law that the process of moral discovery is a social one, and that there is something akin to a "collaborative articulation of shared purposes" by which men come to understand better their own ends and to discern more clearly the means for achieving them.[68]

Fuller makes several important points in this brief quotation. First, he is interested in the method of natural law as a necessary corrective to the limits of positivistic method. Second, he embraces the possibility of moral discovery. These issues reflect both the influence of Aristotle as well as Fuller's fundamental orientation in the sociological theory of symbolic interactionism. The originator of symbolic interaction George Herbert Mead expressed his view of the mind as a combination of the I and the Me. One was the receiver of experience; the other was reflection

[65] The requirements of generality and congruence between the rule and its enforcement do not apply to managerial direction. The prohibition on retrospectivity is inapplicable. Id. at 208-209.
[66] Id. at 214.
[67] On the morality of aspiration, see id. at 5, on the problems of making judgments in an aspirational context, see id. at 30-32.
[68] Fuller, *A Rejoinder to Professor Nagel,* 3 Natural L.F**.** 83, 84 (1958).

and interaction with the experience. The self was constructed of the combination of experience and reflection.[69]

As it happens, Fuller told me that when he was studying symbolic interaction, he read Mead's followers like W. I. Thomas.[70] Later, when Mead's students posthumously published his lectures, *Mind, Self and Society*,[71] Fuller was involved with other research and never read Meade's book. Yet, in his response to Hart in the 1958 debate in the *Harvard Law Review*, he defined morality as the product of a process of experience and discussion.[72] Because discussion is reflection carried out in a social setting, we find a perfect parallel between Mead's experience and reflection for the individual and Fuller's experience and discussion as the way in which morality is continually generated within society. Since the morality is continually evolving, the notion of moral discovery is firmly embedded within it. Moreover, this conception of morality arises from the same methodological assumption as his exploration of the principles of social order.

B. The Possibility of Moral Progress

Even more importantly, the possibility of moral discovery necessarily implies the possibility of moral progress. As it turns out, Fuller affirmed that belief quite explicitly. In 1965 in *Irrigation and Tyranny* in the *Stanford Law Review*[73] he expresses, more clearly than in previous work, his belief in the possibility of human progress, the possibility of moral evolution.

> So, if humanity has over the centuries shown some slight capacity to outgrow its inclination toward and its dependence upon despotism, this growth reflects not only the increasing availability of social alternatives to despotic rule, but also an increasing moral disposition to employ these alternatives which has itself been nurtured by actual experience with their use.[74]

What Fuller shows us here might seem surprising in light of the intellectual modesty that restrained him from articulating anything concrete about substantive justice. Yet, he expresses cautious optimism with respect to the possibility of continuing moral discovery, even of further moral evolution. He foreshadows that belief in his early work in which he imagined the possibility of the discovery of new forms of social order. In this later work, he becomes more specific in envisioning new ways of organizing social life, of directing human affairs that had not previously been conceived. Although we find it impossible to imagine what has not been invented yet, if we look back in time, we see an impressive history of human invention of institutions of social organization and governance.[75] Courts, legislatures, and executives all look

[69] G.H. Mead, Mind, Self and Society 197 (1934).
[70] For an example, see Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 455 (1934) (referring to Thomas' "definition of the situation").
[71] Mead, supra note 69.
[72] Morality consists of "generally shared views of right conduct that have grown spontaneously through experience and discussion." Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 638 (1958).
[73] Fuller, *Irrigation and Tyranny*, 17 Stan. L. Rev. 1021 (1965).
[74] Id. at 1034.
[75] Schwartz and Miller, Legal Evolution and Societal Complexity, 70 Amer. J. Soc. 159 (1964).



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very different today than they did 300 years ago, 600 years ago, 1,000 years ago. Moreover, if we reach far enough back in our social evolution, we can find no institution that we would call a legislature. Whatever institutions that existed then do not fall into our neat categorization of the branches of government.

For example, we now take police for granted, but policing is a recent invention that is only about 200 years old. The Bobbies in London received their name in popular speech from the fact that the Prime Minister at the time, Sir Robert Peel, came up with the idea for a permanent and more or less professionalized policing force, an institution that had not previously existed.[76] A further example would be the administrative agencies that now abound. A century ago they were quite a new idea. Many other examples could be explored, but the point is that it is possible to think of new ways of organizing things that can help us to improve the structure of our social order. What Fuller finds here is the link between the discovery of new forms of social order and the possibility of moral progress. That result is far from guaranteed; its achievement depends upon human effort, upon our joint good will, and upon our willingness to engage in real communication.

V. Communication as the Road to Substantive Justice

Indeed, Fuller came to believe that our willingness to undertake the effort to achieve communication constitutes the really critical element in our endeavor to discover justice. At the very end of the final chapter of the original edition of *The Morality of Law*, Fuller responds to H.L.A. Hart's contention that the goal of personal survival provides a minimum content of natural law.[77] Fuller expresses his hope that we can manage some degree of human striving greater than mere survival. Instead, Fuller stakes a bold claim for the central importance of communication as a defining characteristic of human existence:

> If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law--Natural Law with capital letters--I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. . . . And if men will listen, that voice . . . can be heard across the boundaries and through the barriers that now separate men from one another.[78]

Communication provides the means by which we engage in that process of reflection and discussion of our experience, a process that Fuller had earlier conceived of as producing our views of morality.[79] Moreover, communication provides the means by which we can hope to participate in the ongoing process of moral discovery. In this Symposium, Emily Hartegan's contribution especially impresses me.[80] She undertakes efforts at communication across significant distances of value judgment. In discussion, several participants expressed rather

[76] Hall and Albion, A History of England and the British Empire 598 (3d ed. 1953).
[77] H.L.A. Hart, The Concept of Law 192-93 (2d ed. 1994).
[78] Fuller, The Morality of Law 186 (rev. ed. 1969).
[79] Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 638 (1958).
[80] Hartegan,



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strong skepticism at the success her efforts might have in bridging such impressive cultural gaps. However, I believe that Fuller would heartily applaud her efforts.

A. How Communication Works: A Case Study

I believe that Fuller would approve of Professor Hartegan's efforts precisely because he himself took on a communicative challenge that was even greater at the time. In 1961, Fuller made an extended visit to Poland.[81] The Soviet bear held Poland in its secure grip. Because Poland was behind what Winston Churchill had called the Iron Curtain,[82] Americans perceived it to be part of the Soviet threat. Nor did the United States see any possible chinks in the Soviet armor. Fuller's travels in Poland were far from the typical American academic excursion. He spent six weeks there, speaking with leading legal and judicial officials and important members of the academic community. When he returned, he drafted an extensive report of more than forty single-spaced typed pages.[83] Most remarkably, he had no plans to publish this report of his investigations. He intended his report for private circulation. Among those on his list to receive a copy was his former student at Duke University Law School, Richard M. Nixon. Nixon had served as Vice-President under Dwight David Eisenhower. He had then lost very narrowly to John F. Kennedy in the disputed presidential election of 1960. He held solid credentials as a vigorous cold war opponent of world communism.

Nixon did not at first respond to the report when he received it from Professor Fuller, so Fuller sent him another copy.[84] Fuller had reported his earth-shattering opinion that the Polish officials with whom he spoke were open to communication. Nixon now responded that he was shocked at the suggestion, that he believed eternal vigilance was necessary against the Communist menace, but that he valued Professor Fuller's insights.[85] The seed of an idea had been planted.

Fuller emphasized his point in the conclusion to his book quoted above: "Open up, maintain, and preserve the integrity of the channels of communication."[86] Six years later when Nixon ran successfully for President, he chose Henry Kissinger as his National Security Advisor. Detente with the USSR's Leonid Brezhnev ensued, capped by Nixon's famous visit to Communist China. Political observers are generally agreed that only someone with the solid anti-communist credentials that Nixon possessed could have managed to pull off such a complete about-face in U.S. policy. Nixon's initiatives to the communist world began the process that culminated more quickly than one could have imagined in the destruction of the Berlin wall and the disintegration of the USSR. We cannot know what prospects Fuller thought possible when he drafted his

[81] I have treated this historical vignette at greater length in Robert C.L. Moffat, How Can Law Pave the Road to Perpetual Peace? What Law Does and What Law Does Well, in *Kant and the Problems of the Contemporary World* 295-302 (Krakow, Poland: Jagellonian University Press, Justyna Miklaszewska ed. 2006).
[82] The phrase appears in a speech by Churchill at Westminster College in Fulton, Missouri, on March 5, 1946. See also Hall & Albion, A History of England, supra at 1038.
[83] Lon Fuller, An Unsolicited Report on Poland (43 pages) 1961, on file at the Richard Nixon Library, Yorba Linda, California.
[84] Letter from Lon Fuller to Richard Nixon, dated November 14, 1961, on file at the Richard Nixon Library, Yorba Linda, California.
[85] Letter from Richard Nixon to Prof Lon Fuller, dated November 30, 1961, on file at the Richard Nixon Library, Yorba Linda, California.
[86] Lon Fuller, The Morality of Law, New Haven, Yale University Press, 1964, p. 186.

extensive report, and he did not live to see the fall of the USSR.[87] What we can know decisively is that, at the time he wrote it, very few thought that communication with those behind the Iron Curtain held any promise whatsoever.

B. How to Thwart Communication and Obstruct the Quest for Justice

Although the case in favor of efforts to communicate is clear, we must also be aware of the conditions that are essential for the process of communication to be effective. Fuller assumed the effectiveness of argumentation in the process of justification. However, in order for that process to work, the fundamentals of all successful communication must be observed. Clearly, the discussion must be open. As Professor Ehrenreich indicates in her Introductory Essay, the discussion must be free of dogma. The exchange of views must shun absolutes. We should beware of anyone who claims to have final answers. We must ignore anyone who contends that no more debate or discussion is needed.

Indeed, that contention characterizes the most evil of governments. Cutting off debate and controlling communication in general are indispensable tools of despotic regimes. Both Hitler and Stalin were masters of controlling the flow of accurate information and replacing it with disinformation, a term made notorious by the Soviets. We see this phenomenon at work at the present time in the efforts of the Iranian mullahs to suppress the protests of their subjects, who believe that those rulers rigged the results of the recent election.[88] At the present time, an unfortunate number of other practitioners of this evil art range around the globe in countries from Burma with its loathsome generals to Venezuela and its would-be President-for-Life Hugo Chavez.

Why is open communication so vital? We must recall that for Fuller the process of natural law is one of moral discovery. How then can we call time out at some point? How could we allow anyone to declare "Now we have the answers; the codes will be promulgated tomorrow; and they will provide all you need to know about the requirements of substantive justice?" Why should we believe that the process of moral discovery has come to a screeching halt all of a sudden? Does it not seem arrogant to claim that human knowledge is now complete? Why should we accept that there is no more discovering to be done; that our insight is now perfect? The Apostle Paul made many claims of humility, but we can be forgiven for wondering if all his claims were entirely sincere. In I Corinthians, however, he foresaw perfect knowledge, but not until he reached heaven. There, he thought, he would no longer see as through a glass darkly, but then face to face, he thought "shall I know even as also I am known."[89]

So that kind of perfect understanding in which the process of moral discovery can reach its final culmination may be a destination that can be reached only in the perfection of a heaven. If the religious motif is bothersome, we could consult the noted atheist Richard Dawkins. He might

[87] Fuller died in 1978.
[88] For a penetrating analysis, see Edward Luttwak, Iran's Regime Will Never Be the Same, *The Wall St. J.*, June 24, 2009, page A15.
[89] 1 Corinthians 13: 12 (KJV). See The Bible: An American Translation (Goodspeed trans. 1939) ("If there is knowledge, it will pass away." id. at 8b; "For now we are looking at a dim reflection in a mirror, but then we shall see face to face. Now my knowledge is imperfect, but then I shall know as fully as God knows me." id. at 12).

suggest that at some point in the future we will be revisited by the aliens from outer space.[90] Those beings might now decide that we have evolved enough that we are ready to be blessed (or cursed?) with perfect knowledge. Fuller did not imagine anything so fanciful. The realm of human possibility, as he saw it, condemns us to continue trudging along, engaging, if we are persistent, in the process of moral discovery.

What Fuller did see was how easy it is to obstruct the process of moral discovery. He noted that the great judges, like Benjamin Cardozo[91] and Lord Mansfield,[92] depended on argumentation as a vehicle to produce justifications that would in turn generate the moral discovery of new insights into the demands of justice. On the other hand, he saw clearly how important despots found the need to suppress debate and control information.[93] Their claim that their dogma provides the enshrinement of perfect justice means that no more argumentation is necessary. The despot has the answers and anyone who disagrees will shut up or be shut away. Suppression of debate brings to a halt the process of moral discovery.

We may be surprised to learn that Fuller's conception of moral discovery includes the entire range of social discoveries, including even those of science. Those who consider themselves guardians of absolute truth do not hesitate to obstruct any exploration that threatens their dogmatic hegemony. The tribulations visited upon Galileo are famous.[94] Stalin brought to a halt progress in biological research in the Soviet Union by commanding that Lysenko's theory must be accepted.[95] More modest, yet important, examples are provided when school boards follow a political agenda in deciding what must be included in or excluded from the curriculum.[96] Similarly, in too many university departments, alternative views are simply not voiced.[97] But, in any discipline where you terminate debate, you likewise foreclose further progress in the process of moral discovery.

The whole lengthy debate regarding what has come to be called "hate speech" presents us with an agonizing dilemma.[98] Speech that is as obnoxious as the actions of the Iranian mullahs

[90] He expressed the idea in an interview with Ben Stein that was included in the documentary *Expelled: No Intelligence Allowed* (2008). He offered a more extensive explanation of his view in an interview with Terry Gross on "Fresh Air" WHYY Philadelphia, March 28, 2007, http://www.youtube.com/watch?v=kNu8F01BD9k

[91] Cardozo, The Nature of the Judicial Process (1921).

[92] His most famous statement of his judicial philosophy is found in the argument he made while he was still Solicitor-General Murray: "All occasions do not arise at once; . . . a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament." Omychund v. Barker, 1 Atk. 21, 33, 26 Eng. Rep. 15, 22-23 (Ch. 1744).

[93] See, e.g., Fuller, The Morality of Law 123 (rev. ed. 1969).

[94] See Stillman Drake, Galileo at Work: His Scientific Biography (1978).

[95] "In August, 1948 Lysenko triumphantly announced to the Academy of Science that his biological views had been approved by the Central Committee of the Communist Party and members rose as one man to acclaim this decision." Michael Polanyi, Personal Knowledge 238 (1958).

[96] See, e.g., Randall Hall, Unnatural Selection: The Fundamentalist Crusade against Evolution and the New Strategies to Discredit Darwin, 17 U. Fla. J. Pub. Pol'y (2006).

[97] See, e.g., Collier, Affirmative Action and the Decline of Intellectual Culture, 55 J. Leg. Ed. 3 (2005); id., Intellectual Authority and Institutional Authority, 35 Inquiry 145-81 (1992), reprinted in 42 J. Leg. Ed. 151 (1992).

[98] For example, see the fine work of my colleague Charles Collier, *Meaning in Law: A Theory of Speech.* New York & Oxford: Oxford University Press, 2009; id., Speech and Communication in Law and Philosophy, 12 *Legal Theory* 1-17 (2006); id., Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory,

suggests that we must try to stamp out whatever we can. Yet those codes may backfire, and we are left to worry about the emotions that may be pushed underground. Moreover, even for the best of motivations, we risk endangering the climate of moral discovery with the great chill of threatened censorship. We need to consider the counsel of cooler heads like Dean Martha Minow who advise against privileging the victim mentality.[99]

Efforts to enlarge the range of those with whom we endeavor to communicate seem essential to future progress. However, some of those with whom we might try to communicate hold truly loathsome views. What standards can we develop to guide us in determining when such efforts may be worthwhile? Moreover, can we generate a clearer distinction between the complete surrender of values implied in absolute cultural relativism and genuine steps to bridge broad chasms of cultural norms? Such questions make clear to me that we have much more work to do in carrying out the indispensable task of communication.

## VI. Conclusion

As I said at the beginning, the goal of this essay is to provide some perspective in our search for substantive justice. Its objective is to assist in the endeavor to say something positive about the substantive content of justice. In particular, the method employed has been to share the insights generated in the life-long exploration of natural law carried out by Lon Fuller. His outlook can be better understood by exploring the state of legal thinking that the young Fuller found as he embarked on his academic career. That setting explains why Fuller turned to natural law, as well as the distinctive perspective he developed. More specifically, his approach to natural law avoided its substantive side for three reasons. First, claims of natural law really turned out to be a competing form of positive law. Second, when looked at in historical perspective, substantive natural law quickly became dated. Finally, he found many claims of substantive natural law to be shocking in their claim to absolute truth.

In place of those blind alleys, Fuller looked for the foundations of justice in the realm of procedure--in the largest sense of that word.[100] Building upon Aristotle's classic analysis of distributive and corrective justice, he advocated exploring the principles of social order. That work produced many insights, including his distinction between law and managerial direction and the consequent limits on the judgments of justice we are able to make. In a positive direction, he began the work of showing us how the principles of social order offer an evolutionary path toward a greater understanding of justice. Finally, that evolutionary theme culminates in his statement of faith in the possibility of moral progress.

Even so, moral progress is merely a possibility. Having confronted the horrors of the Second World War as he did,[101] Fuller could not countenance unbridled optimism. Amazingly though,

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7 *Legal Theory* 203-34 (2001).

[99] Minow, Surviving Victim Talk, 40 UCLA L. Rev. 1411 (1993).

[100] "[T]he word 'procedural' should be assigned a special and expanded sense." Fuller, The Morality of Law 97 (rev. ed. 1969).

[101] Among many examples, see Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 648-57 (1958).

he was still able to believe in the possibility of positive work toward the achievement of greater knowledge of substantive justice. Progress toward that goal comes only through employment of real communication, however; not the easy communication with those of like minds. Rather, Fuller anticipated the challenging kind of communication with those who hold very different views. For him, this postulate was no mere academic idea. He put it into work in his path-breaking efforts with the Polish officials who were then viewed as being imprisoned behind an impenetrable Iron Curtain. His effort shows us what communication can achieve. At the same time, we must not allow ourselves to forget that there are many roadblocks to successful communication, just as there are many whose efforts to protect their own dogmas will happily strive to obstruct our quest for justice.

## VII. A Project Proposing Further Exploration in our Quest for Justice

On the basis of this rudimentary outline of Fuller's views regarding justice, I suggest a question for further study. What might be the link between conceptions of law held by those engaged in Critical Studies of Law and limitations both on perceptions of justice and on the scope of criticism produced?

Exploring Fuller's views suggests strongly that the conception of law we hold has a direct impact on what we see as possible in the nature of justice. Critical Studies of Law have in general followed American Legal Realism in adopting the particular command version of legal positivism.[102] As we have seen, that version of legal positivism has no room for the application of general rules. We also noted that it is general rules which allow us to make judgments of justice.[103] Hence, we must ask whether a positivist view of law has obstructed those who pursue Critical Studies of Law in their efforts to conceive of substantive justice. If so, that raises some additional foundational questions.

Obviously, scholars engaged in Critical Studies of Law are not going to abandon criticism of the law. However, criticism of the law implies some standards of justice from which to make value judgments. Exploration of Fuller's thinking reveals the larger comprehension of justice that is possible when our horizons escape the limitations of legal positivism. Consequently, the real challenge for Critical Studies of the law is whether they can continue to provide critique if they adopt a non-positivist view of law? One of the important aspects of a non-positivist view of law is that it embraces fully the social foundations of the law. From a critical standpoint, part of the problem with a sociological view of law might be that it could be taken to imply a positive acceptance of the law as the law in action.[104] That aspect of a non-positivist view of law surely concerns those engaging in criticism of the law. On the other hand, a sociological view of law also provides a larger and deeper target of criticism. Paradoxically then, a legal positivist view

[102] See, e.g., Note, Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 (1982) (arguing that recognizing the historical contingency of the law is a first step toward social and political change because this realization removes "the sense of necessity inherent in perceptions of the present social order").
[103] See text accompanying notes 58-67 supra.
[104] Pound, Law in Books and Law in Action, 44 Am L. Rev. 12 (1910).

of law has limited the scope of criticism of the legal system provided by many critical studies of the law.

Stated in an oversimplified way, criticism based on a legal positivist view of law is condemned to remain superficial, in the sense that the social foundations of the law remain unexplored. What is unexplored, of course, will not be subjected to critical reflection, as the distinguished critical philosopher Robert Paul Wolff observed in praising Fuller's contribution to legal philosophy.[105] In previous work, I have concluded that appraisals of law and the legal system that dig into the social foundations of the law produce a much deeper and more radical critique than those that look only at the law in a positivist sense.[106] Consequently, we should anticipate the generation of more penetrating criticism if the sociological roots of law are explored. Clinging doggedly to a positivist view of law seems perversely obstinate in the face of knowledge that critical projects founded on a deeper exploration of law and society promise to further our understanding of the continuing demands of and for justice.

[105] "Fuller's theory . . . is in fact potentially revolutionary, for it defines standards against which actual law can be measured and rejected as inadequate." Wolff, Afterword, in The Rule of Law 243, 251 (Wolff ed. 1971).
[106] "[T]he common thread pulling together [these most radical] approaches . . . is a focus on the social dimension of society and law. That same theme characterizes the approaches of Marx, Pashukanis, and Habermas. Such approaches find too limiting the individualism of liberal theories such as utilitarianism and legal positivism." Editors' Introduction, Radical Critiques of the Law 1, 16 (Stephen Griffin & Robert Moffat eds. 1997).

## Justice as fairness: Rawls' theory of justice*

The most influential theory of distributive justice is that of the American philoso-pher John Rawls (1921–2002). Rawls held chairs in philosophy at Cornell Uni-versity and the Massachusetts Institute of Technology before moving to Harvard University, where he worked for more than 40 years. Rawls' theory of justice as fairness was set out in his seminal work *A Theory of Justice*, first published in 1971, but its elements were already in place by 1963 (Rawls 1963, 100–5).

Rawls' theory of justice is a theory of just political institutions. It is not a theory of distributive justice based on the wants or needs of individuals or groups. He explained it this way:

> Put another way, the principles of justice do not select specific distributions of desired things as just, given the wants of particular persons. This task is abandoned as mistaken in principle, and it is in any case, not capable of a determinate answer. (1963, 102)

Rawls' theory, then, is about the justice of political arrangements. It is a theory of distributive justice only in a limited sense. It does not call for fair shares of the social pie, but rather seeks to maximise equal liberty of individuals without disadvantaging the least endowed groups in the community.

* Suri Ratnapala, **Jurisprudence,** pp. 336-349 (2009).

## Why distribute at all?

Imagine a free society of individuals who are constrained only by the rules of legal justice, such as the laws of crime, tort and contract. Every person either produces their own material goods or obtains them by legal exchange with others. Some goods – such as security of person and property (police services) – may be difficult to secure, so individuals may band together to hire a protection agency that is able give everyone security. They may end up creating what Nozick called a minimal or night-watchman state, to which the members of society pay fees (called taxes) in return for protection (Nozick 1974, 26–8). The night-watchman state does not redistribute rights but simply protects them. Where is the injustice in such a community? Distribution achieved by voluntary transactions between two free persons can hardly be called unjust. The plumber needs money and I need my taps fixed. We satisfy each other's needs by contract. Agreement between people with similar bargaining strength represents the purest form of justice.

The need for distribution, according to Rawls, arises from the fact that people gain more by social cooperation than by living alone by their own efforts (Rawls 1999, 4). Let us say that a person living alone will be able through their own efforts to gain utilities worth X. They gain utilities worth Y by cooperating with each other. The net gain for all is Y − X, which, let us say, is S. The question, then, is how to distribute S. There are different kinds of social cooperation. Members of primitive societies survive by cooperative hunting, gathering and defence. Since I live in a market exchange society I cooperate with others (in fact, directly and indirectly, with millions of others), mainly through contract. I don't have to do my own plumbing, car repairs, medical treatment, gardening, and my tax returns because I get others to do these things at an agreed price. I also need not grow my own food or make my own wine because I can buy them at my local supermarket and wine store. This means that I can use my time for other things that I wish to do, like reading a book or watching cricket. The markets on which I rely work because of the rules of just conduct that most people voluntarily observe, as in performing contracts and respecting each other's person and property. Rawls' point that I am better off in society than by myself is valid, but so is everybody else. The case for distribution is still not clear. Rawls argued that people differ on how the gain from cooperation should be divided, and therefore it is necessary

to have an institutional structure that distributes the surplus fairly, according to a set of principles that all can agree on. He wrote: 'There is a conflict of interest since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share' (1999, 4).

The problem of distributing the surplus is clearer in a primitive society. A caveman who hunts by himself with primitive weapons may only take small game with great effort. He will not share that meat with anyone but his own family. A hunting party of cavemen may bring down a large animal that will provide everyone with meat for a month or more. The cooperation has made everyone substantially better off. Traditional rules will determine who gets which share of the meat. The need for rules for distributing the surplus created by a market exchange society is less clear. People buy the benefits they receive. The persons who gain from the existence of a market exchange society may have already paid for their gains, raising the question: should they pay again? Rawls did not address this issue. Let us leave this question for later, and examine Rawls' theory on the assumption that there is a surplus that needs to be distributed.

## The new social contract: two principles of justice

Many philosophers who have tried to work out the terms of a just social order have been attracted to the idea of the social contract. Rawls said that his aim was to present a conception of justice which 'generalises and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant' (1999, 10). Imagine a number of persons living in an original condition where each person fended for themselves through their individual efforts, with no cooperation among them. Imagine also that they each realised that they could do much better for themselves if they cooperated at some level on agreed terms. What kinds of rules of association would they agree on? This is not the way human societies actually grew. The evidence suggests that society is not the product of deliberate designing, but the result of habits and traditions that grew gradually and imperceptibly among people coming into daily contact with each other. Nevertheless, philosophers have found the idea of an original condition a useful device to speculate on the kinds of rules that people in their primordial state would find agreeable as the basis of social cooperation. This is the kind of condition that Hobbes and Locke called the state of nature. Hobbes described the state of nature as one in which every person was at war with every other person. Life in this state, he famously said, was 'solitary, poor, nasty, brutish and short' (Hobbes 1946 (1651), 82).

Hobbes thought that the persons who wished to escape the state of nature would agree to establish a sovereign government, to which each individual would concede their autonomy in exchange for the sovereign's commitment to protect their life, liberty and property. Locke's state of nature was not so harsh, but also

had the fatal flaw that each person was their own law maker, judge and law enforcer. The people under Locke's social contract create a government with limited power, which is:

> . . . bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by these Laws; And to employ the force of the Community at home only in the execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion, And all this to be directed to no other end, but the Peace, Safety, and publick good of the People. (Locke 1960 (1690), 371)

Rawls also adopted the social contract device to construct his theory of justice. He did not take us back to the state of nature, but to an even more primordial state in which we are ignorant about ourselves. We do not know our stations in life, and what knowledge, abilities and skills we have. In fact, we have no knowledge that allows us to predict what the future holds for us. Rawls then speculated on what kind of political arrangement we will adopt, from among the many alternatives available in a situation where no one knows whether they will end up at the top or the bottom of the social heap. He concluded that people negotiating behind this veil of ignorance will agree to the following principles, which he called the principles of justice:

*First Principle*: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

*Second Principle*: Social and economic inequalities are to be arranged so that they are both:

a) to the greatest benefit of the least advantaged, consistent with the *just savings principle*; and

b) attached to offices and positions open to all under conditions of fair equality of opportunity (1999, 266).

The First Principle is a straightforward endorsement of the classical liberal ideal that an individual should have the greatest degree of freedom that is compatible with the equal freedom of others. It is most famously expressed in John Stuart Mill's aphorism that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others' (2002 (1869), 8). Absolute freedom is impossible when we live in society. My freedom to swing a baseball bat ends where your head begins. If I have total freedom to practise my baseball swing in a crowded bar, I will destroy the freedom of other patrons to drink their beer in peace. My freedom to drive on a suburban road at high speed will limit the freedom of others to use that road. Unrestrained freedom of speech can lead to incitement to violence against others, to the destruction of reputations and the subversion of fair trials. In a society that values freedom for all, there cannot be absolute freedom.

The Second Principle is not so straightforward. First, what is the *just savings principle*? It is the principle of justice between generations. Each generation must leave to the next not only its political institutions but also sufficient assets and resources:

> Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time suitable amount of real capital accumulation. This saving may take various forms from net investment in machinery and other means of production to investment in learning and education. (Rawls 1999, 252)

In practice, this means that there is a limit to how much can be transferred (through taxes and subsidies) to the least advantaged people in the current generation.

It must be noted that inter-generational transfer of moral, cultural and economic capital happens anyway, in the normal course of social life. Most parents invest heavily in the upbringing and education of children. Some parents strive to leave some legacy to their children. In some traditional cultures, like the one in which this author was raised, parents make enormous personal sacrifices to ensure the education of their children. Consider the case of commerce and industry. Businesses are ongoing operations that can grow over many generations. A corporation has a life beyond the lifetimes of its directors and shareholders. A government cannot and does not build roads and bridges only to benefit the current generation. Again, what is the current generation? The reality is that generations are intermingled in a continuum. The next generation is already with us, shaping economic activities even as we progress to retirement. Its members are already partially in command.

## The meaning of the Second Principle

Leaving this issue aside, what does the Second Principle mean? First, it assumes that social and economic inequalities are unavoidable in society. Second, it assumes that social and economic inequalities can be 'arranged' by political action. So, what are the conditions that justify inequality? According to Rawls, they must: (1) be of the greatest benefit to the least advantaged; and (2) provide a fair equality of opportunity to all to gain 'offices and positions'.

### Fair equality of opportunity

What is a fair equality of opportunity? Rawls considered two possible interpretations. The first is an interpretation in terms of what Rawls called a system of natural liberty. This is a system that eliminates all legal barriers to the attainment of offices and positions but does nothing to assist persons in gaining them. There are no positions reserved for nobility and all careers are open to talent. It presupposes equal liberty for all and a free market that allocates goods according to supply and demand. Rawls rejected this system, as it does not help people

disfavoured by social circumstances and chance (1999, 62–3). Children of affluent and educated parents, for example, are more likely to be well educated than are children of poor working class families. Chance brings windfalls to some and adversity to others. According to Rawls, a system of natural liberty does not offset these factors. This is not entirely true. There is no reason to presume that human qualities such as friendship, charity and benevolence are lacking in the state of natural liberty.

The second option is what Rawls called a 'liberal interpretation'. The reader should be aware that Rawls used 'liberal' here not in the sense of classical liberalism or libertarianism (which is closer to what he calls natural liberty) but in the North American sense of social democratic liberalism. Liberals in the American sense think that formal equality is not enough and that some affirmative action is required to deliver actual equality. In Rawls' words, liberals recognise 'the importance of preventing excessive accumulations of property and wealth and of maintaining equal opportunities of education for all . . . and the schools system, whether public or private, should be designed to even out class barriers' (1999, 63). Rawls thought that the liberal interpretation was superior to the natural liberty interpretation but was still inadequate: 'For one thing, even if it works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents . . . shares are determined by the outcome of the natural lottery, and this outcome is arbitrary from a moral perspective' (1999, 64). Even if every person is given the same opportunities for education, some persons will have advantages over others because of their inborn characteristics. Take a class of students having the same state provided benefits, such as free tuition and living allowances. Some will do better than others because of personal qualities such as superior intelligence, better work ethic, effort and motivation. In other words, some students will make more out of their equal opportunity than others. Inequalities will arise inevitably over time, and the offspring of the more industrious and successful students will have greater opportunities than those of the less successful.

Rawls believed that more should be done to promote equal opportunity by limiting wealth accumulation. Limits can be placed by devices such as inheritance and gift taxes and restrictions on rights of bequest (1999, 245). These are meant to prevent the concentration of wealth, which tends to enhance inequality of opportunities. The other way is through income tax, which allows the state to make transfers to the least advantaged and hence increase their opportunities (Rawls 1999, 246).

### The difference principle

It should be remembered that Rawls was trying to explain the principles that people in the *original position* will accept, in the state of ignorance about their future condition. He argued that they will find the fair equal opportunity principle to be inadequate even when it is given the liberal interpretation as explained

above. The people behind the veil of ignorance will wish to make sure that if they find themselves at the bottom of the pile, they have an assurance that those at the top cannot get further ahead by making their position even worse. Hence, they will insist on what Rawls calls the difference principle.

According to the difference principle, 'the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate' (Rawls 1999, 65). Let us say that A represents the better off people in society and B represents the worst off people. No change in the rules should be made that makes A better off unless it also makes B better off. A rule may be made that makes A worse off and B better off. What does the difference principle mean in practice, in the kind of market exchange society that many people live in?

Rawls thought that markets are efficient means of allocating resources, but that they leave some people worse off and do not meet their basic needs. Hence, the difference principle requires a suitable minimum income to be guaranteed for everyone (1999, 245). This is done by taxing the rich and transferring some of the income to the poor. Once the suitable minimum is determined, the market may allocate the rest of the income. In fact, Rawls took the classical economic view that it is more efficient to meet the needs of the least advantaged by minimum income guarantees than by devices such as wage regulation (1999, 245).

## Priority of basic liberties

Rawls granted what he calls lexical priority to the First Principle over the Second Principle. Lexical (or serial) priority is explained as follows:

> This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception. (Rawls 1999, 38)

Rawls believed that people in the original position will wish to ensure that their basic liberties are given priority over equal opportunity and the regulation of inequalities. He also believed that the people would rank the Second Principle over the principle of efficiency, and rank fair opportunity over the difference principle (1999, 266). The overall ranking, therefore, can be stated as follows:

1. equal basic liberties
2. fair equality of opportunity with respect to offices and positions
3. arrangement of inequalities so that they are to the greatest benefit of the least advantaged
4. principle of efficiency and the maximisation of the sum of advantages.

An important question then is: what are basic equal liberties that are given priority? Rawls proposed a non-exhaustive list:

- political liberty (the right to vote and to hold office)
- freedom of speech and assembly
- liberty of conscience and freedom of thought
- freedom or integrity of the person, including freedom from psychological oppression and physical assault and dismemberment
- the right to hold personal property
- freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

When the elements of the two principles, the priority rules and the basic liberties are considered as a system, it is apparent that the people in the original position, according to Rawls, would vote for a political system remarkably like the market oriented welfare state democracies of the Western world.

## Entitlement theory of justice: Nozick's response to Rawls

Rawls' theory of justice is widely regarded as the most important contribution to political and moral philosophy since the 19th century. However, it is not without its critics, whether from the left, right or centre of the ideological spectrum. Critics on the left, for whom material equality is the primary value, regard Rawls' theory as too individualistic and liberal. Brian Barry, a liberal in the American sense, made a critical departure from Rawls' original position in his magisterial work *A Treatise on Social Justice* (1989).

Rawls' theory of justice is based on the hypothetical social contract reached by a group of self-interested individuals in a state of ignorance about their futures. They engage in a game of risk minimisation. Barry questioned whether this kind of game could yield truly moral principles of justice. Barry's model does not place the parties to the hypothetical social contract behind a veil of ignorance but only asks them to be impartial. Barry envisaged a process whereby the issues of justice are decided by persons who are aware of their positions in society and may defend it to a reasonable point. In Barry's original position, 'each person has a veto over proposed principles, which can be exercised unless it would be reasonable for that person to accept a principle' (Barry 1989, 372).

Rawls received his sternest examination from the classical liberal and libertarian thinkers, among whom the most prominent critic was the American political philosopher Robert Nozick (1938–2002). Nozick was Pellegrino University Professor at Harvard University until he succumbed to cancer at the early age of 63. Nozick wrote his book *Anarchy, State and Utopia* as a libertarian response to Rawls' *A Theory of Justice*. Nozick, like Rawls, belonged to the social contract tradition in political philosophy. Unlike Rawls' social contract, struck by persons

working behind the veil of ignorance, Nozick's social contract is the outcome of an evolutionary process involving free bargaining among individuals through the course of time.

## The night-watchman state

The state, in John Locke's theory, is born out of the need to overcome the insecurity that results from every man being the judge and enforcer of his own natural rights (Locke 1960, 368). Individuals escape this state of nature by creating a supreme authority under a trust or social contract that obligates the authority to protect life, liberty and estate of individuals. Nozick showed that, even without a Lockean social contract, an ultra-minimal state can arise through free contracting for protection services without violating anyone's rights. Imagine a state of natural liberty where each individual has a right to their own livelihood and there is no government. Each person relies on their own resources to protect their rights. Some are stronger than others, so person and property are insecure. In such conditions, it is natural that persons will form associations that are capable of providing their members with protection that individually they cannot provide for themselves. These protective associations provide protection only to their members. They defend members against violence by outsiders and settle disputes that arise between members by determining and enforcing the rights of each member. Successful protective associations may then offer their services to outsiders, who may or may not have their own protective associations. The more effective protective associations will absorb the less effective ones over the course of time, and eventually a dominant protective association will emerge. This association is what Nozick called an ultra-minimal state. It has no power to alter the rights and duties of members but only to protect and enforce them. It also has no power over non-members (independents) unless they violate the rights of the members. By the same token, its power does not extend to the protection of independents. Hence, it has no distributive role. The members of the dominant association may recognise that they have a moral duty to offer protection to these non-members who happen to be within their territory. This leads to the emergence of the minimal state, which Nozick called the night-watchman state. The night-watchman state eventually assumes a *de facto* monopoly of coercive powers over all persons within a territory, whether they are members or not.

The ultra minimal state has no distributive function. Those who purchase its services gain its protection, but not others. There is no transfer of wealth. In contrast, the night-watchman state that offers protection to all, including independents, *appears* to perform a redistributive function. Members pay for the protection of non-members. Nozick argued that despite this appearance, the night-watchman state is not a redistributive state (1974, 27). How so? Remember that the night-watchman state arises without the violation of anyone's rights, purely through contract. It exists to protect rights and not to violate rights, even

of independents. The independents may use self-help to vindicate their rights against members. The night-watchman state may ask the independents to use fair procedures before they act against a member, because members have rights to fair procedure. In other words, it prohibits the use of what it deems to be unfair procedures. This may seriously affect the way the independents go about their lives. They may, for example, have to take extra expensive precautions because they cannot use self-help to redress their wrongs. The members of the night-watchman state must therefore compensate the independents for this disadvantage. Nozick said that it may be cheaper on the whole for the members of the night-watchman state to offer protective services to independents to cover disputes that they have with members (1974, 110). If this is the case there is no redistribution.

Nozick concluded that the minimal state is the most extensive state that can be justified and that any state more extensive violates people's rights (1974, 149).

## Entitlement theory of justice

Nozick started his entitlement theory of justice by denying that anyone is entitled to engage in distribution of property. The philosophical foundation of his theory of justice in a free society is revealed in the following passage:

> There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are doled out. What each person gets, he gets from others who give to him in exchange for something, or as a gift. In a free society, diverse persons control different resources, and new holdings arise out of voluntary exchanges and actions of persons. There is no more a distributing or distribution of shares than there is a distributing of mates in a society in which persons choose whom they shall marry. (1974, 149–50)

Nozick understood distribution purely in the sense of entitlement: thus 'the complete principle of justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution' (1974, 151). Justice in holdings is represented by the following three rules:

1. A person who acquires a holding in accordance with the principle of *justice in acquisition* is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of *justice in transfer*, from someone else who is entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2. (Nozick 1974, 151)

These rules look backwards to see how a person came to hold the property, and in that sense are historical principles. A person may come upon a thing by purchasing it, by producing it, by receiving it as a gift, by gambling, by finding it, and so on. In legal terms, the transferee gets good title to a thing if the transferor had the right to pass property in the thing. It is possible that at some point in

the past a person obtained the property by theft, fraud or some other unlawful means. The current owner may be an innocent receiver in a chain of transactions that was started by a person who stole the property. How far back the law will look is a matter for each legal system, but all legal systems provide some means of rectifying past injustices. The common law and equity, for example, allow the tracing of property by the owner. Nozick therefore added a fourth principle:

4. A person who acquires a holding according to the principle of *rectification of injustice* is entitled to the holding (1974, 153).

Nozick added what he called a version of the Lockean Proviso. Locke's theory of property postulates that a person acquires a previously unowned thing by mixing his labour with the thing. A person who cultivates an acre of land that does not belong to any other person acquires it. Locke, however, stated a proviso that those who acquire things from nature must leave 'enough and as good in common' for others. Thus, if there is only one source of water in the desert a person cannot acquire it to the exclusion of all others. Nozick stated that any adequate theory of justice in acquisition will contain a similar proviso:

> A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened. (1974, 178)

Nozick contrasted historical principles with end-state principles. The aim of end-state principles is not merely to see that persons came to hold things in a lawful manner but also to determine a pattern of distribution of things across society according to some distributive principle. These principles can take many forms, such as: to each according to merit; or according to usefulness to society; or need; or marginal product; or the weighted sum of these qualities. The principles of historical entitlements do not ensure patterns of distribution, but on the contrary have a tendency to upset established patterns.

## Nozick's criticism of Rawls' theory of justice

Rawls' case for distributive justice in its simplest form is that a system of social cooperation makes everyone better off than a system of non-cooperation in which each person fends for themselves by their own effort. Principles of justice are required to distribute the surplus that results from social cooperation. People in the original position will decide on the two principles that Rawls stated. Nozick challenged this theory on several grounds, and the most important among them are explained in what follows.

### The principles that people settle on in the original position are not necessarily fair

This is an argument that Barry made, but it was previously identified by Nozick. People who have no knowledge of where they stand in society or what abilities

they possess will naturally seek to minimise their risk in case they happen to be the least endowed. Nozick's argument was: what has this to do with fairness and justice? Unanimity is not justice. Once the veil of ignorance is drawn they may find the system very unjust. Nozick employed the following illustration to make the point. I have simplified it for easy reading.

In the first scenario, a class of 10 students complete an examination and are given scores between 0 and 10. Let us say that the sum of all the scores given is 60. They are not told what scores each of them has received and are asked to determine unanimously what score each student should receive. The only condition is that the total of all the scores awarded must not exceed 60, which is the total of marks gained by the group as a whole. The students do not know how clever they are in relation to each other or how well each has prepared for the exam. In other words they are placed in a Rawlsian original position. The likely decision is to divide the total into equal shares so that each student gets 6. If the students are asked not to determine individual scores but a principle for distributing the scores, they would opt for the equality principle, namely dividing the whole by the number who sat the exam. The second scenario is the same as the first, except that the students are told the score each of them was actually awarded by the examiner. They are nevertheless given the right to overrule the examiner and award themselves the final scores. If self-interest is the sole criterion, the students will still not agree to anything but equality (Nozick 1974, 200).

The point Nozick made is the same one that Barry noticed. The conditions that Rawls created in the original position make self-interest the criterion for determining the principles of justice. Nozick's further point was that these conditions do not allow historical or entitlement principles to be considered. (The people do not even know their own histories.)

> The nature of the decision problem facing persons deciding on principles in an original position behind a veil of ignorance limits them to end-state principles of distribution. The self-interested person evaluates any non end-state principle on the basis of how it works out for him; his calculations about any principle focus on how he ends up under the principle. (Nozick 1974, 201)

## The problem of procedural principles in Rawls

A procedural principle is a principle that governs a decision-making process. Whatever emerges from following the procedure is considered to be just. The procedural principle Rawls used is that of a contract concluded by persons in the original position. He wrote: 'The idea of the original position is to set up a fair procedure so that any principle agreed to will be just. The aim is to use the notion of pure procedural justice as a basis for theory' (1999, 118).

Nozick noticed a heavy irony in Rawls' use of the contract process to generate his principles of justice. The contract process yields a principle that is anti-contract. Rawls' principles of justice do not deny the freedom of contract. However, the difference principle takes precedence over contract and thus limits

contractual freedom. Freedom of contract is permitted only if it improves the conditions of the least advantaged persons in the community. Nozick's essential point is this. If the contract is a fair process to determine the principles of justice, contract should also be capable of being one of the principles of justice so determined. 'If processes are good enough to found a theory upon, they are good enough to be the possible result of the theory. One can't have it both ways' (Nozick 1974, 208–9).

**Immorality of taking natural assets into account**

Nozick reserved his harshest criticism for Rawls' position that the distribution of natural assets is arbitrary from a moral point of view. Natural assets are the inborn or self-developed qualities of a person, such as intelligence, psychological motivation, strength of character, single-mindedness and endurance. Rawls' view of these assets is revealed by the following passage:

> While the liberal conception seems clearly preferable to the system of natural liberty, intuitively it still appears defective. For one thing even if it works to perfection in eliminating the effects of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents. Within the limits allowed by the background arrangements, distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from the moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune. (Rawls 1999, 63–4)

Rawls refused to recognise even conscientious effort as a basis of distribution. He said: 'It seems clear that the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him' (1999, 274). This led Rawls to the conclusion: 'The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset . . . Those who have been favoured by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out' (1999, 87).

As Nozick pointed out, this approach amounts to attributing everything noteworthy about a person to 'external' factors (1974, 214). He doubted that any coherent conception of a person would remain after the person is stripped of talents, assets, abilities and special traits (1974, 228). An individual's talents benefit society anyway. A talented person is likely, all being equal, to be more productive than a talentless person. A talented person may be of greater service to others. A physician may have a higher income than a law professor. Part of the difference may be attributable to the difference in talents. It is more likely, though, that the difference correlates to the greater usefulness of the physician to the community. In other words, the difference in the incomes is based on a difference that is not arbitrary from the moral point of view (Nozick 1974, 218).

## Nozick and social security

One of the frequent criticisms of Nozick's entitlement theory of justice is that it has no place for any form of socially provided safety net. The question, then, is whether the society can retain the loyalty of the poor who for one reason or another (such as old age and disability) cannot look after themselves. According to Nozick's theory, 'the state may not use its coercive apparatus for the purpose of getting some citizens to aid others' (1974, ix). The theory only excludes coercive means. In a minimal state social security will be a voluntary exercise. This presumably may take various forms, such as charities and privately funded social insurance. Nozick was aware that the apparent callousness towards the needs and suffering of others would turn many away from his theory. What he sought was a consistent theory of the state that did not violate the rights of citizens as defined by the rules concerning justice in holdings.

Another frequently heard criticism concerns Nozick's supposed failure to show why his entitlement theory is right. This is not true, as his entitlement theory is based on the Lockean moral theory of natural rights. Nozick rejected utilitarian arguments for entitlements because they lead to end-state justice, which is incon-sistent with his Lockean view of natural rights. His reasoning commenced in the state of nature before the birth of government. Individuals had natural rights to their lives, liberty and property. (Imagine trying to live without liberty and property.) Property is acquired in the first instance by persons taking possession of things that are not already owned. This is his principle of justice in acquisi-tion. Property thereafter changes hands according to the principle of justice in transfer and the principle of rectification. Nozick theorised how a minimal state may arise that does not violate these rights through free contracting. One may disagree with the Lockean theory of natural rights. However, anyone who adopts the Lockean view will find in Nozick's *Anarchy, State and Utopia* one of the most systematic, logical and coherent expositions of the principles of justice that flow from this view.

# Amartya Sen's Position on Social Justice: An Assessment of Social Injustice in Modern Society

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**Abstract**

*This article examines at Amartya Sen's thoughts on the subject of injustice and what justice is. To understand Sen's view of justice, one must consider his critique of Rawls' Theory of Justice. One way to read Sen's Idea of Justice is as a critique of Rawls' theory of justice with an alternative. Niti and Nyaya's human reasoning is able to discern between justice and injustice by analyzing and comprehending Sen's idea of justice, which was developed as a result of Sen's critique of Rawls' theory of justice. According to Adam Smith's Theory of Moral Sentiments, the moral standard is the unbiased observer. Sen brings this concept to the political justice discussion. Sen suggests the Capability Model in his writings as a remedy for the problem of equal justice.*

**Key Words:** Amartya Sen, Justice, Niti and Nyaya,

## Introduction

Amartya Sen's contributions to welfare economics, social choice theory, and the issues facing the impoverished earned him the 1998 Nobel Prize in Economic Sciences. His view of justice is comparative and evaluative. Sen's work expands on his earlier studies of capabilities and makes an effort to develop a thorough philosophy of comparative fairness. Sen's The Idea of Justice, dedicated to John Rawls, first distinguishes two schools of thought around the concept of social justice. According to Sen, the notion of social justice has been discussed for a very long time, but it was significantly reinforced by the social and economic transformations brought about by the European Enlightenment in the 18th and 19th centuries, which altered the political landscape in both Europe and America. As a result, the main philosophers' perspectives on justice follow two different lines of reasoning and two different techniques.

## Philosophical Perspectives on Justices

Thomas Hobbes was the first to suggest the justice concept in the 17th century, and it was later embraced by notable philosophers from a variety of schools, such as Rousseau, Locke, Kant, and Rawls. In modern political philosophy, the "social contract" hypothesis is a popular perspective that highlights social justice processes. Additionally, Sen calls this

approach the transcendental institutionalism technique. Smith, Wollstonecraft, Bentham, Mill, Marx, Condorcet, and others all supported different institutions that affect justice. Justice may be attained by comparing different lives under it, according to the comparative philosophy of justice (Sen, 2009:6-7).

The transcendental institutionalism method, according to Sen, aims to describe what is just and what perfect justice is without particularly addressing real societies, as opposed to contrasting justice and injustice in actual communities. Because it presupposes a hypothetical social contract scenario, Sen, views this part of the approach- which prioritizes the equal arrangement of institutions rather than individuals and real societies- as a contractual style of thinking. Since this social compact offers the ideal antidote to chaos and uncertainty, it is evidently significant.

"The results of this approach lead to the development of theories of justice that focus on the transcendent identity of ideal institutions," Sen says, highlighting the arrangement-focused nature of the transcendental institutionalism approach (Sen, 2009:6). Sen notes that the other approach to justice, the comparative justice approach, is realization-focused. Comparative theorists attempt to rectify this by demonstrating the injustice in the world and that social realization (actual institutions, behaviors, and other effects on human life) claims that they concentrate on the outcomes. Rather than restricting their research to the transcendent analysis of an ideal society, these theorists have compared current or likely cultures and focused entirely on eliminating injustice worldwide (Sen, 2009:7).

As a key distinction between the arrangement-focused and realization-focused approaches to justice, the realization-oriented approach- that is, the comparative justice approach—focuses on people's real behavior rather than their compliance with ideal behavior. The realization-oriented approach asks "How can justice be developed?" in contrast to the regulation-oriented approach (transcendental institutionalism approach), which asks "How is a competent just institution?" The realization-oriented approach concentrates on the actual realization of justice in societies rather than merely on institutions and regulations; in other words, it emphasizes comparison rather than taking a transcendent path (Sen, 2009:7-9). Sen contends that transcendental institutionalism is the prevailing perspective on justice in contemporary political philosophy and cites John Rawls as an example of this perspective.

According to Sen, the principles of justice may be seen in Rawls' Theory of Justice, where our relationship with perfectly just institutions is fully defined and specified, and the standards of proper action in the moral and political environment are illuminating. Sen contends that the transcendental institutionalism approach, which incorporates Rawls, has two issues with regard to justice. First, there can be an irrational consensus on what constitutes a just society, even in the face of rigorous standards of impartiality and open-minded examination (as in Rawls' initial view, for instance).

Sen declares that this is a transcending solution that has been agreed upon and that the viability of the result reached is the issue. The selection of the extremely unlikely ideal scenario from among potential options and the real selection requirements for a comparison framework of justice in the application of practical reason are two more of these issues. The repetition problem of research in terms of a transcendent answer is what Sen refers to as this (Sen, 2009:9). A fictitious state of equality (the initial position) is presumed to exist at the beginning of Rawls' theory of justice, as does the idea that

individuals who are ignorant of themselves will all agree on one of the two principles of justice.

Rawls, however, is unable to explain why other perspectives on justice were not selected. Sen, attempts to demonstrate with this approach to justice that Rawls' explanation of this concept of justice is incorrect. Sen contends that since Rawls developed his argument to highlight objectivity, various alternative viewpoints might readily reject it as unhelpful and unreliable. According to Sen, this blocks the fulcrum of Rawls' theory of justice. Sen is interested in ways to lessen unfairness, notwithstanding the fact that we all have diverse ideas about what a rationally consistent ideal system might look like.

In this regard, Sen views "the diversity of systems and lifestyles as things that signify human freedom, rather than as an error or mistake" (Sen, 2009:12). Sen contends that there can never be complete agreement on what constitutes a just world. There can be more than one competing cause for justice, all of which claim to be impartial. Sen (2009:16) contends that "there are multiple systems of values and criteria to consider justice." The fundamental idea of Rawls' theory of justice is truth, according to Sen (2009:54), who also notes that "The principles of justice in Rawls' formulation determine the basic social institutions that regulate society." When determining the principles of justice and impartiality in a hypothetical original circumstance, accuracy becomes necessary. Since the inception of political theory, "justice as truth has been central as a right" (Sen, 2009:55). The identification of suitable principles that dictate the consensus selection of just institutions required for a society's fundamental structure is one of the structural goals of righteousness practice. Accuracy and impartiality are integrated in Rawls to choose the right justice principles. This is where Sen situates Rawls alongside Kant.

According to Sen, "Those who defend a universal law, as Kant did, accept that the characteristics such as not being emotional and being objective are shared by most people" (Sen, 2009:57). Sen then discusses the variety of conflicting objective principles and attempts to clarify this by using the example of three kids playing a flute (Sen, 2009:16): Our three children are named Anne, Bob, and Carla, and we own a flute. One of these three kids has to get this flute. Bob wants that flute because he doesn't have any toys, Carla says she made the flute herself, and Anne thinks she only deserves it because she can play it.

In the aforementioned example, Sen, highlights that every youngster has a unique motive for possessing the flute, making it extremely challenging to decide who should receive it. Sen claims that liberals, utilitarians, and proponents of economic equality will all have different opinions about who should be given the flute. Because Bob is the poorest, for instance, economic egalitarians will support him; liberals will want to give the flute to Carla because Carla made it; and utilitarians will support giving it to Mother because only Anne is proficient on the flute and she will enjoy playing it the most. For Rawls and his adherents, Sen contends, only one of these kids will be correct, and the choice will be made accordingly.

Rawls is part of the transcendental institutionalism perspective, which views justice as universal and necessary, applicable everywhere and at any time. Sen, who contends that this is impossible, highlights that according to Rawls' theory of justice, there is only one kind of just society, and that is described in terms of principles. That is, this ideal form of Rawls cannot account for tenable, rational responses to the plurality that exists in the modern world, and all other replies fall short. However according to Sen, in the case of the three kids, we always violate at least one justice standard when we give the flute to one of

them: Not giving the flute to Anne will result in human performance; not giving the flute to Bob will lead to the abolition of poverty; and not giving the flute to Carla would be incompatible with the right to enjoy the fruits of one's labor.

Sen, notes that the aforementioned example makes it clear that there are valid reasons for each child to receive a flute. To put it another way, Sen contends that if we have to make a choice, we can only come up with three distinct answers for three distinct people. Sen contends that potential solutions are likewise illegitimate, emphasizing that it is extremely challenging to come to an agreement on the fundamentals of justice. Instead of talking about ideal solutions that might not work, the emphasis should be on selecting from among plausible alternatives. "If we try to choose between Picasso and Dali, we should not do it by referring to the diagnosis that Mona Lisa is the most ideal painting in the world," Sen (2009:16) tries to justify this decision.

Sen claimed that each of the three children's justifications in the "three children with a flute" scenario demonstrates non-arbitrary justifications and various forms of impartiality. Sen contends that no social institution, but only social negotiation, can bring about a peaceful resolution to such a dispute. In order to quantify justice, he highlights that this is achievable by eliminating standards that do not stem from common sense (Sen, 2009:14-15). As Sen notes, the flute example illustrates various basic concepts about what constitutes a just society that are examined independently and argued objectively. As a result, it appears impossible to identify the institutions required for the fundamental framework of society and to define the fundamentals of justice. Sen claims that "it is very difficult to use the whole procedure/procedure of justice as the correctness developed by Rawls in his theory" (Sen, 2009:57) because of this.

In his book *Theory of Justice,* Rawls makes the case that the development of justice principles will occur independently and that those who join together in the first place will not select other alternative beliefs about justice. Sen views Rawls' method as an attempt to arrive at a transcendent ideal. Sen, claims that although Rawls acknowledged later that it was difficult to get to a unanimous agreement on the one set of justice principles, this unsolvable issue had disastrous consequences for the notion of justice as truth. Sen, however, asserts that Rawls' theory "enriched political philosophy with its thoughts and played a great role in our understanding of various aspects of the idea of justice" (Sen, 2009: 58). However, Sen (2009:18) believes that "knowledge about the creation and regulation of institutions and rules cannot replace the importance of experiences and realizations in human life."

**Sen's Views of Nyaya and Niti**

Niti is an idea that links organizational relevance and behavioral correctness to norms and institutions. Niti, according to Sen, therefore replaces the idea of a perfectly just society and is consistent with the transcendental institutionalism approach, which aims to answer the question, "What do competent just institutions look like?" in the modern world. Nyaya's philosophy, however, is about making a breakthrough. In other terms, Nyaya is a comprehensive plan or vision of justice that is realized. While Niti represents the procedural sense of justice and the instrument of codification, Nyaya represents the more practical and comprehensive idea of justice, which is focused on particular results. Furthermore, Nyaya in particular gives people useful life advice. Nevertheless, Nyaya and Niti both wish for the development of just, understandable justice. Sen argues that when

considering justice from Nyaya's wider and more inclusive perspective, organizations, laws, and institutions all play crucial roles, but they are all inexorably linked to the actual world. Accordingly, he claims that the Nyaya concept is consistent with the realization-oriented comparative justice approach. Nyaya's focus on justice is on "how justice can be developed," not "how perfect just institutions look." Sen 2009:21.

Justice is seen as Nyaya rather than Niti, according to the old Indian tradition. In accordance with Sen (2009:411), "the difference between transcendental institutionalism and social realization approaches regarding justice to the difference that exists between Niti and Nyaya".

In ancient India, the legislators also debated, or matsyanyaya, according to Sen. In line with this argument, "the big fish can freely swallow the small fish, which is justice in the world of fish." Sen insists that we need to consider this demeaning rhetoric, which parliamentarians call matsyanyaya, for a specific reason. Preventing matsyanyaya should be the main goal of justice as "justice in the fish world" shouldn't be allowed to enter the human world. Sen proposes that in this instance, achieving justice by Nyaya awareness and society's self-reasoning is more significant than assessing institutions and laws. Sen senses that transcendental notions for the creation of capable just societies or social arrangements do not lead to a solution in order to avoid the Matsyanyaya example that was previously discussed. "The realization-oriented approach makes it easier for us to understand the importance of preventing sharp injustices seen in the example of matsyanyaya and to prevent or correct the injustices that exist in the actual world," according to Sen (Sen, 2009: 21).

In this context, Sen references the 18th and 19th century rebellions to abolish slavery as an example. Sen asserts that Adam Smith, Condorcet, and Mary Wollstonecraft are among those who emphasize that a society with slaves is unjust, and that it is not necessary to seek consensus on what makes a just society in order to abolish slavery; rather, slavery was abolished by a majority vote. The American Civil War led to the abolition of slavery. Sen points out that the "great strike launched for justice in America, the enhancement of justice through the abolition of slavery, cannot be shown within the transcendental institutionalism approach, but within the social realization approach (comparative justice approach or realization-oriented approach)" (Sen, 2009:22). A proper understanding of social realization, or the Nyaya-based view of justice, according to Sen, "contains a comprehensive, broad explanation (including process) of the events and situations that occur through the right processes" (Sen, 2009: 24).

However, Sen values the global component of justice highly in his vision of justice. Sen ( 2009:24) argues that "the restrictive/limiting perspective of the dominant view of transcendental institutionalism in political philosophy emphasizes that it will not be possible to realize global justice from this perspective." This assertion is stated within the framework of the transcendental institutionalism, or regulation-oriented, justice approach, which is unable to meet the demands of a fair world in this day and age on a global scale. In actuality, applying the Rawlsian method to the philosophy of justice requires a comprehensive grouping of institutions in order to determine the essential elements of a just society. When it comes to how to conceive about global justice, Rawls does not compromise his principles of justice or turn to creative interpretations.

While pursuing calls for justice as truth, Rawls's subsequent book, The Law of Peoples, attempts to show how this would transpire amongst countries. Sen claims that

"this addition, which includes the resolution of the fundamental problems of humanity through negotiations between the delegates of different countries, remains very weak and qualifies justice in a very limited way" (Sen, 2009:27). "What global change is required to make the world less unfair?" Sen ponders. Sen asks the question that in order to reap the benefits of political chances, technical progress, and commercial relations, the interests of disadvantaged and oppressed countries must also be sufficiently considered. (Sen, 2009:25). Sen argues for a more equitable distribution of the vast advantages of globalization, seeing poverty and pervasive inequality as the primary problems at its heart. "The impoverished should have a better and fairer arrangement with less economic, social, and political inequalities of opportunity," states Sen (2010:156). It should be examined what advantages the domestic and international reorganizations will provide. The introduction or strengthening of social security regulations, together with other positive governmental measures, might be very useful to Sen at this time. Sen contends that while there are still differences on other matters, public discussion may result in agreement on the pursuit of global justice for a capable fair society.

Sen emphasizes that the institutional structure of the contemporary society must be altered in order to lessen unfairness and redress existing inequalities. Sen notes, for example, that the drugs needed by poor AIDS patients may be produced more easily, sold for less, and acquired more easily from the market. Reforming the laws governing this is a simple matter with some implications for international justice. By contrast, Hobbes' 1651 book Leviathan, which might be seen as a model work, emphasized the 'evil, wild, and brief' quality of people's lives. Sadly, Sen states that "this Hobbesian conclusion still constitutes a good starting point for today's theories of justice" (Sen, 2009:412). Sen indicates that far too many individuals throughout the world continue to live with these terrible traits in spite of enormous material development. Sen's approach centers on people's lives and capacities, as well as their oppression, suffering, and lack of resources. Some assumptions about the nature of human life are shared by many conceptions of justice, according to Sen. These assumptions include disparaging and shaming other people, hurting them, being cruel and empathetic, disputing, disagreeing, etc.

According to Sen, the fact that these traits are common in human life does not need a particular theory of justice; rather, it suggests that, in spite of our varied ways of living, we should all work toward achieving justice and eradicating injustice from human society. Sen confirms in his argument that he frequently highlights human potential and capacity and contrasts it with alternative ideas of justice. Sen thinks that while certain individuals and communities lack fundamental human traits like collaboration, empathy, communication, and empathy for others, they shouldn't be condemned to live solitary lives. Sen thinks that avoiding loneliness is essential to the quality of human life. Sen claims that Hobbes emphasizes the 'bad, wild, and brief' quality of people's existence in Leviathan in order to underscore the pain of loneliness. In this case, Sen's insights on the plight of the isolated and the difficulties of loneliness that Hobbes emphasizes are identical (Sen, 2009:415). In an already awful world, Sen argues, we face a lot of issues, such as tyranny and famine, and to make things worse, we fight with each other all the time yet are unable to relate to each other. Sen now promotes the replication of true democratic opportunities and forums for discussion while highlighting the importance of public reason. Sen argues that justice should have a worldwide reach in the last section of The Thought of Justice, where he also examines the practical problems of the last 25 years.

Unlike Rawls, who presents an ideal of justice, Sen summons us to a non-local, impartial mind. You consider things from Smith's objective audience's point of view, emphasizing the need to consider our tendencies, routines, and preferences without supposing that there is just one viable strategy (Sen, 2009:394-396). Sen urges us to pursue justice by relying on public reason that is independent of any specific goal. "We need to compare the effects of specific policies that were implemented in the name of impartiality and integrity in order to assess the far-reaching effects of social arrangements without obsessively following formal and procedural rules," he argues. (Sen, 2009: 408–409)

**Amartya Sen Capability Approach**

In the late 1980s, the United Nations Development Program (UNDP) created the capacities approach, which was based on the work of Amartya Sen and Martha Nussbaum (Tilak, 2002:192). In 1989, Sen and Mahbub ul Haq created the Human Development Index (HDI). The HDI took into account skills such basic health and education, in contrast to earlier development indexes. Both the index's development and the recognition of the importance of some unmet liberties have benefited greatly from the previously discussed "feminist economics" (Sen, 2004b:80). The human development concept was developed by Sen in 1999 and introduced as a capacity approach, according to Tilak (2002). As "the most serious criticism developed against utilitarian liberal justice theories," Sen's capabilities approach addresses human flourishing from several perspectives (Seker, 2009:260). This approach demonstrates an interdisciplinary feature. This approach was used in empirical studies and provided the theoretical underpinnings for the paradigm of human development.

"The capability approach addressed the question of 'what is equality?' in liberal political philosophy and concentrated on what people can do and become effectively, rather than their happiness or income and expenditures" (Nussbaum, 2005, pp. 168, 93). The capacity approach, as opposed to traditional money or benefit-based approaches, proposes a development plan that is seen as a process of expanding people's basic rights. It is thought that expanding freedoms is the main objective and tool of progress. These are the essential and essential functions that freedom plays in development, respectively; according to Sen. Being able to improve your life is one of the fundamental human rights and the purpose of freedom.

Examples of fundamental freedoms include the freedom from preventable diseases, early mortality, malnourishment, and famine. Other liberties include the capacity to study and practice calculus, to engage in political activities, and to freely express oneself. On the other hand, instrumental freedoms emphasize how different rights, opportunities, and advantages contribute to a person's total capacity to lead a more free life. For example, instrumental freedoms such as political freedom, economic opportunity, social opportunity, transparency guarantees, and protective security tend to have an impact on the overall capacity needed for a person to live more freely (Sen, 2004a:57-58). Benefit and income methods, which gave other development criteria precedence, disregarded the significance of values like rights and freedoms in human wellbeing (Sen, 2000:19).

This approach, which provides a more holistic perspective of human growth, recognizes the instrumental importance of increasing national and individual incomes in expanding freedoms, even while it opposes seeing them as a goal. Individuals should also be given the freedom to pursue their lives and reach their full potential. The capacity approach holds that the objectives of justice, progress, and human welfare are constructed

using people's competencies. Individual liberties are the core elements of the capacity approach, according to Sen. Sen (2004a:101) asserts that "individuals can choose the lifestyles that they value" in this context. Freedom itself, not its outcomes, is what you appreciate in this circumstance. Sen is interested in enabling more individuals to live the lives they choose. As explained by Sen (2004a:108), "capacity" refers to the wide range of activities that a person may do.

As a result, the ability to act—which stands for the various things one may decide to be or achieve—is what matters in this circumstance. It is clear that Sen has a complex perspective on poverty, which differs from traditional economic theory. Conventional economic theory holds that while economic expansion and increased worker productivity can reduce poverty, unemployment and government intervention in free markets worsen it. Conventional economic theory holds that increasing the efficiency of commodity production and optimizing utility are essential. According to Nussbaum (2000), the "capability approach is a universal approach, every thought, every individual, and everything that is considered as a goal is important" (p. 241). The statement "Human rights and human competencies have a very close relationship" is also emphasized (Nussbaum, 2000:243, 2005:184; Osmani, 2005:206; Sen, 2005a:163, 2005b:8).

Osmani (2005:206) views the capacity approach as a "bridge connecting human rights and poverty" when looking at poverty and human rights from this perspective. Because "rights are moral reasons based on a moral basis and they should be handled without prejudice and impartially," morality need to be used while discussing human rights (Sen, 2005a: 153; Sen, 2005b:8). The capability approach holds that "human rights and human competencies should be considered together," considering all of these as fundamental to justice (Nussbaum, 2000:244, 2005:184; Sen, 2005a:153). Considering these aspects makes each case easy to understand. Certain liberties should be considered rights since freedoms and rights are inextricably linked. According to Sen (2005a:185), "fundamental freedoms need to be protected, integrated, and expanded." Sen states that "basic capabilities to avoid hunger, malnutrition, preventable diseases, and premature death, to receive education, to benefit from political participation and free expression" are among the fundamental freedoms (2004a:56).

However, the capacity method also emphasizes how historically sexist culture views women's skills as inferior to men's. Sen has used the term "missing women" to refer to women who, in most parts of the world, are less supported in carrying out daily tasks: "In reality, the 'missing women' are second-class citizens, despite their theoretical equality" (Nussbaum, 2000:241). This perspective interprets women's rights as human rights and holds that women have different human talents and competencies due to their unequal social and political situations (Nussbaum, 2000:240, 2005:183). The world is a vast prison that limits women's creativity, according to Mary Wollstonecraft. Sen asserts that "the description of Wollstonecraft, who lived and started the defense of human rights, is still valid today, two and a half centuries ago" (Sen, 2005b:3).

Sen's gender study states that women are discriminated against and thus disadvantaged in all areas of social life, a situation that is "not acceptable in terms of universal norms of equality and freedom, and needs to be reconsidered in terms of the distribution of opportunities and resources," according to Nussbaum (2000:242). It is necessary to provide additional resources to individuals or groups tackling these problems. In terms of increasing awareness and providing alternatives, education is the

most important element in addressing these problems (Nussbaum, 2005:184). The capacity viewpoint holds that education is a fundamental human right, independent of its financial value, and that rights are seen as an extension of human freedom. "A wider educational perspective that emphasizes people's capacity to select the lives they value is highlighted by the idea that education is a right" (Sen, 1997:1959).

There is a relationship between capacity and education. Capacity refers to the variety of options that a person is likely to choose from. The focus of "capability thinking" is therefore on the freedom that allows a person to select their own lifestyle (Saito, 2003:20). Consequently, "people are deprived of their freedom when they have poor educational attainment or are unable to obtain an education" (Costantini & Monni, 2005:335). "Education enhances an individual's inner peace, self-confidence, employment opportunities, and the capacity to take various beneficial actions" (Alkire, 2005:129). According to the capacity perspective, education broadens human skills. When people learn ideals and improve their skills via education, they become freer. Personal liberties are said to expand with education. According to this viewpoint, which sees individual rights as the essential building blocks, education is a virtue regardless of whether or not individual freedom of action is restricted.

While other development models see education as a means to increase profits, the capacity approach sees it as an end in itself. Based on the capacity approach, a lack of education both contributes to and results in poverty. It makes a distinction between economic poverty and capacity/adequacy poverty, as was previously mentioned. Income is not the sole factor used to explain poverty. According to Sen, poverty is "the state of being deprived of certain rights, opportunities, and options" (Sen, 2004a:101), therefore the genuine definition of poverty is capacity/competence poverty. Sen's technique in modern economic theory, as was previously noted, is a new beginning in the struggle against the belief that all preferences and material desires are only specific expressions of a universal and abstract need concept such as utility.

However, Sen used the standard tools of economic theory to define utility as an individual's capacity for action rather than wellbeing, which removes the need to interpret utility as contentment or the fulfillment of wishes. Sen's theory of freedom, in other words, argues that utility is an individual's capacity to act rather than the outcome, unlike the welfare theory, which is based on the utility-happiness pair. Choice and freedom are two concepts that are fundamental to ethics. For a variety of reasons, freedom is defined as the extension of one's choices for attaining a preferred lifestyle. In this case, the main goal of progress is freedom. Sen's method is predicated on the fundamental idea that an individual's value is better reflected by freedom itself than by its outcomes. Freedom is important to you not only because it allows you to achieve specific objectives but also because of its intrinsic value, which surpasses the value of the state obtained.

Freedom, then, necessitates not just material riches, income, and formal advantages, but also the capacity to seize and build upon opportunities for basic human activity. The ability to make choices and act on them is the complement of freedom. It takes more than only optimizing one's own gain to reach a position of choice (İnsel, 2000:15–17). As a result, the core idea of the capacity approach is that humans, as individuals with agency, make decisions rather than the "self-interested" people that resulted from utilitarianism, one of the main currents of the Enlightenment philosophy. His definition of economic human (homo economicus) was broad, and he "advocated that welfare economics should be

methodologically addressed within a broader set of variables (such as famine, hunger, injustice, income distribution, malnutrition, and gender discrimination)" (Seker, 2009:275).

Sen's capacity approach integrates "many basic variables pushed out of welfare economics, without compromising scientificity and measurability, are theoretical researches." It recognizes the development of human potential as a core principle. In contrast to positivist and immoral economics methodology, which disregards such evaluative techniques due to the fact that they are factors that cannot be measured with scientific care (Seker, 2009:270).

**An Assessment of Amartya Sen's Theory of Justice**

As the cornerstone of views of justice, liberalism was positioned alongside the concepts of individuality and freedom. Liberalism values and elevates the person and freedom. An individual is someone who is self-centered and has the basic rights of life, liberty, and property. Each of these rights must be taken into consideration by the state when establishing laws. The protection of each person's legal rights is the aim of the justice system. The state's sole duty is to uphold the rights and freedoms of every individual while enforcing the law. The state cannot infringe upon the rights and freedoms of any individual.

The state is the state of law, and justice is the protection of rights in whatever manner. Since liberal doctrine ensures freedom in the exercise of rights, justice has typically also been viewed as freedom. However, whether freedom is a goal or a means is not yet obvious. The reason for this is that freedom in this context is both a goal and a means to an end. If freedom is seen as a right in and of itself, then the relevance of the liberal concept of the right to justice is easily understood. The ability to exercise one's rights requires freedom. Individuals can be free in accordance with their rights. For example, if someone cannot vote, there is no freedom to do so. To a certain extent, allowing freedoms also means guaranteeing rights. The reason for this is because human rights and freedoms are closely related (Gündoğan, 2003:2-3).

This inherent relationship between freedoms and human rights is demonstrated by the capacity technique developed by philosophy and economics professor Amartya Sen. Sen (2004a:108) defines capability as "different combinations of functions that a person can achieve." According to Sen, a much narrower distribution of rights and capacities is usually the outcome of unequal financial distribution. Because of the initial unequal distribution of capacities, inequality is socially reinforced. However, the endowment of access to rights really necessitates the implementation of measures to redistribute talents in the context of social policy. Sen agrees that redistribution of capacities, not simply national income, is required to reduce inequality.

Sen contends, for example, that poverty encompasses not just a lack of financial resources but also a lack of rights and the capacity to enjoy life's opportunities. In one sense, poverty results from the denial of civil and political rights, the right to health care, the right to education, the right to access culture and other communal resources, and- above all- the ability to take part in public decision-making. These rights improve one's ability to make decisions, which makes them equally as significant as the right to financial income. But they are also physical manifestations of poverty and low income. Sen argues that these rights, combined with the right to financial gain, define personal liberties and form a whole (İnsel, 2000:18–19).

## Conclusion

Sen's conceptions of Niti and Nyaya have the potential to eliminate social injustice and establish justice through the process of realization. According to Sen, Nyaya is a comprehensive plan or vision for justice that is realized, focusing attention on specific outcomes and embodying the practical and comprehensive concept of justice. Nyaya's main objective is to prevent matsanyaya, or the unfair practice of huge fish eating little fish. "Justice in the fish world" should not be allowed to infiltrate the human world; its main purpose should be to prevent matsyanyaya. Sen, rather than assessing institutions and laws, basic acceptance is predicated on society's self-reasoning and the achievement of justice with Nyaya awareness. By emphasizing public reason through human reason and separating fairness from injustice through a realization process, he aims to eradicate social injustice and establish a system of justice and equality. He also promotes the replication of true democratic possibilities and debate places.

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# The Concept of *Nyaya* (Justice) in Indian Philosophical Tradition and Contemporary Theories (John Rawls & Amartya Sen)

- *Babita Singh Parasain**

*This chapter discusses the concept of Nyaya in Indian philosophical tradition and tries to answer the question as to how the ancient idea of Nyaya can inform and enrich contemporary justice theories like those of Rawls and Sen. It enumerates John Rawls' theory of Justice, focusing on distributive justice, social contract, and the original position, contrasts it with Amartya Sen's Capability Approach, emphasising individual freedoms, capabilities, and well-being, encompassing the broader perceptions of the ancient Indian philosophical thoughts.*

## Introduction

The concept of justice exists since the inception of human society. It is more intrinsic to a society's orderly and moral living and deeply ingrained in the roots of human culture. In other words, a society finds its peaceful co-existence with the practice of justice as its primary idea. Justice is the *"correct application of a law, as opposed to arbitrariness"* (Leslie & Paul). Justice means *"appropriate and effective enforcement of law"*. Etymologically, the word 'Justice' is derived from the Latin term '*Justitia*' which means and signifies 'righteousness' or 'equity'. It is also understood from the French word *'Jostise'* which means 'equity' or 'fairness', 'uprightness', 'vindication of right' and 'administration of law'. In political and legal philosophy, justice is understood as *"morally justifiable distribution of rewards and punishment"* (Heywood, 114). It is an equitable distribution of freedom, rights, wealth, and leisure, and so on, though the grounds of just distribution of resources may differ.

In classical Indian philosophy, justice, social, political, or individual, involves the promotion of the welfare or good of the people. It involves rights, system structures, harmony, and duties. In a way, justice revolves around the concept of propriety and welfare. Historically, justice was seen as an ethical and moral virtue as well as an important and desirable characteristic that a social and political order requires which is also essential for a universal order. In the western thought, Cephalus, a character in Plato's *Republic*, presents a basic definition of justice and says *"justice consists in speaking the truth and paying one's debt."* In this traditional view, upholding truthfulness and fulfilling obligations are key aspects of being just. For Plato, justice in the individual soul consists of the harmonious operation of the major elements out of which it is constituted: reason, spirit, and appetite; and justice in the city-state consists of harmonious operation of the following elements: rulers, guardians (or soldiers), and producers e.g., farmers and craftsmen (Britannica). Aristotle conceived of justice as an individual virtue as well as a characteristic of an ideal (or well-functioning) city-state (Britannica). For Hume, justice was to be

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understood as adherence to a set of rules that assign physical objects to individuals (such as being the first possessor of such an object) (Hume, 484). Justice or *Nyaya* in Indian tradition is intricately related to the worldview. To Bentham, 'justice', in the only sense in which it (utilitarianism) has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases' (Bentham, 125-126).

In the 17th and 18th centuries, the English philosophers Thomas Hobbes and John Locke and the French philosopher Jean-Jacques Rousseau developed influential conceptions of justice based on the notion of a social contract. Individuals born into an anarchic "state of nature," formed a society employing a contract or agreement that defined a set of rights and duties of individuals and a set of powers to be exercised by a government. Social contract theories thus attempt to legitimise and delimit political authority on the grounds of individual self-interest and rational consent. Conceptions of justice based on social-contract theory were significantly different from earlier understandings, because they viewed justice as a human creation or social construct rather than as an ideal rooted in objective features of human nature and society (Britannica, "Social Justice").

However, the concept of Justice in Indian philosophy embarks upon a deep and inherent connection with the concept of *Dharma*, or righteousness for India being knowledge based society since inception. The *Dharmshastra*, endorsed and attributed to Manu, the son of the creator god, and the first human, a text commonly called *Manusmriti* or 'the Code of Manu'. This *Smriti* is the most celebrated and best-known legal text of ancient India. The Indian philosophical tradition may said to be on a different platform from other philosophies as it is not limited to legalistic definitions and it is not restricted to only the administration or governance of law as generally known, but also embodies the broader ethical, moral as also the spiritual responsibilities of the rulers as also the individuals. It has been stated as essential for maintaining cosmic law as well as social order.

In the contemporary times, justice can mean both legal justice and distributive justice. Legal justice is concerned with how law provides logic for punishments and rewards, in other words, distributes penalties for wrongdoing, or allocates compensation for a legally enforceable act causing injury or damage. Justice in this sense involves the creation and enforcement of a set of rules that should have a strong ethical and moral basis. The legal justice realm provides for the procedure adopted for imparting justice and the concrete form of justice, which is concerned with the rules themselves and whether they are 'just' or 'unjust'. As the laws in present society are a way adopted for an orderly behaviour of the society so they are recognised by the People as binding, for an inherent understanding of such law being a "justified" law.

Distributive justice is concerned with the equitable distribution of wealth and the process adopted in such distribution. This also reflects upon the ultimate results achieved in such distribution. The preamble to the Indian Constitution that informs about the main objective of the Constitution, promises to secure to all its citizens social, economic and political justice. It includes - Peoples' or Societal Justice, where we ensure one's right to life and equality within the

framework of *Dharma or Righteousness*; Economic Justice ensuring similar advantage distribution of resources for sub serving the 'common interest', fair commerce and trade, to earn livelihoods and sustainable development for future generations; Political Justice meaning rule of law, Citizens' rights and duties, good governance and role of the state in ensuring justice; In the neo forms of justice, one's right to privacy, environmental justice from both the individual's as well as governance point of view. These ideals may not themselves be explicit in the preamble itself, but the enacting provisions of the Constitution of India, particularly Fundamental Rights in Part-III, Directives and Duties and Special Provisions Relating to Certain Classes in part XVI and their judicial interpretations over the years have made these ideals the very soul of the Constitutionalism that we practice. The very sequence of these values in the Preamble establishes primacy of justice over freedom and equality (Shukla, 5).

We may, thus define Justice as

*Justice means being fair, impartial, just and equitable, reasonable and honest in deciding matter of a context in question. It can also refer to use of power to establish what is right.*

**Justice in Indian Philosophical Tradition**

Justice or *Nyaya* in Indian tradition is intricately related to the worldview. The concept of Justice in Indian philosophy has an intense connection with the idea of *Dharma*, or righteousness. It has been stated as necessary for maintaining cosmic and social order. Thus, the Indian philosophical tradition is on a different pedestal from other philosophies as it is not limited to legalistic definitions often found in other philosophies and it is not restricted to only the administration of law as generally known at the global level, but also embodies the broader ethical and spiritual responsibilities of the rulers as well as the individuals.

The philosophy of Justice in Indian thought has some special features, which make it stand on a different pedestal than the other philosophies. The ancient Indian approaches to justice emphasise the following:

a. It is intricately connected with the universal or cosmic physical order
b. It emphasises the importance of the principles of duty
c. Upholding righteousness is the focus of Indian philosophical tradition
d. Imparting justice with reasoning, integrity and honesty.

The earliest literature relating to the Vedic Age speaks of *Ṛta,* which is a cosmological principle equated with justice, which not only governed nature but also the human conduct. *Ṛta* is the inviolable, eternal law which makes for order, regularity and harmony in the universe, the law which even the Gods obey and by which *Varuna* (the god of cosmic law and the sky and guardian of the moral law) metes out justice to man (Saksena, 286). *Ṛta* combines positive law, natural law and moral principles. This moral conception of nature generates in the Indian mind a deep

confidence in cosmic justice (Saksena, 268). The ideals like *satyameva jayate or Lokah Samastah Sukhino Bhavantu* i.e., the righteous side or truth alone prevails and let the entire world be happy. (The *Mangala* mantra is a prayer for peace found in the ancient scriptures - the "*Rig Veda*"). There is a unity of moral outlook amongst Indian thinkers despite the diversity of metaphysical theories. There is a common belief that human life is a rare opportunity, obtained after a long series of incarcerations, it is momentary. So, it is foolish not to utilise this life for improving the future possibilities.

To follow *Ṛta* was to act following justice or the natural law. The concept of *Ṛta* in the Rig Veda was gradually transformed into the concept of *Dharma* in later literatures. It was only after the coming in of the Upanishads that the concept of "Karma" that justice became the consequence of an action. This meant that whatever actions one performs, s/he would reap the outcome of those actions only in this birth or the next. However, during the later centuries justice came to be defined as *Dharma* and played a significant role in the social and political order. Due to the prevailing form of Kingship, it became the duty of the King to do justice and thus in turn do *Dharma* to his subjects. This also became a levelling tool to protect the subjects from the tyranny of the rulers, which existed before the coming in of this idea that justice and *dharma* could be equated.

These age-old concepts and principles find their appropriateness and relevance in the present social system as well. Ancient India was not only rich in knowledge of mathematics, astronomy, literature, medicine, etc, but it witnessed a developed and strengthened administrative mechanism and judicial system. The evidence for this is the huge number of legal literature written in ancient India. The ancient sources of Hindu law are the Shrutis, Smritis, Digests, Commentaries, and the popular folklores, customs, and practices followed since super ancient times.

While identifying Daston Lorraine's views with the ancient Indian thought, he had said: 'Justice can be thought of as distinct from and more fundamental than benevolence, charity, mercy, generosity, or compassion. Justice has traditionally been associated with concepts of fate, reincarnation or Divine Providence, i.e. with a life under the cosmic plan. The association of justice with fairness has thus been historically and culturally rare and is perhaps chiefly a modern innovation in western societies' (Loraine, 7).

Although the concept of justice as a good deed and part of the law of nature is mainly metaphysical, but its practical or enforcement aspects have also found a place in several approaches. We can see examples of such application in the traditional Indian opinions of justice, in which it is mainly through prescriptions or examples that the notion is understood, being true to the method of establishing a theory or *Siddhanta* by considering *dristanta,* a method proposed by the logical schools.

The *Manusmriti* is one of the most important scriptures on Justice and Dharma (law and conduct) in Indian tradition. The *Dharmshastra*, ascribed eponymously to Manu, the son of the god of creation (The Creator), and the first of the humans, a text created by him, commonly called as *Manusmriti*, is the most recognised and well known law text of ancient India. Manu was viewed as the absolute and supreme authority in law related matters, and views contradicting Manu were taken to be invalid. It particularly deals with the role and responsibilities of kings in

administering justice, ethical and moral conduct, pecuniary matters like restitution and compensation, and other aspects of justice. According to *Manusmriti*, justice is a concept that involves the destruction of evil, the protection of the weak, and the development of knowledge and welfare. Manu believed that justice was truth and that the law was a means to achieve justice. More stress was placed on the concepts of justice and equity by Manu, who also felt that whoever breaks justice, is always disgusting (Derrett, 45).

The idea of social justice as it exists today is included in Manu's conception of justice. He referred to it as the "social purpose of justice", where the king had to stand up for the rights of people who couldn't stand up for themselves (Bhattacharya). The *Manusmriti* outlines a detailed code of conduct and justice was meant to govern various aspects of life, including social order, duties, and punishment (Kaul, 83). The text details the four varnas and their functions within Hindu society, emphasizes the importance of a good council for governance, and addresses moral and ethical guidelines. However, as a natural corollary and being influenced by the then scenario, the Manusmriti speaks of certain aspects that appear drifted away from the current social set up and modern thought but that should not hold importance and needs to be diluted when compared with the bigger contribution as well as larger framework of law and justice as prepared and provided by Manu in such an ancient period of time in humanity. No wonder the Code of Manu received high praises from Friedrich Nietzsche in several of his works. In one place he says that "*it has an affirmation of life, a triumphing agreeable sensation in life and that to draw up a law book such as Manu means to permit oneself to get the upper hand, to become perfection, to be ambitious of the highest art of living."*

Often referred to as *Nyaya* in Sanskrit, justice in Indian philosophy primarily relates to ensuring fairness and equality amongst people. The main aspects of justice, as explained in the ancient texts, include: Fairness and Equity: Ensuring that actions and decisions are fair and equitable, providing everyone with what they deserve. *Nyaya* also extensively studies the nature of reasoning in the attempt to map pathways, which lead to veridical inferential cognition. Nyaya's methods of analysis and argument resolution influenced much of classical Indian literary criticism, philosophical debate, and jurisprudence (Dasti). Mr. Justice S. S. Dhavan, in his *The Indian Judicial System: A Historical Survey*, says,

> *We must go to the original texts to get a true and correct picture of the legal system of ancient India. The reader will discover from them that Indian jurisprudence was found on the rule of law; that the King himself was subject to the law; that arbitrary power was unknown to Indian political theory and jurisprudence and the king's right to govern was subject to the fulfilment of duties the breach of which resulted in forfeiture of kingship; that the judges were independent and subject only to the law; that ancient India had the highest standard of any nation of antiquity as regards the ability, learning, integrity, impartiality, and independence of the judiciary, and these standards have not been surpassed till today; that the Indian judiciary consisted of a hierarchy of judges with the Court of the Chief Justice (Praadvivaka) at the top, each higher Court being invested with the power to review the decision of the Courts below; that disputes were decided essentially in*

*accordance with the same principles of natural justice which govern the judicial process in the modern State today: that the rules of procedure and evidence were similar to those followed today; that supernatural modes of proof like the ordeal were discourage; that in criminal trials the accused could not be punished unless his guilt was proved according to law; that in civil cases the trial consisted of four stages like any modern trial – plaint, reply, hearing and decree; that such doctrines as res judicata (prang nyaya) were familiar to Indian jurisprudence; that all trials, civil or criminal, were heard by a bench of several judges and rarely by a judge sitting singly ; that the decrees of all courts except the King were subject to appeal or review according to fixed principles ; that the fundamental duty of the Court was to do justice "without favour or fear"*(Dhavan).

The Indian jurists like Manu, Yajnavalkya, Katyayana, Brihaspati and others, and in later times commentators like Vachaspati Misra and others, described in detail the judicial system and legal procedure which prevailed in India from ancient times till the close of the Middle Ages. Amongst many scriptures, the *Rigveda*, the epics *Mahabharata* and *Ramayana*, the sacred *Srimad Bhagavatam*, the philosophically oriented Upanishads, besides *Manusmriti* and Kautilya's *Arthashastra* deal with morality, ethics of conduct and administration, duties, rights, laws and virtues, with their reflective insights, have played a significant role in determining the concept of justice in Indian philosophy, which is closely associated with the fulfilment of one's duties (*Dharma*). The cosmos is instinct with an inherent structure and functional pattern in which men, at their best willingly participate. Justice, then in the Indian context, is a human expression of a wider universal principle of nature, and if men were entirely true to nature, their actions would be spontaneously just (Underwood). It is pertinent to describe these scriptures in establishing the rich Indian Philosophical tradition; the perennial attitude of Indian culture has been that Justice and harmony among men are microcosmic reflections of the natural order and harmony of the macrocosmic universe.

The Vedas are considered as the *"first source of dharma"* (Jois, 1). *Dharma* constitutes the foundations of all affairs in the world. Everything in this world is founded on dharma and it is therefore, considered 'supreme'. The commandants of *dharma* are compared with nature's laws, which must be adhered to categorically. *Vedas*, *Vedangas*, and *Upanishads* give information about the Indian judiciary. Vedas are four in number, namely: Rigveda, Yajurveda, *Samaveda* and *Atharva Veda*. And *Vedangas* namely: *Siksha, Chandas, Vyakarana, Nirukta, Jyotishya and Kalpa*. Eighteen Upanishads, supplemented to the respective Vedas and other texts, which together constitute the *Shrutis,* are mainly religious books. However, they contain some rudiments of law. Vedas are the sources of Dharma. It is difficult to trace law from the Vedas, except by following the indications of positive (Vidhis) or negative (Nishedas) indications. There are several Vidhis and Nidhis which formed the foundation of the Smriti laws in later periods. Some of such Vidhis and Nishedas are: tell the truth, never tell untruth, never hurt anyone, follow dharma, treat your father and mother as god, perform only such acts which are not forbidden, etc. According to the Hindus, the foundation head of Dharma or law is the Vedas or revelation, but there are no special chapters in the Vedas treating law.

In the Bhagavad-Gita the concepts of *Dharma* (righteous duty) and justice are deeply intertwined and central to its teachings. The dialogue between Arjuna and Lord Krishna on the battlefield of Kurukshetra explores the complexities of *Dharma*, especially in the context of justice and moral duty. Some of the relevant verses in the original focus on the significance of people following their Dharma, the importance of justice in maintaining social order, as well as the nature's laws of divine intervention re-establish Dharma when it declines.

The Upanishads say, verily that which is justice is truth. The Upanishads are the ancient Indian scriptures that came into existence after the Vedic Period. They present the deep philosophical thought of Hinduism. They deal with the nature of reality, the self of an individual and the fundamental truth. Through deep debates and teachings, the Upanishads are a gateway to the concepts of righteousness (Dharma), besides providing deep insights into the philosophical thoughts about self and creation. These sacred texts go into the concept of Righteousness i.e., Dharma as a basic principle of reality and truth, social order and harmony, brotherhood as well as justice.

The epic Ramayana enshrines the tenets of *Dharma* (righteousness). Shree Rama, considered as an avatar of Lord Vishnu, always followed the rules of *dharma*. His actions were always accompanied by reason and justification and never transgressed the limits of propriety. Thus, Rama is considered as *Maryadapurushottam* in all his deeds and actions. *Mahabharata,* however, has more complex situations to deal with and more complex solutions as well. Therefore, it emphasises the indescribability of Dharma (it says *dharma suksmatah* or Dharma is subtle). The tenets of justice and Dharma are intricately interwoven as situations of complex moral dilemmas arise in the narrative. Mahabharata has a distinct feature as it emphasizes that Dharma does not have a set definition as it can vary depending on the diverse context, role, and purposes in this world that is inherently full of contradictions and ambiguities. Mahabharata visualises that in a complex world, justice itself may become multifaceted and in need of difficult choices beyond following tradition or existing moral percept. Therefore, Mahabharata in its story-telling mode tells us what should not be done by exposing the tragic flaws of its heroes when they meet their nemesis in the battlefield, duty-centric, utilitarian as well as a spiritual theory of action. Thus law, morality, and justice in the Indian tradition need to be explored integrally, holistically as also spiritually.

Kautilya's Arthashastra, one of the most detailed and reliable texts on Indian political philosophy and statecraft, carries forward the Dharmic understanding of justice enumerated in Shrutis and Smritis and covers various aspects of governance, economics, military strategy, and diplomacy from a more pragmatic perspective. He is of the strong view that it is an important duty of rulers to maintain order in the kingdom. The ultimate source of all law is dharma which is one's duty or righteousness and for the prosperity of a state, the state must be devoid of internal conflict and the King should be in control of the state. He prescribed just and realistic rule of law. Attaching great importance to *dandaniti,* which includes, protecting property, acquiring property, augmenting them and distributing them, Kautilya considered justice as an important constituent of state's power or sovereignty, which needs to be preserved by the State. He also held a view similar to the one in Mahabharata if the ruler fails in his duties. Mahabharata says, *"A king who after*

*having sworn to protect his subjects, fails to protect them, should be executed by his enraged people.*" (Shanti Parva, Chapter 67, Verse 34)

The above verses of Mahabharata express the strength of character with which virtues were evolved by the Indian society. It reflects the seriousness of a king's responsibility towards his subjects in ancient Indian thought, where failing to fulfill this duty (Dharma) is seen as a serious betrayal, meriting severe punishment.

Justice in Indian philosophy extends beyond mere legal frameworks, deeply interwoven with the concept of Dharma, is a phenomenon that is not limited to the making of laws, it enshrines a way of life, a societal conduct emphasising righteousness and morality. Integrating justice with moral, ethical and spiritual dimensions, the ancient texts, including the Mahabharata, Ramayana, and Manusmriti in the Indian tradition emphasize the duties and responsibilities of the governors and the governed. Thus, Indian philosophy presents a holistic view where justice and Dharma are amalgamated to express societal harmony and ethical integrity.

**Justice as Fairness (Rawls)**

John Rawls, widely considered the most important political philosopher of the 20th century, proposed a general concept of justice. In his *A Theory of Justice*, Rawls defends a conception of "justice as fairness." He holds that an adequate account of justice cannot be derived from utilitarianism[1], because that doctrine is consistent with intuitively undesirable forms of government in which the greater happiness of a majority is achieved by neglecting the rights and interests of a minority. Reviving the notion of a social contract, Rawls argues that justice consists of the basic principles of government that free and rational individuals would agree to in a hypothetical situation of perfect equality. To ensure that the principles chosen are fair, Rawls imagines a group of individuals who have been made ignorant of the social, economic, and historical circumstances from which they come, as well as their basic values and goals, including their conception of what constitutes a "good life." Situated behind this "veil of ignorance," they could not be influenced by self-interested desires to benefit some social groups (i.e., the groups they belong to) at the expense of others. Thus they would not know any facts about their race, sex, age, religion, social or economic class, wealth, income, intelligence, abilities, talents, and so on (Duignan). In other words,

> *"All social primary goods-liberty and opportunity, income and wealth, and the basis of self-respect are to be distributed equally, unless an unequal distribution of any or all of these goods is to the advantage of the least favoured."* (Krishna Iyer)

[1] According to Bentham, justice is a social construct created to maximize enjoyment for as many individuals as possible. He held that the utility principle, which states that deeds should be judged according to their capacity to increase happiness and lessen suffering, should serve as the foundation for justice. Utilitarianism has the considerable attraction of replacing moral intuition with the congenitally down-to-earth idea of human happiness as a measure of justice.

Justice as fairness is Rawls's theory of justice for a liberal society. As a member of the family of liberal political conceptions of justice, it provides a framework for the legitimate use of political power. Yet legitimacy is only the minimal standard of moral acceptability; a political order can be legitimate without being just. Justice sets the maximal standard: the arrangement of social institutions that is morally best (Wenar). As Rawls says, its *"main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it"* (Rawls, 20). In the "original position," as Rawls characterizes, any group of individuals would be led by reason and self-interest to agree to the principles. Rawls constructs justice as fairness around specific interpretations of the ideas that citizens are free and equal, and that society should be fair. Rawls also argues that justice as fairness is superior to the dominant tradition in modern political thought: utilitarianism.

Justice as fairness aims to describe a just arrangement of the major political and social institutions of a liberal society: the political constitution, the legal system, the economy, the family, and so on. Rawls calls the arrangement of these institutions a society's *basic structure*. The basic structure is the location of justice because these institutions distribute the main benefits and burdens of social life: who will receive social recognition, who will have which basic rights, who will have opportunities to get what kind of work, what the distribution of income and wealth will be, and so on. The form of a society's basic structure will have a great impact on the lives of citizens.

The basic structure will influence not only citizens' life prospects, but more deeply their goals, their attitudes, their relationships, and their characters. Institutions that will have such pervasive influence on people's lives require justification. In setting out justice as fairness, Rawls assumes that the liberal society in question is marked by reasonable pluralism as described above, and also that it is under reasonably favourable conditions: that there are enough resources for it to be possible for everyone's basic needs to be met (Wenar).

**The Two Fundamental Principles of Justice as Fairness**

These guiding ideas of justice as fairness are given institutional form by its two principles of justice (Rawls, 54):

**1**. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

**2**. Social and economic inequalities are to satisfy two conditions:

a. They are associated to offices and positions open to all under conditions of *fair equality of opportunity*;

b. They are to be utilised for the maximum benefit of the least-advantaged members of society (the *difference principle*).

The first principle confirms that all citizens shall have an unabated claim to all basic rights and liberties, i.e., freedom of speech and expression, freedom of practising faith and freedom of association, right to life and liberty, rights to vote or to hold any public office, and also to be equally subjected to the rule of law, and so on. For example, the first principle would discard a policy that would give exemptions to university professors on the premise that highly literate citizens will bring about economic prosperity. Such a concept will be a violation of fundamental liberties, and if it is enforced, then equality matters even if the pace of growth is slow.

The second distinctive feature of Rawls's first principle is that it requires that citizens should be not only formally but also substantively equal. That is, citizens who are similarly endowed and motivated should have similar opportunities to hold office, to influence elections, and so on regardless of how rich or poor they are. Rawls's second principle of justice has two parts. The first part, fair equality of opportunity, requires that citizens with the same talents and willingness to use them have the same educational and economic opportunities. "In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed" (Rawls, 63). The second part of the second principle warrants any economic inequalities are to the greatest advantage of those who are the disadvantaged or the least advantaged section of the society. Rawls says, "Men agree to share one another's fate."

In terms of his Conception of Citizens, Rawlsian citizens are not only free and equal, they are also reasonable and rational. Rawls calls this reasonableness the capacity for a *sense of justice*. Citizens are also rational: they can pursue and revise their view of what is valuable in human life. Rawls calls this the capacity for *a conception of the good*. Together these capacities are called the *two moral powers* (Wenar).

Rawls derives his account of *primary goods* from the conception of the citizen as free and equal, reasonable and rational. Primary goods are essential for developing and exercising the two moral powers, and are useful for pursuing a wide range of specific conceptions of the good life. Primary goods are these: The basic rights and liberties, Freedom of movement, and free choice among a wide range of occupations, The powers of offices and positions of responsibility, Income and wealth, the social bases of self-respect: the recognition by social institutions that gives citizens a sense of self-worth and the confidence to carry out their plans. All citizens are assumed to have fundamental interests in getting more of these primary goods, and political institutions are to evaluate how well citizens are doing (Wenar).

In what he calls a *well-ordered society* all citizens accept the principles of justice and know that their fellow citizens also do so, and all citizens recognize that the basic structure is just. The consent of and amongst citizens is something that identifies Rawls's justice as fairness with the social contract tradition of Locke, Rousseau, and Kant.

**The Original Position**: **Veil of Ignorance**

The original position is an imaginary situation or a thought experiment. Rawls's conceptions of citizens and society are subtle. In the first instance, it offered a new way of understanding the

issues concerning justification and objectivity in political philosophy. The focus of these difficulties is to find a specific viewpoint from where one could deliberate upon matters of basic justice. The original position is important in the second place because of the many interesting philosophical questions it raises. How could the fact that one would have agreed to certain principles in a special situation of choice give those principles binding authority over him/her? Finally, the original position is significant because of its evident traction: it has inspired other philosophers to take up alternative positions, to rethink it, and to conceptualise afresh the philosophical problems to which the idea was initially addressed (Hintonpp). In other words, In John Rawls's *A Theory of Justice* treatise, the 'original position' presents as a subtle abstraction from reality which comprise a people who are not aware about themselves, such as their class, age, religious inclination, gender, or names, are asked to decide principles of justice that could serve which principles they would select for the basic structure of society, its laws and for imparting justice, but they must select as if they did not know themselves. Rawls is of the view that the choices made from behind such an ignorance, would result in equal rights and liberties for all; equality of jobs and education opportunities; and an assured minimum of means.

The most striking feature of the original position is the *veil of ignorance*, which prevents arbitrary facts about citizens from influencing the agreement among their representatives. As we have seen, Rawls holds that the fact that a citizen is of a certain race, class, and gender is no reason for social institutions to favour or disfavour them. Each representative in the original position is therefore deprived of knowledge of the race, class, and gender of the real citizen that they represent. In fact, the veil of ignorance deprives the parties of all facts about citizens that are irrelevant to the choice of principles of justice: not only facts about their race, class, and gender but also facts about their age, natural endowments, and more. Moreover, the veil of ignorance also screens out specific information about what society is like right now, to get a clearer view of the permanent features of a just social system (Wenar). The original position is also the bottom line of meta-moral or meta-ethical theory as thought of by Rawls, i.e., political *constructivism*. Political constructivism is Rawls's account of the objectivity and validity of political judgments.

Rawls' theory of justice has also been criticized for its limited approach in the contexts. In *Anarchy, State, and Utopia* (1974), Robert Nozick argues that, while the original position may be the just starting point, any inequalities derived from that distribution employing free exchange are equally just, and that any redistributive tax is an infringement on people's liberty. He also argues that Rawls's application of the maximum rule to the original position is risk aversion taken to its extreme, and is therefore unsuitable even to those behind the veil of ignorance. In *Liberalism and the Limits of Justice* (1982), Michael Sandel has criticized Rawls's notion of a veil of ignorance, pointing out that it is impossible, for an individual, to completely prescind from beliefs and convictions (from the Me ultimately), as is required by Rawls's thought experiment.

**The idea of Justice (Amartya Sen)**

Amartya Sen offers a significant critique of John Rawls's theory of justice, particularly focusing on what Sen terms "transcendental institutionalism". Rawls's theory, according to Sen,

aims to identify perfectly just institutions. Sen criticizes this "transcendental" approach, arguing that it's less useful for addressing real-world injustices. Sen advocates for a "comparative" approach, focusing on comparing different states of affairs and identifying ways to reduce existing injustices. He believes that we don't need a perfect theory of justice to make meaningful improvements. Sen argues that Rawls overemphasizes the role of institutions as guarantors of justice, while neglecting the actual realizations of justice in people's lives. Sen's "capabilities approach" emphasizes individual capabilities and freedoms, arguing that justice should be assessed by how well people can live the lives they value. Sen questions the feasibility of achieving a single, universally agreed-upon conception of justice, as Rawls's theory proposes. He highlights the plurality of reasonable perspectives and values. He argues that there may be multiple, conflicting, yet justifiable principles of justice. Sen argues that justice is a multi-dimensional concept, and that there are multiple views of what is just. He emphasizes that the aim of justice is to prevent severe injustice, not just achieve a perfectly just society.

Sen places a high value on public reasoning and democratic deliberation in determining what is just. He believes that justice should emerge from open and inclusive discussions, rather than being imposed by a theoretical framework. Sen also raises concerns about the Rawlsian concept of the "veil of ignorance." While acknowledging its value in promoting impartiality, he suggests that it may not adequately account for the complexities of real-world decision-making. In essence, Sen's critique encourages a shift from seeking ideal institutions to addressing actual injustices, emphasizing the importance of individual capabilities and public reasoning.

In this connection, Sen draws from the classical Indian tradition the distinction between *niti* and *nyaya*. According to Sen, both terms stand for justice in classical Sanskrit. However, they refer to different dimensions of justice. *Niti* means ‘organizational propriety and behavioural correctness’, whereas *nyaya* refers to a ‘comprehensive concept of realized justice ... which is inescapably linked with the world that emerges, not just the institutions or rules that we happen to have’ (Sen, 20). One of the reasons a nyaya (outcome of applied law) approach is preferable to a niti (law as prescribed) approach is that it leaves room to consider consequences. A nyaya approach also takes into account processes, duties and responsibilities, as is exemplified in Bhagavad-Gita. This is the reason Sen insists on the concept of ‘comprehensive outcome’ which includes the processes involved, and which has to be distinguished from just the ‘culmination outcome’ (Sen, 22).

Sen offered criticisms that have significantly shaped contemporary discussions of justice. Sen successfully shifted the focus of justice from purely institutional arrangements to the actual realization of justice in people's lives. His “capabilities approach” has become a vital framework for assessing well-being and justice, particularly in development economics and social policy. For Sen, instead of pursuing a perfect theory of justice, pursuing the reduction of manifest injustice is important. However, Sen at some point seems to be lacking in his realising the fact that institutions act as a “mechanism” for realising and ensuring the good of each individual and a group of individuals as a whole. They are designed as well as endeavour to act as a balancing agency to

work for individual and group interests keeping in mind the larger picture of national interest especially in law making, its implementation and imparting justice. In human societies such institutions are a need to identify a 'way' for building of rights and providing justice. While Sen criticized Rawls's emphasis on institutions, it's important to note that institutions remain crucial for creating and maintaining just societies. The debate continues about the appropriate balance between institutional design and the realization of capabilities. The degree to which the "transcendental" side of Rawls' work is unhelpful is still debated. Some scholars argue that ideal theory still serves an important role in providing a long-term vision and guiding principles for justice. However, in Sen's theory, the emphasis on comparative assessments of justice has provided a practical and flexible approach than the pursuit of a single, ideal theory. In its own way, Sen's views will be particularly influential in addressing real-world problems where achieving perfect justice may be unrealistic.

**Conclusion: Contrasts Drawn and Similarities Identified**

It is interesting to consider how the modern debates on justice might resonate with ancient Indian philosophical perspectives. While direct, one-to-one correspondences are difficult to establish, we can identify some intriguing parallels and points of contrast. The concept of *dharma* in Indian philosophy encompasses duty, righteousness, and cosmic order. It's not simply a set of rules, but a contextual understanding of one's obligations. Rawls' emphasis on just institutions could be seen as aligning with the idea of establishing a *dharmic* social order. However, Sen's focus on capabilities and real-world outcomes echoes the practical application of *dharma* in ensuring well-being. *Dharma* or righteousness is the duty to do justice for those bestowed upon it and for those governed by them. It is one's duty to assert his/her rights, and at the same time to secure the rights of others. Dharma as a unique conglomeration of *deontic* morality, rationality, and compassion, with the concern for consideration of greater social well-being and flourishing informs the modern theories of justice about the grounded approach to justice both for individuals and the whole humanity in a much wider perspective. Sen's "capabilities approach" shares some common ground with the pursuit of liberation in Indian philosophies. Both emphasize the importance of individual potential and the removal of obstacles that hinder human flourishing. Whereas liberation is a very individual pursuit, the capabilities approach is looking at the society's ability to allow for individual flourishing.

Kautilya's *Arthashastra* provides a *dharmic* but pragmatic approach to governance and social welfare. It emphasizes the importance of effective institutions and policies for ensuring the well-being of the state and its citizens. This resonates with both Rawls' concern for just institutions and Sen's focus on practical outcomes. The *Arthashastra's* emphasis on realpolitik also provides a contrasting perspective to Rawls' ideal theory. As some scholars have noted, the complexities of justice depicted in the Mahabharata, particularly the dialogue between Krishna and Arjuna in the Bhagavad Gita, offer a rich source of insights. The conflict between duty and consequences, as exemplified in Arjuna's dilemma, mirrors the tension between Rawls' focus on principles and Sen's concern for outcomes.

Rawls' search for universal principles of justice contrasts with the contextual nature of much of Indian philosophy, which emphasizes the importance of dharma as it applies to specific individuals and situations. The Indian systems often recognise that justice must be applied differently, depending on the caste, or station of the individual or a group of individuals. While Sen concerns with individual well-being, ancient Indian philosophies often place greater emphasis on the interconnectedness of individuals and the importance of social harmony.

By considering these connections and contrasts, we can gain a deeper understanding of the Rawls-Sen debate and its relevance to diverse philosophical traditions. Justice is a concept that civilizations and societies across the world strive for an ethical and equitable existence. In this context, it would be relevant to quote from Justinian's 'Corpus Juris Civilis': *"Justice is the constant and perpetual will to render to everyone that to which he is entitled"*. So, it is accepted universally that the foundation of justice is to ensure rights to all individuals and also to make it accessible to them. Here, it is pertinent to mention the theory of Advaita School in the Indian Dharmic System, popularised by Adi Shankaracharya, in lines with ancient Upanishadic tradition, which offers the epitome of idealistic world view and emphasizes the oneness of all existence. Advaita asserts that the ultimate reality (*Brahman*) is identical to the individual self (*Atman*). The apparent diversity of the world is an illusion (*Maya*). So despite their uncompromising monism, Advaitins allow a degree of reality and value and think in terms of identity-in-difference in respect of all phenomena including social ones. Identity is the ultimate truth but differences are its appearances, and to be able to realise identity through diversity is a necessary and valuable step towards the ultimate truth (Datta, 273). This world-view offers a unique perspective on justice, which prioritizes compassion, non-violence, and the interconnectedness of all beings. Some scholars argue that an Advaita-inspired approach to justice would emphasize the importance of individual responsibility for the well-being of the whole. It might also advocate for social structures that promote equality and minimize suffering, recognizing that harm to any individual ultimately affects the entire interconnected reality.

The concept of *Dharma*, as "righteousness" or "duty," deeply rooted in various schools of thought, emphasizes ethical conduct, social harmony, and individual responsibility. Dharma is not merely a set of rules but a dynamic principle that guides human behaviour towards a just and equitable society. Supreme Court in *the Scheduled Castes and Scheduled Tribes Officers Welfare Co v The State of Uttar Pradesh & Anr (1996)* has quoted Swami Ranganathananda of the Ramakrishna Mission on the definition of Dharma as follows:

> *... Dharma stands for the integrating principle in human society and can be translated roughly as justice or righteousness or ethical sense. Next to the truth of the Atman, it is the most significant and pervasive truth and value in Indian culture. Dharma is that very truth of the Atman reflected in the social context of human interactions*.

Unlike Western legal systems that often focus on individual rights and adversarial proceedings, Indian legal thought emphasizes a more holistic approach to justice. Concepts like *Dharma* and *Karma* (the law of cause and effect) encourage a focus on individual duty, social harmony, and the long-term consequences of actions. This holistic perspective often seeks to balance individual rights with societal needs and promote restorative justice.

The Contractarian tradition, from Hobbes onwards, presumes the centrality of self-interest of the moral or political agent in their policy formulation and therefore leaves the pure altruistic concerns for *the other* untheorized in their account. The motivation to follow the law is a necessity or a rational assessment of the best strategy for maximizing self-interest and does not have any bearing on the personal pursuit of improvement of the self. Though the Kantian[2] account of contractualism places the dignity of the human person at the centre of his method of self-legislation, the primary drive remains the desire not to be treated in a particular manner. Further, the norms borne out of this hypothetical contract amongst self-centred beings may serve some altruistic objectives, but will always have an inherent fragility for not being the product of goodwill. Contractarians like John Rawls believe that the best conception of a just society is one in which the rules governing that society are rules that would be chosen by individuals from behind a 'veil of ignorance'. The 'veil of ignorance' as discussed above is a hypothetical situation in which individuals do not know any particular details about themselves, but they at least know that they are human beings and therefore choose the policies that suit themselves. But Dharmic concerns are not based on any such presumptions of ignorance of one's position, but on the awareness of one's unity with the other and external world and the cosmos emphasising their interconnectedness.

Ancient Indians talked about *Matsyanyaya* or justice in the world of fish, where a big fish can freely eat a small fish. So avoiding *Matsyanyaya* should be the essential part of justice. Rawls tries to protect small fishes from being devoured by the big ones by formulating rules without knowing one's own size and Sen wishes to infuse the element of actual happenings as a constant reminder to the legislator. However, Dharmic approach, following the establishment of *Dhramavyavastha* as ultimate aim in the Mahabharata irrespective of all other virtues and duties of individuals involved in it, would include Sen's caution of considering the actual injustices as *Dristanta* in its *Niskama* theorisation of a just order, which is Rawlsian, the only difference being it is not born out of ignorance of our own status but full awareness of the entire eco-system and interconnectedness of physical, human and spiritual world.

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[2] Rationality requires that we respect persons, which in turn requires that moral principles be such that they can be justified to each person.

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# Nyaya in Legal Reasoning and Argumentation*

The province of law applies logical and critical thinking in all of its stages: evolutionary, legislative, interpretive and dispute resolution. This chapter makes a humble attempt to invoke *Nyaya* logic and epistemology for a renewed understanding of legal reasoning and argumentation. The main objective of this chapter is to introduce law students and legal researchers to Indian logic and epistemology so that legal reasoning, courtroom rhetoric, parliamentary persuasions in the legislative process and ultimately the legal system of our land could be benefitted from the critical and analytical thinking of her past. Though *Dharmashastra* are the main texts to look into if we wish to find the legal philosophy of ancient India, our quest is bound to be incomplete if the assertions of the *Dharmashastra* are narrated to the modern mind without situating and contextualising them in the logical and epistemic foundation of the norms. Therefore, the first part of this chapter discusses the importance of logic and epistemology in Indian thought, the second part spells out the *Nyaya* philosophy including the discussion on sixteen categories in *Nyaya Sutra*, sources of valid knowledge and validity of reasoning, and the third part attempts to evaluate the application of logical reasoning or *Nyaya* method of dialectic and 'grounds of defeat' in legal thinking and argumentation.

## INTRODUCTION

The different philosophical schools of Indian origin have a common incorrigible conviction that critical thinking is incomplete without an account of the 'ways of thinking'. Their diverse world-views are intricately entwined with their respective life-views and both are in turn based on their respective epistemologies i.e., theories of knowledge with regard to its source, method, validity and limitations. Therefore, the prescribed pursuits for individuals, spiritual practices, legal and political system, medical practices, social structures and understanding of the world at large are all embroidered in the cultural

* Mohan Parasain, **"Nyaya in Legal Reasoning and Argumentation"** in ***Bharatiya Jurisprudence: Redefining Legal Philosophy*** by Seema Singh and Vinayak Sharma (eds.), pp. 99-117 (2025).

and epistemic structures of Indian origin. In other words, there is cohesion of cultural provinces in art, literature, social and political organisation, which is a "complex and continuous whole." As a result, the Western thought-binaries of reason and experience, subjective and objective, rational and emotional or even philosophical and religious, create more hurdles than offering any understanding of the Indian structures of knowledge and assertions made on the basis of that knowledge system. Further, if we try to look into any one aspect of the traditional Indian thinking through the prism of modern division of sciences or compartmentalised disciplines, we may be led into confusion. The walls of disciplinary divisions melt down in the integrity of knowledge disciplines in Indian tradition and that integrity is mostly pronounced in the analytical and critical thinking and a quest for logical and epistemological foundation of any of the integrated knowledge disciplines. The province of law applies logical and critical thinking in all of its stages: evolutionary, legislative, interpretive and dispute resolution. This chapter makes a humble attempt to invoke Nyaya logic and epistemology for a renewed understanding of legal reasoning and argumentation.[1]

The main objective of this chapter is to introduce law students and legal researchers to Indian logic and epistemology so that legal reasoning, courtroom rhetoric, parliamentary persuasions in the legislative process and ultimately the legal system of our land could be benefitted from the critical and analytical thinking of her past. Legal theorists, legal philosophers, argumentation theorists, philosophers, legal students may find important tools in *Nyaya* for addressing the theoretical and practical problems of legal argumentation. The choice of *Nyaya* to serve the above stated objective is justified because public reasoning was developed and sharpened in India particularly because of *Nyaya* and *Buddhist* scrutinising each other for centuries. Further, *Nyaya* is acknowledged not only by the six traditional schools of Indian thought, but also continuously engaged in disputations by the heterodox schools as the worthiest opponent. The first part of this chapter discusses the importance of logic and epistemology in Indian thought, the second part spells out the *Nyaya* philosophy including the discussion on sixteen categories, sources of valid knowledge and validity of reasoning, and the third part attempts to evaluate the application of logical reasoning or *Nyaya* method of dialectic and grounds of defeat, which are by-products of *Nyaya* epistemology, in legal thinking

1 Past few decades have witnessed the study of legal reasoning and argumentation drawing interdisciplinary interest, with logical, rhetorical and dialogical approaches to the subject coming together to offer some credible theories of legal reasoning. The theories of legal reasoning viz., logic-based, case-based, discourse model (adversarial reasoning) and Alexy's 'procedural theory' are important ones. Further, whether artificial intelligence is capable of analogical reasoning in legal matters is a question, which is getting recent attention. The Indian legal system, particularly Nyaya logical models and methods, may offer a very important perspective to the ongoing discussion.

and argumentation. As *Nyaya* is *"a multi-dimensional system of interlocking views,"*[2] historically spreading across three thousand years, an introductory quest into only *Pramanavada* and dialectical methods must begin with a disclaimer that the present effort may miss out certain important insights in some other corners of the *Nyaya* universe.

## 1. HISTORY OF LOGIC AND EPISTEMOLOGY IN INDIAN THOUGHT

As India has been a "knowledge civilisation" and the only surviving civilisation of antiquity which has continuity till the modern period, any search into the secret of her survival must look deeper into her rational and critical innovations than merely parroting the 19th century colonial and missionary 'fascinations' with her esoteric past. A misconception has been created that there is no analytical tradition outside the western world and Indian philosophy is limited to primitive speculations, with some occult religious cults and *"an odd assortment of spirituality, mysticism, and imprecise thinking, concerned almost exclusively with spiritual liberation."*[3] It is as if *"Indians could engage themselves in philosophical reflection without reflexivity, without linguistic or conceptual self-awareness."*[4] Such misconception along with the complacency in continuing with the immediate colonial past with well-established British administrative and legal framework have deprived us of any genuine critical inquiry into the epistemological and logical foundations of our civilisation and evolve a decolonised perspective into our juridical system.

Most of the attempts by legal researchers to develop Indic or Dharmic jurisprudence have been limited to the inquiry into the *Dharmashastras*. *Dharmashastra* means 'the teaching (or science) of righteousness' and includes the modern understanding of the concept: 'law' and much more.[5] Because, *Dharma*, as righteousness, has greater import than the norms required for day-to-day administration of justice. There is no doubt that *Dharmashastras* are the main texts to cull out the legal philosophy of ancient India. It is because *Dharmashastras* are not only the repository of ancient Indian legal thought, but *the Indian concept of Dharma is the 'institutional a-priori' of even its modern legal system*.[6] But our quest is bound to be incomplete if the assertions

2 Stephen Phillips, "Gangesha", *The Stanford Encyclopaedia of Philosophy* (Summer 2024 Edition), Edward N. Zalta & Uri Nodelman (eds.), available at: <https://plato.stanford.edu/archives/sum2024/entries/gangesa/>, last visited on 16th Nov 2024.

3 B. K. Matilal, *Epistemology, Logic, and Grammar in Indian Philosophical Analysis,* xii, (ed. by Jonardon Ganeri, Oxford University Press, New Delhi, 2005).

4 S. Deshpande, "Introduction: Modern Indian Philosophy: From Colonial to Cosmopolitanism", in: S. Deshpande (ed.) *Philosophy in Colonial India. Sophia Studies in Cross-cultural Philosophy of Traditions and Cultures Volume 11,* 5, (Springer, New Delhi, 2015).

5 J. D. Derrett, *Dharmashastra and Juridical Literature, Vol. V. Fasc. 1.* 2 (Manohar, New Delhi, 2020).

6 M. Parasain, "Philosophy for Environmental Policy and Law", 100, in: Biswas, D., Ryan, J.C. (eds.) *Environmental Humanities in India. Asia in Transition, Vol. 25,* (Springer, Singapore, 2025).

of the *Dharmashastras* are narrated to the modern mind without situating and contextualising them in the logical and epistemic foundation of the norms. When Indologists trained in Western knowledge paradigm, which was believed to be the only philosophically credible intellectual paradigm, treated the *"practising grammarian, logician and metaphysician as mere narrator of classical text, as 'local informants.'"*[7] and whose data needs to be conceptualised in Western metaphysical and theoretical framework, thereby objectifying the entire Indian traditional knowledge in historical, comparative and philological perspective, the task of searching Indic jurisprudence in indigenous rationality was muddled. As J. N. Mohanty says,

*The role a concept of rationality has within a culture is a highly stratified one, its criteria and principles operating first of all in the life-world of the community concerned, then in the higher-order decisions of the scientists, law-givers and artists, finally in the theoretical discourse of the philosophers.*[8]

Therefore, the rationalities which have travelled through the public discourse to *shastras* and then to the treatise of logic and epistemology must act as the most important supplement to the *Dharmashastras*. The *Dharmashastras* themselves admit that dharma or duty should be ascertained by logical reasoning (*Tarka*), and recommend *Anvikshiki* as a necessary study for a king and the logician (*Tarki*) as an indispensable member of a legal assembly.[9] Kautilya characterises logic as the lamp of all sciences and the permanent shelter of all virtues.[10] Therefore, as a *"theory of theoretical practice,"*[11] the importance of logic is emphasised by both epics and *Dharmashastras*.

The broad division of *Adhyatmavidya* and *Anvikshikividya* places the general scheme of things in Indian tradition in proper perspective. The former, which is also called *Brahmavidya* or *Atmavidya, is the* foundation of all other sciences, but embodies certain assertions about the nature of the soul, which are intuitive and admittedly beyond the limitations of reason, while *Anvikshiki* contains reason supporting their assertions. So *Anvikshiki* dealt with divine as well as theory of reason and in about 650 BC it was recognised as a distinct branch of learning.[12] In about 550 BC *Anvikshiki* was more or less associated with logical argumentation when Medhatithi Gautama wrote *Nyayashastra*.

7 *Supra* note 4 at 7.

8 J.N. Mohanty, *Essays on Indian Philosophy*, 261 (ed. by Purushottama Bilimoria, Oxford University Press, Delhi, 1993).

9 *Manusamhita*, Adhyay 12 verse 106; Adhyay 7 verse 43; and Adhyay 12 verse 111 respectively. (Manusamhita quotes here and henceforth from S. C. Vidyabhushan, *History of Indian Logic: Ancient, Medical and Modern Schools,* (Shiv Books International, New Delhi, 2005).

10 *Arthashastra,* ch.II.

11 J. N. Mohanty, *Reason and Tradition in Indian Thought,* 227 (Clarendon Press, Oxford, 1992).

12 S. C. Vidyabhushan, *History of Indian Logic: Ancient, Medical and Modern Schools,* 4 (Shiv Books International, New Delhi, 2005).

Nyaya, in ordinary language, means 'right' or 'justice'. *Nyayashastra*, therefore, means the science of right judgement or true reasoning.[13] Though the *Nyayasutra* or 'the aphorisms of the Nyaya system' were compiled by Aksapada Gautama later[14] Nyaya's prehistory is tied to the ancient traditions of debate and rules of reasoning (*Vada Shastra*). It has long been believed that the received text of *Nyaya Sutra* shows 'compilatory' features. Specifically, there is evidence to suggest that portions of the text belonged to some other work that dealt with debate, which was possibly a debate manual.[15]

The *Anvikshiki*, by virtue of the predominance of the theory of reason, was also called *Hetushastra* or *Hetuvidya*[16]*, Tarkavidya* or the art of debate or *Vadavidya*[17] or the art of disputation and also *Nyaya Shastra*. Nyaya logic differs from the syllogistic demonstrations of Aristotle, though the basic principles of inherence involved in syllogism is similar to that of *Panchavayavakya* of Nyaya. The dialectics or the art of philosophic disputation in Nyaya and its historical opponent Buddhism resemble the notion of dialectic found in the writings of Plato and Aristotle. Though it is yet to be established which of the ancient civilisations influenced the other, the antiquity of the Indian system of logic cannot be disputed. It is primarily because, ancient Indian literature, in written form, were mostly believed to be compilations from a rich oral tradition and influenced by a prolonged literary existence of Sanskrit. Therefore, as dating of any Indian text is notoriously difficult, dating of the ideas inherent in the

13 Yuan Chwang (Hwen-thsang) translates *Nyaya* to mean true reason and the Tibetan translation also conveys the same meaning (*Supra* note 12 at 40).

14 *Nyaya Sutra,* according to most of the commentators, was compiled between 200 BC to AD 100. The first commentary on *Nyaya Sutra*, *Nyaya Bhashya* of Vatsyayana (400 AD), responds to Nagarjuna and *Vijnanavada*, *Nyaya Vartika* of Udyotkara (635 AD) is a sub-commentary on *Nyaya Sutra*, which responds to Dignaga's definition of perception along with giving critical accounts of Vasubandhu and Nagarjuna; *Nyayavartikatatparyatika* of Vacaspati Mishra (841 AD) responds to the criticisms against his predecessors Udyotkara and Vatsyayana by the Buddhist logicians. The debate between Buddhists and Naiyayikas which was carried out for centuries in public forums and written texts offers a very rich tradition of public discourse and it was played out on logical and epistemological grounds rather than being a sectarian conflict. Thus, the history of evolution of Indian logic itself is adversarial and argumentative and therefore, the conceptual categories evolved in the process are most conducive for our modern adversarial legal reasoning. In order to simplify the task for giving an overview of Nyaya logic and epistemology, the definitions of technical terms etc have been given in this research from *Nyaya Sutra* without going into the complexity of Nyaya-Buddhist controversy on the meaning and otherwise of the concepts. A full-fledged argumentation theory which may come up from the detailed account of Indian logic and dialectic incorporating Jaina tradition, *Lokayata* tradition, *Mimamsha* theory of interpretation, Grammarian's accounts and *Navya Nyaya* along with classical *Nyaya* and Buddhists, warrant a collaborative research project with experts from the field of Law, Philosophy, language and rhetoric.

15 Alberto Todeschini, "Twenty Two Ways to Lose a Debate: A Gricean Look at the Nyaya Sutras Points of Defeat" 50, *Journal of Indian Philosophy 38 (1):49-74.* 2010, *Available at:* https://doi.org/10.1007/s10781-009-9083-y last visited on November 15, 2024.

16 *Manusamhita*, 2-11, *Mahabharata*, Adiparva, Adhyay 1, verse 67 and in other places call it Hetushastra.

17 *Manusamhita*, *Mahabharata*, *Skandhapurana, Ramayana, Yajnavalkya samhita* and Nyaya Sutra call it *Vadavidya* and *Tarkavidya*. *Supra* Note 12 at 7-8.

texts remains impossible without employing certain loose secondary methods. In Indian tradition, when an idea is addressed in a work, the circumstances of life or even the identity of the author was not considered as important as in the West. The persons of the author are not infrequently *obliterated or fated to remain anonymous forever.*[18]

The Greek writings mention about the 'gymnosophists' of India.[19] (Matilal, 1985, 1). Before Alexander came to India, the Greeks had some idea about a mysterious world which Herodotus mentioned in his *Histories*, where 'spiritual athletes' roam at the very edge of the *oikoumene* (inhabited or inhabitable known world).[20] Maulana Azad, in his "Introduction" to *History of Philosophy: Eastern and Western,* mentioned about the accounts of Alexander that his teacher Aristotle had requested him to find out the state of knowledge among Indians, which gives a fair amount of suspicion that the Greeks were aware of the Indian wisdom much before the invasion[21] But unfortunately, as Kapil Kapoor laments, *"Europe's 13*th *century successful venture of relocating the European mind in its classical Greek roots is lauded and expounded in the Indian universities as 'revival of learning' and 'Renaissance'. But when it comes to India, the political intellectuals dismiss exactly the same venture as 'revivalism' or 'obscurantism'."* Therefore, he advocates for "*relocating the Indian mind in Indian thought."*[22]

Though Indian tradition has distinct and complete-in-themselves philosophical schools, there is a commonality amongst them on two fronts relevant to the present enquiry: firstly, an epistemological analysis of 'ways of thinking' which aid their critical thinking and secondly their foundational philosophical quest for the highest good. The schools of Indian thought are always engaged with each other in their agreements and disputation as well as in practices and spiritual quest for salvation. Even a school of logical realism like Nyaya begins with the assertion that *"the knowledge of the true character of the sixteen categories leads to the attainment of the highest good."*[23] The sutras and the commentarial tradition argue that epistemic success is central in the search for happiness, since we must understand the world properly should

18 Supra note 5 at vii.

19 B. K. Matilal, *Logic, Language and Reality: An Introduction to Indian Philosophical Studies,* 1 (Motilal Banarsidass, New Delhi, 1985)

20 Sanujit, "Depiction of India in Ancient Literature", *World History Encyclopaedia,* 11 Jan 2011, available at https://www.worldhistory.org/article/199/depictions-of-india-in-ancient-literature/ (last visited on November 16, 2024).

21 Maulana A. K. Azad, "Introduction: The Meaning of Philosophy", in *History of Philosophy: Eastern and Western, Vol. 1*, 24 (S. Radhakrishnan, (ed.) George Allen & Unwin Ltd., London, 1952).

22 Kapil Kapoor, "Eleven Objections to Sanskrit Literary Theory: A Rejoinder", available at: http://www.indianscience.org/essays/st_es_kapoo_eleven.shtml (last visited on November 16, 2024).

23 Ganganath Jha, *Gautama's Nyaya Sutras: with Vatsyayana-Bhasya,* 3 (Oriental Book Agency, Poona, 1939).

we desire to achieve the goods it offers. Nyaya argues that epistemology should improve cognitive abilities to help people achieve their life goals.

Therefore, one of the most important medical works of the classical period, the *Charakasamhita* talks about the rules that were to be observed in actual arguments and an indication of what handbooks or manuals of debate may have contained. *Panchavayavakya* or five step demonstration of argument (*sthapana*) is found in the logical section of the *Charakasamhita*, which also borrows a lot from the categories of *Vaisheshika* School, which is a sister-system of Nyaya. Though the medical school might have independently developed its logic and epistemology, it shares certain common concerns with the first and fifth chapters of the fundamental text of the Nyaya School of philosophy, the *Nyaya Sutra*. The treatment of logical method and ways of argumentation in *Charakasamhita* is much simpler and less technical than in *Nyaya Sutra*[24], because of the obvious reason that the former was primarily developed as method and philosophy of science i.e., an epistemological and logical foundation for a scientific practice of medicine. The similarity between the two suggests that there is a common ancestry of a rich oral tradition of argumentation or the existence of treatises which influenced both the medical school and logical school. Moreover, in any build-up to a school of holistic knowledge system, an inquiry into the 'ways of knowing', art of disputation and conditions of defeat were commonly adhered to.

## 2. NYAYA LOGIC AND EPISTEMOLOGY

*Nyaya* philosophy provides a profound framework for understanding justice and legal principles within the broader context of Indic jurisprudence. *Nyaya* emphasises logic, reasoning, and the pursuit of truth. *Nyaya's* methods of analysis and argument resolution influenced much of classical Indian literary criticism, philosophical debate, and jurisprudence.[25] *Nyaya Sutra* begins with enumerating the sixteen categories, the knowledge of which, it says, leads to the highest good. The categories, scholars believe, are arranged in such a manner that they represent stages of dialectic or the process of clearing up knowledge by discussion. A bare mention of them gives a fair idea about Nyaya philosophy. The sixteen categories are: *Pramana* (1), which signifies the means of knowledge; *Prameya* (2) or object of knowledge; *Pramana* and *Prameya* constitute the basis of a debate, where a thesis is to be proved but *Samsaya* (3) or doubt arises out of conflicting judgements of the disputants when they while pursuing their *Prayojana* (4) or purposes cite *Dristanta* (5) or familiar instances which is not open to such a doubt. The case is then shown to

24 S.N. Dasgupta, vol. 1, *A History of Indian Philosophy,* 302 (Motilal Banarsidass, New Delhi, 2022).

25 M R Dasti, "Nyaya", *Internet Encyclopaedia of Philosophy*, available at: https://iep.utm.edu/nyaya/ (last visited on November 17, 2024).

rest on *Siddhanta* (6) or tenets, which are accepted by both the parties. That the case is valid is further shown by an analysis of it in five parts called *Avayavas (7)*. Having carried out *Tarka* (8) against all contrary suppositions the disputant affirms his case with *Nirnaya* (9) or ascertainment. If the opponent (defendant), not being satisfied with this process of demonstration, advances an antithesis, he will have to enter upon *Vada* (10) or discussion which may assume the form of *Jalpa* (11) or a wrangling and *Vitanda* (12) or cavil. Failing to establish his antithesis, he will employ *Hetvabhasha* (13) or fallacious reasoning *Chhala* (14) or quibbles, and *Jati* (15) or sophisticated refutation on the basis of false analogy, the exposure of which will bring about his *Nigrahasthana* (16), the twenty-two grounds of defeat.[26] (Vidyabhushan, 52).

Such a detailed employment of logical and epistemological tools to understand the nature of reality and a quest for the highest good through reason and where logic, moral laws and quest for selfhood are interwoven, is the most unique method of philosophising. The highest good is sought visualising adversarial opinions developed through a properly prescribed research methodology (definitions and kinds of *Siddhanta* (sutra 26 and 27), the 6th Category, one of which is a hypothetical doctrine (sutra 31), a methodological point of departure for the discussion to begin with and the *Siddhanta* being based on sound common sense[27]). These sixteen categories may be grouped into Pramana Theory, Metaphysics, Procedure and Dialectics or *Vada-vidhi*. For our limited purpose of legal reasoning in this chapter we shall discuss the Pramana Theory in this section and dialectics in the next so that it may serve as an introduction to our subject of discussion.

## 3. PRAMANA THEORY

At its essence, Nyaya is concerned with epistemology or the study of knowledge and the methods of acquiring valid knowledge (*Pramana*). *Pramanas* serve both as originating causes of true cognition and means of critical appraisal of cognitive claims. It is the most important component of a rational belief. *A rational belief is one that is appropriately caused, justified by one or more appropriate Pramanas and leads to successful practice*[28] (Mohanty, 332). Nyaya identifies four valid sources of knowledge: perception (*Pratyaksha*), inference (*Anumana*), comparison (*Upamana*), and testimony (*Shabda*). These sources serve as the foundation for our understanding of Nyaya argumentation and its application in legal reasoning.

26 *Supra* Note 12 at 52.

27 *Dristanta* (category 5), being defined by sutra 25 as *"with regard to which both ordinary man and trained investigator or professional expert are in agreement"* (*Supra* Note 23 at 57).

28 If something conflicts in practice (*vyaghatavadhirasamkha*), the cognition has not overcome the sceptic challenge.

1. *Pratyaksha* (Perception**):** Nyayaysutra defines perception as *that right knowledge generated by the contact of the sense with the object, which is devoid of doubt and error.*[29] Perception is commonly called the *Jyesta Pramana* (the 'eldest' knowledge source) by Nyaya, since other *Pramanas* depend on perceptual input, while perception operates directly on the objects of knowledge. Indeed, Gangesha suggests the following definition of a perceptual cognition: *"a cognition that does not have another cognition as its proximate instrumental cause."* Inference, analogy, and testimony, on the other hand, depend on immediately prior cognitions to trigger their functioning.

   The primacy of observation is central to any knowledge claim. Perception is accepted by all the schools of Indian thought as a valid source of knowledge including the *Charvakas*. Direct observation forms the basis for establishing facts in legal contexts as well. Evidence presented in court must be verifiable through sensory experience, aligning closely with the principles of evidence in modern jurisprudence.

2. *Anumana* (Inference): Anumana is the most important contribution of Nyaya. *Nyaya Sutra* 1.1.5 defines inference as follows.

   *An inferential cognition is preceded by perception, and is threefold: from cause to effect, from effect to cause or from that which is commonly seen.*

   Inference consists in making an assertion about a thing on the strength of Linga or mark which is associated with it, as when finding smoke rising from a hill, we remember that since smoke cannot be without fire, there must be fire in the distant hill.[30] Here smoke is the hetu or linga. That about which assertion has been made, the hill in the example, is called Paksha, and fire is Sadhya. For a valid inference it is necessary that the linga must be present in the Paksha and all other known objects similar to *Paksha* in having the *sadhya* in it but must not be present in any such object, which does not possess the *sadhya*. The use of *Avayavas* or five step demonstration is a type of proof procedure admissible in a critical inquiry. It insists that the inquirer be able explicitly to set out for others the piece of knowledge so acquired as the conclusion of a precisely formulated demonstration (*avayava*). In its general schematic form, a demonstration scheme has five steps: (i) Preliminary statement of the thesis to be proved. (ii) Citation of a reason. (iii) Invoking an example. (iv) Application to the present case.

29 *Supra* note 24 at 333.

30 *Id* at 343.

(v) Assertion with confidence of the conclusion.[31]

For example: (i) There is a fire on the mountain (*pratijna*, thesis). (ii) Because there is smoke there (the *hetu*, reason or probans). (iii) As in the kitchen (the *udaharana*, illustration of concomitance). (iv) The mountain is likewise smoky (the *upanaya*, application of the rule). (v) Therefore, there is fire in the mountain (the *nigamana*, conclusion). To give another example in simpler form, if one has to convince another that it is going to rain, he would argue: "Look, it is going to rain. For, see that large black cloud. Last time you saw a large black cloud like that one, what happened? Well, it's the same now. It is definitely going to rain."

The general conditions for something to be taken up as a subject for inference are that it be under dispute or currently unknown, with no reports from other knowledge sources available to definitively settle the issue. There is a token of inductive support for the *Vyapti* in the form of Udaharan, *a kitchen hearth.* There are also known negative examples, (*vipaksha*) of something that lacks both the prover property and the probandum; *where there is no fire, there is no smoke*, *like a lake.* Obviously, an instantiation of the prover property in the *vipaksha* class vitiates the argument.

Legal reasoning often involves drawing conclusions based on available evidence. Nyaya's method of inference enables legal practitioners to construct logical arguments and derive legal principles from specific instances.

**3.** *Upamana* (Comparison): Upamana consists in associating a thing unknown before with its name by virtue of its similarity with some other known thing. A man from the city who has never seen a wild ox goes to the forest and asks a native what is wild ox? The native replies "it is just like a cow." Then when he sees a wild ox and finds it similar to a cow, he forms the opinion that it is the wild ox. Had the native told him "This is wild ox" by pointing towards the wild ox, the knowledge source would have been Shabda. The association of the known with the unknown makes it Upamana.

The principle of comparison allows for the application of established precedents to new cases, facilitating the evolution of legal norms. This dynamic mirrors the common law system, where past judgments and analogical reasoning inform current rulings.

**4.** *Shabda* (Testimony): The Nyaya concept of *Shabda Pramana* is

31 Jonardon Ganeri, *Philosophy in Classical India: The Proper Work on Reason,* 14 (Routledge, London, NY, 2006).

defined as the testimony of reliable authority (*apta*). *Shabda,* as a *Pramana* is applied not only to the Vedas, but to the testimony of any trustworthy person, and Vatsayana says that trustworthy person may be of three kinds, *rishi, arya or mleccha*[32], which may be loosely translated in the present context into an expert, noble or foreigner.

Nyaya's recognition of valid testimony or *Shabda* is the most distinctive feature of Indian epistemologies. Language plays a very important role in shaping our knowledge, but no Western philosopher recognised it as a source of knowledge as in *Pramana* tradition. A sentence or a word by itself may upon being uttered by a competent speaker and heard by a competent listener, generate in the later a valid knowledge about a state of affairs. Our understanding of the principles of precedence as well as the authenticity of evidence and testimony has something to do with dependence on a reliable authority. *Shabda Pramana* underscores the importance of credible sources in establishing legal arguments. In this context, the testimony of witnesses and authoritative texts plays a crucial role, in addition to the legal research being dependent on the *apta vachana* or the authoritative precedence, insights and authority of our predecessors. For that matter, the entire knowledge system is built up on *Shabda Pramana,* our experiences, reasoning and comparison, being corroborative to the knowledge and this is what Pramanavada is saying.

Many ancient Indian legal texts, such as the *Manusmriti* and *Arthashastra*, reflect Nyaya principles. Commentators have historically used Nyaya logic to interpret and apply these texts, blending philosophical rigour with practical legal application. Legal judgments are frequently grounded in logical analysis, drawing from the Nyaya framework to ensure coherent and just outcomes. Dharmashastras mention legal reasoning as an important source of our knowledge of law in addition to *Smriti* (that embodies the memory of wise men, i.e., tradition), *sadachara* (good custom) and *atmatusti* (self-satisfaction), which may be construed to mean approval of one's own conscience. Where law text conflict, *Nyaya* (reasoning) should step in.[33]

## 4. LEGAL REASONING AND ARGUMENTATION

We have observed above that we are doing inference when presuming something to be true, we conclude that some other things are true and when we express it in language, we are giving an argument. The condition which distinguishes good inference from bad inference is stipulated by what is called logic. Logic in India was developed in two distinct traditions: a. *Vada* tradition, the tradition of debate which was concerned with dialectical tricks, eristic arguments (arguments which are presented for rebuttal rather than establishing a point

32 *Supra* note 24 at 304

33 J. N. Mohanty, *Reason and Tradition in Indian Thought,* 248 (Clarendon Press, Oxford, 1992).

of view) and sophistry and b. *Pramana* tradition, which was concerned with the criteria of empirical knowledge.[34] The section above enumerates *Pramana* doctrine of Nyaya and the present section gives a brief account of the *Vada* and *Vada-vidhi* (method of debate), with special reference to legal reasoning.

In legal reasoning and argumentation, there is a deductive reconstruction of a judges' justification of a decision and a dialectical process which had led to the selection of the chosen justification. The adversarial and discretionary nature of legal reasoning also involves reasonable evaluation of alternative choices. Nyaya philosophy of *Vada* and *Vada-vidhi* could have immense influence on the development of jurisprudence and legal reasoning through its insistence on critical thinking, disputations, structures of argument, and thereby contributes to a comprehensive understanding of justice. The system of logic and epistemology in Nyaya is particularly relevant to legal reasoning and argumentation. The *Nyaya* method provides a rhetorical model of argument presentation that relates to and differs significantly from both Aristotelian and contemporary approaches to argument, rhetoric, and epistemology. The *Nyaya* method has not been fully explored in legal argumentation because *Nyaya* has been misinterpreted as a relative of Greek logic and the use of commonly translated terminologies often obscure rather than clarify.[35]

*Nyaya Sutra* discusses the debate categories in later chapters so that its primary concern with the acceptable and sound method for philosophical discourse is not compromised in the initial discussion. It puts the discussion of the debate categories in its natural home, in the context of the discussion of the *Pramanas*, means of knowledge, as well as *Prameyas*, the object of knowledge. It was concerned especially with the *Pramana* called *Anumana*, literally "after-knowledge." In other words, this tells us what else we know (or what truths can be derived) when we know certain things already. The idea was, in effect, an unconscious search after the nature of rationality as it was understood in the Indian context.[36]

The development of dialectic in India may be traced back to a critical period when Vedic ritualism and practices were challenged and social codes, moral norms and Vedic beliefs in the destiny of the soul were doubted.[37]

34 *Supra* note 3 at 96.

35 Keith Lloyd, "A Rhetorical Tradition Lost in Translation: Implications for Rhetoric in the Ancient Indian Nyaya Sutras", in *Advances in the History of Rhetoric, Vol. 10,* 20 (The American Society for the History of Rhetoric, 2007).

36 *Ibid.*

37 Pre-Vedic and non-Vedic philosophies including the extreme materialism of *Charvaka* has profound influence on the development of disputation. As early as the Rigveda (10-30-3, 8-70-7, 8-71-8) refers to a class of man (subsequently designated as *Charvaka*, a pupil of Brihaspati) who believe that consciousness is produced through the combination of four elements, and once elements are dissolved in death consciousness also disappears. In *Ramayana* (Ayodhyakanda, sarga 108, verse 17) Javala elucidates similar doctrine. (*Supra* note 12 at 9) Such a challenge to the orthodox beliefs and

Questions, answers and debates became order of the day. Matilal has called debate the 'preferred form of rationality' in classical India.[38] Nothing was too sacred for criticism and refutation. Manuals for professional debates were written in various schools for training the debater in the types of debate, types of argument, tricky devices of debate and grounds for defeat. *Charakasamhita*[39] divides debate into two: debate in the spirit of cooperation with fellow scholars and debate with opposition and hostility. Nyaya has similar but more systematic classification and carried more authority in debating circles (Matilal, 1985, 12-13).

Nyaya debate into three: *Vada, Jalpa* and *Vitanda*. In *Vada* each participant is a seeker of truth. *Vada* has the following characteristics:[40]

(a) *There is a thesis and counter-thesis opposing each other.* Here *the mutually incompatible attributes are ascribed to the same locus, at the same time and neither to be taken as finally decided.* There is no use of discussion on any subject if the parties come out with pre-settled conviction. The readiness to let go of one's dogma if proved to be invalid is the main condition of any debate, unlike our primetime television debates where the treacherous binary logic of journalistic formulation of the 'flashing question' on the screen (which is already loaded with an answer) does not allow the panel to resolve any issue at hand and even after an hour of disputation, the discussion leads the viewer to nowhere;

(b) *The proving and disproving of either of the theses should be based upon Pramana and tarka (logic).* The reader may visualise the same example of prime-time debate in each of these characteristics to understand how it should not be conducted and then proceed to understand how it should be as per the well-settled debating methods of Nyaya;

(c) *Each side should mention the standard five steps in the demonstration of one's reasoning.*

(d) The reasoning should not entail contradiction with any tenet or

philosophies needed proper development of a logical system. Though the *Charvaka* epistemology and metaphysics was vehemently criticised by other schools, there was an intellectual openness in Indian knowledge tradition which may be best exemplified by the following question asked by Bhartrhari, the 5th century philosopher of language in his last *karika* of the second *kanda* of *Vakyapadiya*, *"The intellect acquires critical acumen by familiarity with different traditions. How much does one really understand by merely following one's own reasoning only?"* (*Supra* note 22).

38 B. K. Matilal, *The Character of Logic in India,* 32 (State University of New York Press, Albany, 1998)

39 *Charakasamhita* also talks about the utility of debate. It says that debate enhances knowledge and happiness, produces dexterity, bestows eloquence and brightness, removes misapprehension**,** and some precious mystic doctrine may come out from pupil, who owing to a temporary excitement and ambition for victory, is impelled to expound them in the course of the debate (*Supra* note 12 at 28-29).

40 *Supra* note 19 at 12

accepted doctrine.

In such a debate there will be defeat (Nigraha), but no animosity. By the detection of faulty reason untenable thesis could be refuted.

In *Jalpa,* two equal rival parties' debate with the goal of victory, which may not coincide with the establishment of truth.[41] This is a type of tricky debate which shares the only first two characteristics of *Vada* mentioned above and also includes *Chala* or proving and rebuttal based upon equivocation and *Jati* or sophisticated refutation on the basis of false analogy. Here if the use of *Chala* and *Jati* is exposed in the opponent, he has met with *Nigrahasthana* or points of defeat. These tricks may be allowed as per the rules of the game, but the onus is on the opponents to stop this or call out the bluff.[42]

*Vitanda*, the third type of debate is characterised by the lack of proving the counter-thesis or where one tries to censure the other without establishing anything. Here the debater is not making any statement and thereby not giving his opponent any opportunity to attack his position. The infamous 'hit and run' method in contemporary politics, best exemplifies *Vitanda*. A *Vaitandika* often enters into public discourse not because he has some alternative plan or a thesis of his own, but just for the fun of it. Vatsayana suggests that if confronted by a *Vaitandika*, one should only ask what he proposes for debating. If his motive is simply to refute then also, he concedes a position viz., refutation of the opponent and then the onus of complete rebuttal shifts to him. But supposing that the debater is just an inquisitive seeker of truth, who is yet to formulate his view on the subject, later Niyayikas classified debate into four: *vada, vada-vitanda, jalpa* and *jalpa-vitanda*, the first two being for the honest seekers and the last two for those who debate for the sake of pride. In fact, according to Matilal, *vada-vitanda* is a more fruitful method.[43]

## 5. *NIGRAHASTHANA*

A brief account of 'Points of Defeat' (*Nigrahasthana*) offers some light on the Nyaya method of vanquishing the opponent by showing weakness. *Nigrahasthana* are those twenty-two occasions that if met in debate would entail defeat. The conditions under which a debater would meet with defeat were discussed widely in India and have also attracted considerable attention from modern scholars. The points of defeat, according to *Nyayasutra*, are:

1. *Abandoning the thesis*, in an instance of abandoning the thesis, a debater admits in his own example the property of the counter example (pratidrishtanta) offered by the opponent.

41 *Id* at 13.
42 *Ibid*.
43 *Id* at 17.

2. Offering *different thesis* or shifting of proposition: when the debater presents a different thesis from the one with which he began the argument.
3. *Contradicting the thesis*, the truth of the reason is incompatible with the truth of the thesis.
4. *Renouncing the thesis*, denying the asserted object when [one's] position is repudiated.
5. *Shifting the reason*, the debater has put forward his thesis and a certain reason. The opponent has attacked this reason and so the debater further qualifies the original reason, thereby modifying it.
6. *Different topic*, if during the debate one of the two parties introduces an unconnected, irrelevant, topic.
7. *The meaningless* is an argument which is based on a nonsensical combination of letters in a series. It also violates 1 and 5. Such arguments deserve rebuke.
8. The *Unintelligible* is an argument where the debater has three chances to make himself understood, but he fails to do so, he is disqualified.
9. *The incoherent* is one where the uttered words or statements have no meaningful syntactical connection and the resulting utterance is therefore meaningless. Vidyabhushan gives the example of an opponent who, finding no other means of self-defence says "ten pomegranates, six cakes, a bowl, goat's skin and a lump of sweet."[44] The example appears very simple and the most obvious but if such an argument is made with sophistry, there could be occasions when such a verbose nonsense go unrebuked.
10. *Mis-timed or inopportune* is an argument, the parts of which are mentioned without any order of precedence. The meaning of the argument is affected by the sequence. Similarly, 11. *Saying too little or Incomplete,* 12. *Redundancy,* 13. *Repetition*, 14. *Non-reiterating*, 15. Not *understanding* the proposition in spite of repeating it three times. 16. *Lack of idea*, 17. *Evasion,* 18. *Admission of the opponent's opinion*, 19. *Overlooking the objectionable*,
20. *Objecting the unobjectionable*, is accusing of a point of defeat when there is no point of defeat. 21. *Deviating from a tenet*, states something that is inconsistent with those very tenets.
22. *Pseudo-reasons* or *hetvabhasa* are fallacies of reason. These are occasions when the debater has met with defeat. Nyaya, in their own

44 *Supra* note 12 at 87.

admission, say that these 22 are not the exhaustive ones, but include most of the conceivable situations, where the decision regarding the defeat of a participant could be arrived at.

These points of defeat are the most important analysis from the point of view of legal reasoning. The debater loses as soon as he shows his incompetence or acts in a way that indicates his confusion. Most of the twenty-two varieties are checks in the game of debate and therefore are very important for the science of disputation and indispensable for legal reasoning. These situations are pointed out so that they can be recognized and, if recognized, they can be avoided on one's own and reproached in the opponent's arguments. Thus, the knowledge of the 'points of defeat' is strategically advantageous. That is, as Todeschini argues, *a debater who is conversant with the norms followed in debates is more likely to be victorious than one who isn't.*[45]

Thus, the criteria for valid reasoning or the general principle or rule that validates the reasoning is the prime focus of *Nyaya* logic. This structure parallels modern legal argumentation, where claims must be substantiated by evidence and logical reasoning. The mutually irreducible claims and counter-claims in any dispute in an adversarial legal system require a closure in the form of justice. Such a closure is facilitated by applying the methods of reasoning in legal argumentation. By emphasising clarity and precision in definitions and concepts, which is essential in legal contexts, *Nyaya* logic may help the modern Lawyers in articulating their arguments while avoiding ambiguity and misinterpretation. The *Nyaya* framework encourages the examination of the consistency of arguments. Legal arguments must be coherent and not contradict established laws or precedents. *Nyaya's* emphasis on inference aligns with the legal practice of drawing conclusions from evidence. Lawyers use inductive reasoning to connect facts and formulate arguments that lead to a logical conclusion. Further, through dialectical engagement, anticipating and addressing counter arguments, a lawyer is enabled to defend her client in a more forceful manner. Nyaya advocates the use of *dristanta* or illustrative examples, the fifth of the sixteen categories to elucidate arguments. It is something that is directly perceived and needs no proof. *Nyayasutra* defines an example (*dristanta*) as "something about which experts and laypersons have the same opinion (*buddhi-samyam*)." By (showing) the contradiction of the *dristanta* the position of the opponent can be declared as refuted. By the substantiation of the *dristanta*, one's own position is well-established. In law, precedents and case studies serve a similar purpose, illustrating how legal principles apply to specific situations.

45 *Supra* note 15 at 55.

## CONCLUSION

In addition to the logical and epistemological aspects, *Nyaya* philosophy also offers valuable insights into Indic jurisprudence. Justice (*dharma*) in *Nyaya* philosophy is not merely about retribution; it encompasses a broader understanding of fairness, ethical conduct, and social order. *Nyaya* posits that true justice arises from the alignment of law with moral principles and societal welfare. It advocates for a balanced approach to justice, emphasising that laws must be applied equitably.

Its principles encourage critical thinking, ethical considerations, and a commitment to truth- qualities essential for a just legal system. By emphasising logical reasoning, ethical conduct, and social harmony, *Nyaya* is relevant to contemporary legal thought and practice in India. As legal systems evolve, revisiting and integrating *Nyaya's* principles can enrich the discourse on justice, ensuring that the pursuit of truth remains in tandem with the highest good, and at the heart of jurisprudence. Further, integrating Nyaya principles can enhance legal practice by fostering a culture of rigorous analysis and ethical reasoning.

*Nyaya invites us to view the world differently. Its approach reminds us of what is important, grounding our arguments in experience, seeking common perspectives, and testing our solutions as to their fruitfulness. It reminds us that arguments must actualize sharable realisations in each of us, not just re-affirm what we already thought or attack the perspectives of others. Most of all, it reminds us that arguments just for the sake of arguing are "chatter," that winning indeed isn't everything, that selfish arguments only trap us in an endless cycle of fear and desire, and that arguments are known by their fruits.*[46]

Nyaya logic offers a rich and nuanced approach to legal argumentation, emphasising clarity, consistency, and rigorous reasoning. By integrating these principles into contemporary legal practice, lawyers can enhance their argumentative skills. As we navigate complex legal landscapes, revisiting ancient philosophies like Nyaya can provide valuable insights into the nature of truth and justice. As the ultimate objective of legal reasoning and argumentation is justice, the moral imperative behind the sixteen categories of Nyaya also holds importance. The categories listed after *nirnaya* (ascertainment) and *vada* (discussion) are considered fallacious, not on the ground of invalidity of their argument form, but in the sense that the arguments are approached either with selfish motive or are simply useless, which is considered as the sufficient ground for immediate disqualification from the debate. For example, the motive for the eleventh category, *jalpa,* translated "wrangling," is simply "gaining victory." Such debating practices were condemned in the scriptures too. Manusamhita enjoins excommunication to them (Adhyaya 2 verse 11),

46 *Supra* note 35 at 39.

Ramayana discredits such persons of perverse intellect (Ayodhyakanda, sarga 10), Mahabharata warns the followers of Vedanta against communicating their doctrines to such logicians.

The Indian dialectical system is different from its Western counterpart, because the *Naiyayika or the debater* is enjoined to develop a "spirit of detachment" with the awareness that we are essentially not our bodies or our minds, but the *atman* within and the relative importance we place on the things are insignificant. As much of the world's misery is traceable, directly or indirectly, to man's selfishness, Nyaya's quest for the highest good in the knowledge of sixteen categories and in the integrity of logical, ethical and metaphysical visions stand out as the most credible alternative to jurisprudential thinking. *Nyaya* is not just a method or model, but *a way of seeing and living* that involves an *unselfish moral vision of the world.*[47] This moral vision, where impartiality is not sought in the "veil of ignorance", but in the knowledge of the true nature of the self, stands in sharp contrast to the Western liberal and contractarian moral vision. Our justice imperative must not seek its grounding on the 'rational assessment of the best strategy' for maximising self-interest (contractarian philosophy) and then hypothetically ignoring (bracketing) our own self-interest so that to formulate an impartial vision for the other (Rawls), when we already have a more positive moral vision, well-founded on intellectual openness, compassion and a solid foundation of critical thinking in our own tradition.

In general, *Pramanavada* and theory of justification in legal epistemology form a theory of application of law to a particular case, which leads to the problem of interpretation[48] and a theory of evidence. Such a multipronged strategy to understand the theory of legal reasoning in jurisprudence and argumentation, based on the multidimensional and interlocked views of Nyaya could be useful even in the emerging world of algorithmic problem-solving models and Artificial Intelligence entering into the legal domain.

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47 M. Hiriyanna, *The Essentials of Indian Philosophy*, 105 (Harper Collins, London, 1985)

48 Mimamsa deals with the problem of hermeneutics in greater detail, and the principles therein are more or less similar to the Principles of interpretation taught in law schools like if a sentence's meaning is explicit, no attempt may be made to twist it, when literal meaning does not fit with the context, a technical meaning may be assigned, rules of grammar to be invoked for making seemingly unconnected words into a connected text, contradictory texts should be so interpreted that they are made consistent, if subordinate clause conflict with the principal one, it must be either made to agree with the latter or altogether disregarded, etc.

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# 'INTERPRETATION' – AN EXPLORATION OF MIMAMSA & ITS CONTEMPORARY RELEVANCE

*-Brunda Karanam*

## INTRODUCTION

Certainty in "law" and its "interpretation" is a *sine qua non* for a harmonious society, based on the rule of law. The judiciary shoulders the onerous responsibility of 'interpreting' laws by deciphering their meaning and legislative intent. Thus, the courts play a very important role in fulfilling the object for which the statute was enacted, and in promoting justice and social welfare. "The part that these rules (of interpretation) play in the administration of justice is by no means less important that the rules of procedure or the rules of evidence".[1]

The English Courts have evolved various canons of interpretation like the 'literal rule', 'mischief rule', 'purposive interpretation' and others, for statutory interpretation. In India, the *Mīmāṃsā* principles, authored by eminent Vedic scholars and logicians well-versed in language and grammar, to interpret the *śrutivākyās* (Vedas), came to be applied to interpret the *vyavahāra* portions of the *Smritis* which deal with civil and criminal laws.[2] The *Mīmāṃsā* principles were also used by the British Courts in India, to interpret the personal laws of the Hindus.In the post-independent era too, a few judicial pronouncements have referred to the *Mīmāṃsā* principles while interpreting statutes. However, the application of *Mīmāṃsā* principles in the modern context of statutory interpretation has not been consistent. A thorough understanding of the principles is required in order to apply them in modern statutory interpretation. While *Mīmāṃsā* is a vast area of study, the scope of this paper is limited to exploring the relevance of *Mīmāṃsā* to statutory interpretation in the contemporary context.

Section 1 deals with the applicability of *Mīmāṃsā* to legal and statutory interpretation. Section 2 gives a brief framework of *Mīmāṃsā*. Section 3 deals with the application of *Mīmāṃsā* principles in judicial pronouncements, while Section 4 discusses the contemporary relevance and challenges in applying *Mīmāṃsā* principles to modern statutory interpretation.

### 1. "मीमांसा" (*Mīmāṃsā*) – Applicability to Legal and Statutory Interpretation

The unique contribution of India to the field of interpretation is *Mīmāṃsā*. The meaning of the word "मीमांसा" (*Mīmāṃsā*) is "deep reflection, inquiry, examination, investigation".[3]*Mīmāṃsā* is one of the 6 (six) principal *Darśanas* (schools of philosophy) in *Sanātana Dharma*. *Mīmāṃsā* in the context of interpretation of laws, refers to पूर्वमीमांसा (*Pūrvamīmāṃsā*) or कर्ममीमांसा (*Karmamīmāṃsā*).[4] *Pūrvamīmāṃsā* deals with the accurate interpretation of the Vedic rituals "…and the settlement of dubious points in regard to Vedic texts".[5] The *MīmāṃsāSūtras* were formulated to interpret the cryptic Vedic texts in Sanskrit, which laid down the rules for rituals and religious ceremonies.[6] The *Mimamsakas* constructed "…hyperfine doctrines of ascertainment of the meaning" of *śrutivākyās* (Vedas), which "…led them to an elaborate process of reconciliation of conflicts and resolution of doubts arising from apparent inconsistencies or contradictions in *śruti* texts".[7]"*Maharshi Jaiminī* is the oldest renowned author of the monumental work under the title *Mīmāṃsā*".[8] *Jaiminī's Sutras* "… are decidedly the most comprehensive and prevailing authority on the subject of interpretation".[9]

According to Hon'ble Rama Jois, J., "the prescription of *Mimamsa* as a qualification for judges spells out the importance in the interpretation of civil and criminal law".[10] Coolebrooke declared that, "The disquisitions of the *Mīmāṃsā* bear…certain resemblance to judicial questions…The logic of the

Mimamsa is the logic of the law…Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of the law, and this is, in truth, what has been attempted in the *Mīmāṃsā*".[11]

While *Mīmāṃsā* originally dealt with spiritual duties and rituals, the scientific method of inquiry and interpretation was equally applicable to laws, civil duties and the like. The applicability of *Mīmāṃsā* to statutory interpretation has been explained by K. L. Sarkar in detail [12] and summarised hereinbelow:

i. The "investigation of spiritual law and spiritual duty" which is the subject matter of *Mīmāṃsā*, is "…entirely analogous and similar to that of legal duty and positive civil law".[13]

ii. *Mīmāṃsā* "looks at the words alone"; "…*Mimansakas* start with the words and then follow out their consequences".[14] In this way, *Mīmāṃsā* "…is identical with the judicial principles of interpretation".[15] Contemporary statutory interpretation also begins with the words used in the statute and their literal meaning.

iii. "…(t)he authority of *Mimamsa* principles for interpretation of law has been recognised from ancient times…" [16] They have been referred to and / or relied on by *Apastamba, Baudhayana, Vasista, Vijnaneshvara, Jimutavahana*[17] and have been used to "…reconcile, harmonise and interpret conflicting or ambiguous statements contained in different *Smritis* or in the same *Smriti*".[18]

Prior to independence, the Privy Council and the British Courts in India have referred to and / or applied the *Mīmāṃsā* rules to interpret the personal laws of the Hindus [19] while deciding cases pertaining to adoption [20], succession [21], validity of marriage [22] etc. However, it may be seen that the reference to *Mīmāṃsā* principles in courts in the post-independent era has sharply declined.[23]

## 2. Mīmāṃsā– Basic Framework

An understanding of the basic framework of *Mīmāṃsā* helps in analysing its relevance to modern statutory interpretation. A basic framework of the procedure, principles, and axioms in *Mīmāṃsā* is set out below.

**2.1** Adhikarana – Procedure for Interpretation

*Mīmāṃsā* has a specific procedure for interpretation – "*Adhikarana*", as described by *Kumarilabhatta***[24]**:

विषयोविशयश्चैवपूर्वपक्षस्तथोत्तरम्।
निर्णयश्चेतिपञ्चाङ्गंशास्त्रेऽधिकरणंस्मृतम्॥
*viṣayoviśayaścaivapūrvapakṣastathottaram /*
*nirṇayaścetipañcāṅgaṃśāstre'dhikaraṇaṃsmṛtam* ॥[25]

The 5 constituents of *adhikaraṇa*, according to *Kumarilabhatta*, are as follows:

*(i) viṣayaḥ* – subject / text which has to be interpreted;
*(ii) viśayaḥ* – doubt / ambiguity;
*(iii) pūrvapakṣaḥ* – first side or postulation of a probable meaning;[26]
*(iv) uttaram* – response / answer / counter-argument;

*(v) nirṇayah* – conclusion.

Thus, *adhikaraṇa* gives us a systematic procedure to be followed for any interpretation. As noted by K. L. Sarkar, "…this process of *adhikaraṇa* is unobjectionable. It gives a prominent place to the view opposed to what is eventually adopted by way of conclusion, which by this method acquires a greater clearness and strength than otherwise would have been the case. This mode of argumentation, consisting of *purvapaksha* or *prima facie* argument, the *uttara* or refutation of it, and then the *siddhanta* or conclusion, is peculiar to the Hindu literature. It pervades all Sanskrit discoursive works. The system of *adhikarana* has been followed in *Uttara Mimamsa* or *Vedanta*".[27] Thus, we see that the procedure of *adhikarana* has universal application, and may be adopted for interpretation of laws, contracts, etc.

**2.2** Axioms of Interpretation

The objective of interpretation is to understand the meaning and intent behind a provision of law. To aid the process of interpretation, *Jaimini* lays down certain elementary principles / axioms:

1. सार्थक्यता – *sārthakyatā* – "Every word and sentence must have some meaning and purpose".[28] Any interpretation which rendered a provision nugatory or otiose is faulty, and suffers from अनार्थक्यदोषः *anārthakyadoṣaḥ*.[29] These flows from the "literal rule" of construction in modern jurisprudence.[30] Further, any interpretation which would render any word / provision otiose will not be favoured.[31]

2. लाघव – *lāghava* – "Where one rule or proposition would suffice, more must not be assumed".[32]

3. अर्थैकत्व – *arthaikatva* (unity in meaning) – Consistency in interpretation of the same word – "unless there are special reasons to do so, i.e., unless the context otherwise requires, a word must be given the same meaning at all places in a text wherever it is used.[33]

4. गुणप्रधान – *guṇapradhāna* – When the subordinate / ancillary idea purports to contradict / is in conflict with the principal, the ancillary should be interpreted in such a way that the principal remains, or the ancillary should be disregarded altogether.[34]

5. समञ्जस्य – *samañjasya* – harmonious construction – "Contradiction between words and sentences is not to be presumed where it is possible to reconcile them."[35]The rule of harmonious construction is well-established in modern statutory interpretation.

6. विकल्प – *vikalpa* – In cases of real contradiction, one of the options may be chosen.[36]

The aforementioned axioms may be applied in modern statutory interpretation too. A few decisions post-independence have applied them for interpreting statutes (elaborated in Section 3).

**2.3** Hierarchical Principles of Interpretation

Not only does *Mīmāṃsā* give us precise tools for interpretation, but also lays down the order of priority. The following Sutra by Jaimini makes this clear:

*JaiminiIII, iii, 14*

श्रुतिलिङ्गवाक्यप्रकरणस्थानसमाख्यानां समवाये पारदौर्बल्यम् अर्थविप्रकर्षात् ।[37]
*śrutiliṅgavākyaprakaraṇasthānasamākhyānāṃsamavāyepāradaurbalyamarthaviprakarṣāt /*
("Among the rules, *śruti*(direct assertion), *liṅga* (indicative power), *vākya* (syntactical connection), *prakaraṇa* (context), *sthāna* (place) and samākhyā (name), that which follows is weaker than that which precedes, because it is more remote than the real object".)[38]

As noted from the above *Sutra* of *Jaimini*, rules of interpretation are as follows:

1. *Śruti* (direct assertion) – "When a sentence is complete and explicit in sense and grammar, no attempt should be made to strain or twist its meaning. *Śruti* refers to that meaning which is understood on the mere hearing of the statement. (*Śruti* means hearing)".[39] This is the first, fundamental rule of *Mimamsa* and also the elementary rule of modern jurisprudence. "This is (a) universal principle prevailing in all civilized countries of the present day. It is called the literal principle".[40]

2. *Liṅga* (indicative power) – "When a word or expression used in a provision has more than one meaning, its correct meaning has to be determined by the context in which the word has been used".[41] Contextual interpretation is an established rule in modern jurisprudence also.

3. *Vākya* (syntactical connection) – "When words and sentences are not connected in an explicit or clear manner, they (the words) should be joined grammatically so as to make a sensible proposition".[42] Modern statutory interpretation also recognises that while interpreting a statute, the ordinary sense of the words is to be adhered to, unless it leads to absurdity. The objective behind *Vākya* (syntactical connection) is that "…the defective grammar or composition of a sentence should not be allowed to defeat the purpose (*prayojana*or*artha*) of the provision.[43]

4. *Prakaraṇa* (context) – "…when a sentence or clause makes no complete sense by itself, however clear its meaning and grammatical composition may be, the meaning of such a sentence or clause should be ascertained by reading it with some other passages with which it coalesces, having due regard to the context in which such a clause or sentence is used".[44]

The aforementioned principles "…form the science of interpretation" [45] in *Mīmāṃsā*. The literal rule is the starting point of interpretation both in *Mimamsa* and the modern system. However, as noted by K. L. Sarkar, the rules laid down by *Rishi Jaimini* and his followers for the departure from the literal rule are "… perhaps clearer, more logical and more distinctive than the rules discussed in our modern books. They lay down step by step how a more rational principle is to be adopted one after the other, and how a wider departure from the literal principle should be avoided when a narrower departure would suffice".[46] The sequence to be adopted while departing from the literal rule is definitely clearer in *Mīmāṃsā* compared to modern statutory interpretation. Incorporating the sequence in a *Sutra* form sets out a clear formula and ensures certainty and consistency in interpretation.

**2.4** Obligatory and NON-Obligatory Rules

*Mimamsa* clearly enunciates rules which are obligatory and non-obligatory:

(i) Obligatory rules
   a. *Vidhis* – injunctions / positive commands [47]
   b. *Nishedhas*–prohibitions / negative commands [48]

(ii) Non-obligatory rules

*a. Arthavadas* – explanatory statements [49]; non-obligatory rules connected with *Vidhis*[50]

*b. Namadheyas* – nomenclature [51]; non-obligatory rules which are not connected with any *Vidhi* [52]

Sacrificial formulae were referred to as *Mantras*, which sometimes acquired the character of *Vidhi*.[53] The distinction between obligatory and non-obligatory rules has been relied on in decisions dealing with validity of adoption etc. Whether a rule / provision is mandatory or directory is an issue confronted by the Courts frequently in the context of statutory interpretation.

**2.5** *Nyayas* (Maxims)

*Nyāya* or maxim is "…one of the devices by which an experience secured from or a conclusion reached in a particular case can be used to explain a similar situation in a brief and telling manner".[54] They are also "…based on robust common sense and worldly experience" and may be adopted for interpretation of statutes.[55] Hon'ble Rama Jois, J. opines that they are of immense use like the Latin maxims which have been used in modern jurisprudence.[56] While there are numerous *Nyayas*, a few which have been referred to in the decisions of Courts and / or which are pertinent to the interpretation of statutes are listed below:

(i) कलञ्जन्यायः – *kalañjanyāyaḥ* used to indicate a prohibitory act [57], has been relied on in recent cases involving statutory interpretation and is analogous to the modern rule that "negative expressions are rarely directory" [58];

(ii) मध्यदीपिकान्यायः – *madhyadīpikānyāyaḥ*[59] – "…a word can be shown to throw light on the preceding as well as the succeeding clause"[60];

(iii) सामान्यविशेषन्यायः – *sāmānyaviśeṣanyāyaḥ* – The special law prevails over the general one. This *Nyaya* corresponds to the Latin maxim '*Generalia specialibus non derogant*' in modern statutory interpretation;

(iv) रूढिर्योगमपहरतिः – *rūḍhiryogamapaharatiḥ* – Popular meaning prevails over the etymological meaning. The "common parlance" test has been frequently used by the Courts, especially in the interpretation of fiscal statutes.

3. **Mīmāṃsā Principles – Application by Courts**

Prior to independence, the Privy Council and the British Courts relied on *Mīmāṃsā* principles for interpreting Hindu Law in cases pertaining to adoption, marriage, succession etc. "After the codification of most of the personal law of Hindus, recourse to *Mimamsa* principles has fallen in desuetude".[61]

One of the celebrated cases which accurately applied the *Mīmāṃsā* principles to a case of adoption in Hindu Law, was *Beni Prasad* v. *Hardai Bibi and Ors.*[62] ("***Beni Prasad***"), decided by the High Court of Allahabad in 1892. The case concerned the validity of adoption (having taken place in fact) of an only son under Hindu Law. Sir John Edge, J acknowledged that the Court was faced with the difficulty of ascertaining the "…true and reasonable construction to be put on certain texts of the sacred law of the Hindus, and upon certain passages in the works of Hindu commentators…"[63] He further observed that the difficulty was enhanced by the fact that the texts and passages were in Sanskrit.[64] On how the text of Vasistha was to be construed, he opined that "…it must clearly be construed according

to the rules for the construction of the texts of the sacred books of the Hindu Law if authoritative rules are on the subject exist. That rules for the construction of the sacred texts and law of the Hindus do exist cannot be disputed, although those rules have been frequently overlooked or not referred to by Judges or English text writers, probably because they are in Sanskrit and have, so far as I am aware, not yet been translated. That they are rules of the highest authority is obvious from the manner in which they have been referred to by Mr. Colebrooke".[65]

The rule of *Mīmāṃsā* relied on by the counsel, and accepted by the Judge was that, when a text is supported by assigning a reason, it is not to be deemed as "*vidhi*" (mandatory), but only as recommendatory ("*artha-vada*"). "When a text is treated as *artha-vada*, it follows that it has no obligatory force whatsoever."[66]

The Court in *Beni Prasad* has made extensive observations on the need for Sanskrit scholarship to accurately interpret Hindu Law. While formulating the reasoning for the decision, the Court has time and again relied upon the authority of eminent Sanskrit scholars including lawyers well-versed in Sanskrit.[67] The Court also cautioned against relying on "…the mistaken and misleading translations or unauthorised interpolations of English translators…"[68]The same holds good for adapting Mimamsa principles to the modern context as well.

Hon'ble B.N. Srikrishna, J. has lauded the judgment in *Beni Prasad* for the accurate application of the *Mīmāṃsā* principles relating to the distinction between *Vidhi* and *Arthavada*.[69]

Post-independence, a few judgments of the Supreme Court and High Courts (mostly HC of Allahabad) have attempted to apply the *Mīmāṃsā* principles in the interpretation of statutes.

The *Mīmāṃsā* rule that "the popular meaning overpowers the etymological meaning" was referred to and applied by the Hon'ble Supreme Court of India, in the case of *GUI-ATI and Company v. The Commissioner of Sales Tax, U.P., Lucknow* [70]. In this case, the Court was deciding on whether the expressions "food" and "foodstuff" under the Government Notification [71] in question, included "food colours" and "food essences" for assessing the rate of Sales Tax to be imposed.[72]

The Apex Court noted that "(i)n the interpretation of fiscal statutes, the entries must not *prima facie* be construed in their technical or scientific import but must be understood in its ordinary sense". [73] The Court observed that while there was no fixed test for classification of a taxable commodity, the most commonly employed test was the "common parlance test" or "popular sense meaning". The Court concluded that "foodstuff would refer to anything with a nutritive value which is consumed for growth or sustaining one's life".[74]

In the case of *B. Premanand and Ors.* v. *Mohan Koikal and Ors* [75], ("***Premanand***"), the Apex Court made a reference to the *Shruti* principle and the *Garhapatya-Nyaya* of *Mīmāṃsā*, in the context of applying the literal rule of interpretation. The Court was concerned with the interpretation of Rule 27(c) of the Kerala State and Subordinate Services Rules, 1959, for determining the seniority *inter se* among candidates for a certain post. The Court opined that as the language of Rule 27 (c) was clear and unambiguous, the same had to be followed.[76]

The Court made a reference to several case authorities, both Indian and foreign, in applying the literal rule. In this context, Hon'ble Katju, J. also referred to the *Mīmāṃsā* Principles and observed that there was "…no reason why we should not use *Mīmāṃsā* Principles of Interpretation in appropriate occasions".[77] He noted that, "In Mimansa, the literal rule of interpretation is known as the '*Shruti'* or '*Abhida'* principle. This is illustrated by the *Garhapatyanyaya*".[78] While the Court has discussed *Garhapatyanyaya* and the *Linga* principle, it is not very clear as to how these have been

applied to the facts of the case, as the interpretation of the Rule in question was in accordance with the principle of *Shruti* / plain meaning of the words.

The interpretation of the Proviso in Section 6 of the Land Acquisition Act, 1984 fell for consideration in the case of *Vijay Narayan Thatte and Ors.* v. *State of Maharashtra and Ors*.[79] ("***Vijay Narayan***"). The Proviso was couched in negative language and the Court observed that it was a well settled rule of interpretation that "…when a Statute is couched in negative language, it is ordinarily regarded as peremptory and mandatory in nature".[80] According to Crawford, "Prohibitive or negative words can rarely, if ever, be directory".[81]

Hon'ble Katju, J. examined the Proviso to Section 6 of the Land Acquisition Act, in light of Principles, by referring to negative *Vidhis*. He observed that the *Mimamsakas* distinguished between: (i) prohibitions against the whole world (*pratishedha*) & (ii) those against particular persons (*paryudasa*) [82]. Further, *pratishedhas* were of two kinds – (i) those which prohibited an act in all circumstances without any reference to the manner / usage and (ii) those which only prohibited a particular mode of usage.[83] He also pointed out that the system had a deeper discussion by classifying the injunctions into various kinds.[84] *Nishedha-vidhis* were not only mandatory, but also had to be interpreted comprehensively to mean that one had to "…abstain from the very idea of the act prohibited…"[85]The *Kalanjanyayah* (the *Kalanja* Maxim)[86] was used to indicate a *Nishedha-Vidhi*. Applying this maxim, any rule / provision of law "…couched in negative language is prohibitory in nature and therefore such a rule must not be allowed to be violated directly or circumvented indirectly".[87]

The Court concluded that the Provision to Section 6 was "totally mandatory" and had no exceptions.[88] As the language of the Proviso to Section 6 was clear, the provision had to be construed literally.[89] The Court has lucidly applied the concept of *Paryudasa* to the interpretation of the Proviso in this case.

In *Surjit Singh*'s case[90], the Apex Court departed from the literal rule while interpreting Rule 443 of the Indian Telegraph Rules, which provided that in case of default of payment of the dues in accordance with the Rules, the Telegraph Authority could disconnect the service without notice to the subscriber.[91] The issue for consideration was whether the telephone lines in the name of the husband could be disconnected because of non-payment of dues in respect of the line in the name of his wife.[92]

The Court observed that in this case, the literal rule should not be adopted, rather, the intention behind the rule – which was to ensure payment of dues promptly by the subscribers, had to be considered. The Court adopted purposive construction [93] in upholding the action taken by the authority in disconnecting the lines in the names of the husband.

The Learned Judge also relied on the *Mīmāṃsā* principles and adopted the *Lakshana* (or *Linga*) rule, instead of *Shruti / Abidha* (literal rule), while giving a purposive interpretation to Rule 443 of the Indian Telegraph Rules.[94] Referring to '*Param Laghu Manjusha'*, the work of Sanskrit grammarian, Sri Nagesh Bhatt, the Hon'ble Judge observed that a word / phrase could have three meanings: (i) *Abidha* / literal meaning (ii) *Lakshana* (indicative or suggestive meaning) and (iii) *Vyanjana* (figurative meaning).[95]

Hon'ble Katju, J. made a reference to the 5-fold principles of *Shruti, Linga, Vakya, Prakarana, Sthana* and *Sankhya* and opined that *Linga* (or *Lakshana*) principle would be applicable in this case.[96] He further relied on the decision of the Supreme Court in *U.P. Bhoodan Yagna Samiti* v. *Brij Kishore*[97], in which the Court departed from the literal rule to interpret 'landless person' as a 'landless peasant' and not a 'landless businessman' to interpret a provision of the U.P. Bhoodan Act.[98] It is also

interesting to note that Hon'ble Katju, J. demonstrated in this case, as to how a provision in the US Constitution should be interpreted according to *Linga*, and not *Shruti*, as interpreting it literally would not serve the purpose or intent behind the provision.[99]

Similarly, in a case concerning the interpretation of an insurance policy, the Allahabad Court did not favour a literal interpretation, rather, favoured a beneficial interpretation to enable the policy holder to claim benefit under the policy.[100] In this case also, the Learned Judge referred to Param Laghu Manjusha[101] and concluded that the indicative meaning (*Lakshana*) had to be adopted.[102] While applying the Lakshana principle, the Court relied on the oft-quoted sentence- काकेभ्यो दधि रक्षताम् (*kākebhyodadhirakṣatām* – protect the curd from crows), and observed that literal interpretation (of protecting the curd only from crows, but not dogs, cats etc.) would lead to absurdity.[103] However, it may be noted that Hon'ble B. N. Srikrishna, J. does not favour applying the *Lakshana* principle to the interpretation of contractual terms which were explicit and clear.[104]

In the case of *Rajbir Singh Dalal*v. *Chaudhari Devi Lal University, Sirsa and Ors.*[105] Hon'ble Katju, J. referred to the principle of *Adhyahara* in the context of interpreting the relevant UGC Regulations for the requisite academic qualifications for appointment to the post of a Reader in a University. According to him, in *Mīmāṃsā*, the rule of "casus omissus" is known as *Adhyahara*.[106] He opined that *Mīmāṃsā* principles were superior, as Maxwell's Principles did not go further into the sub-categories of *casus omissus*, whereas, the *Mīmāṃsā*system lays down sub-categories under *Adhyahara – anusanga, anukarsha, vakyashesha* etc. [107] However, it is pertinent to note that the decision in this case was not based either on*casus omissus* or *Adhyahara*.

The concepts of *Adhyahara* and *Anusanga* were also referred to by the Learned Judge in the case of *Mahabir Prasad Dwivedi*[108] while deciding on the extension of principles of natural justice to a provision of a statute, though the opportunity of being heard was explicitly mentioned only in the first proviso (and not in the second one).The Learned Judge dealt with the *Anusanga* principle and its sub-categorisations and applied the same to the proviso in question, while extending the opportunity of being heard to the second proviso also.[109] Commenting on this decision, Hon'ble B. N. Srikrishna, J. notes that *Adhyahara* "…does not permit the random and arbitrary interpolation of words into a *shruti* text. The concepts of *anushanga*, *anukarsh*a, *tadutkarsha* and *tadapakarsha* have all to be read and understood within the basic principles of *Mimamsa*".[110] He further opined that the opportunity for an explanation in the first proviso could not be read into the second proviso, as the purpose of both the provisos was different.[111] The same conclusion could be achieved relying on *Maxwell* too, without recourse to*Mīmāṃsā*.[112]

The *Samanjasya* principle was relied on by the Apex Court in *Gujarat Urja Vikash Nigam Ltd.* v. *Essar Power Ltd.* [113] while dealing with apparent inconsistency in the Arbitration and Conciliation Act, 1996 and the Electricity Act, 2003. The issue to be decided by the Court was whether one law would prevail over the other. In the course of the arguments, a reference was made to the rule of *Generalia Specialibus non derogant*, a well-established rule in contemporary jurisprudence, according to which, the special legislation would prevail over the general one.[114]

Hon'ble Katju, J. relied on the *Mīmāṃsā* system in dealing with conflicts /inconsistencies, and observed that there were three ways of dealing with conflicts, discussed by Shabar Swami in his commentary on Sutra 14, Chapter III, Book III of Jaimini[115] (i) the *Samanjasya* principle harmonious construction[116] (ii) *Vikalpa* – when the conflict could not be reconciled, "….whichever law is more in consonance with reason and justice should be preferred"[117] (iii) *Badha* – one text overrides the other because of greater force.[118] The *Gunapradhana* axiom was also applied to the provisions in the Electricity Act to reconcile the apparent conflict.[119]

*Ispat Industries Ltd.* v. *Commissioner of Customs, Mumbai* [120] ("***Ispat Industries***") concerned the interpretation of Rules under the parent statute. The Court relied on *Gunapradhana*axiom, according to which "…(i)f a word or sentence purporting to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be disregarded altogether".[121] Applying *Gunapradhana* axiom, Hon'ble Katju, J. concluded that the Rule in question, being subservient to the legislation, had to be interpreted in consonance with the relevant provision of the Customs Act.[122]

In *Amit Plastic Industry* v. *Divisional Level Committee Meerut and Ors*[123] ("***Amit Plastic***") the Allahabad High Court applied the *Gunapradhana* axiom[124] and *Sphadi-nyaya*[125]while interpreting a provision of the U.P. Sales Tax Act. Commenting on the application of *Gunapradhana*, Hon'ble B. N. Srikrishna, J. opines that the "*Pradhana*" and "*Guna*" cannot be "arbitrarily decided by one's *ipse dixit*".[126] He further opines that even assuming the Act to be similar to the *Shruti* text, one cannot assume the *Pradhana* when the Act does not declare it.[127]

In *U.P. Agro Industrial Corporation Ltd.* v. *Kisan Upbhokta Parishad and Ors*.[128], the short question which arose for consideration was whether Animal Driven Vehicles ("**ADVs**") were "agricultural implements"? The Court observed that it was a well-settled rule of interpretation that the word should be construed in its common parlance, unless the statute / order defined it with a specific meaning.[129] Hon'ble Katju, J. relied on the *Mīmāṃsā* principle that "the popular meaning overpowers the etymological meaning".[130] While the word "*Pankaja*" literally meant "born in mud" and could refer to several things, the popular meaning was "lotus".[131] Applying the common parlance test, the Court held that ADVs could not be 'implements', as implements were commonly understood to mean tools.[132]

The issue which fell for consideration in *Craft Interiors*[133] was whether "…storage cabinets, kitchen counters, running counters, large reception / conference tables etc. (were) excisable as furniture"?[134] On perusal of the definitions in various dictionaries, the Court observed that "…ordinarily 'furniture' refers to movable items such as desks, tables, chairs, required for use or ornamentation in a house or office".[135] The Court held that items which were ordinarily immoveable and which could not be removed without cannibalizing were not 'furniture'.[136] In this context, Hon'ble Katju, J. also referred to the *Mīmāṃsā* rules according to which the popular meaning is preferred to the etymological meaning.[137]

In *Yogendra Nath*[138], the issue which fell for consideration was whether "…the assessment on the deities through shebaits under the provisions of the Indian Income Tax Act was in accordance with law?"[139] While deciding on the question of the juristic personality of the idol, the Court referred to Sabara Swami's *Bhashya* on *PurvaMimamsa*.[140] The Supreme Court held that "…the Hindu idol is a juristic entity capable of holding property and of being taxed through its shebaits who are entrusted with the possession and management of its property".[141]

In one of the recent judgments [142], the High Court of Gujarat relied on "purposive interpretation" to construe the expression "calendar year", to avoid absurdity. Observing that both *Mīmāṃsā* and Maxwell's Principles recognise "purposive interpretation", the Court opined that while "…the Maxwell method was search bound", the *Mīmāṃsā* rules were "solution-oriented".[143] The Court however did not elaborate on this distinction. The Court also applied the "*Gunapradhana*" axiom relying on the decisions of the Apex Court in *Ispat Industries* and *Gujarat Urja Vikas Nigam Limited* [144], and the "Sarthakeya" principle.[145] According to the Court "Sarthakeya" signified that "…meaningfulness has to be ensured in applying any law or rule. Thereby, the purpose is made to prevail over the outward expression which becomes subordinate".[146]

As seen from the decisions above, there have been attempts by the Courts in recent times to adopt the *Mīmāṃsā* principles to statutory interpretation. However, application of *Mīmāṃsā* to modern statutory interpretation, is not without challenges, as detailed below.

4. **Contemporary Relevance & Challenges**

The *Mīmāṃsā* system of interpretation with its procedure of *Adhikarana*, principles, axioms and *Nyayas* (maxims) is very detailed and systematic. The *Sutras* clearly lay down the procedure, rules and hierarchy to be followed in interpretation. Thus, adherence to the *Mīmāṃsā* system will promote certainty, efficiency and predictability in interpretation. As noted by many scholars and jurists like Coolebrooke, K. L. Sarkar, Rama Jois, J., and Katju, J., the *Mīmāṃsā* principles are no doubt applicable to the interpretation of laws.

In cases decided by the Privy Council and the British Courts (in *Beni Prasad* for instance), the primary rules of interpretation relied on, for interpreting the texts of Hindu Law, were *Mīmāṃsā* principles. The Hon'ble judges and the counsels engaged in a detailed discussion on the accurate interpretation of the Sanskrit texts.

An analysis of the decisions (*albeit* few in number post-independence) which have relied on *Mīmāṃsā* principles shows that the Courts have not applied these principles consistently. In the recent cases, *Mīmāṃsā* principles have been referred to, *in addition* to the rules of modern statutory interpretation. In other words, reliance on *Mīmāṃsā*, in many recent cases, seems ancillary, and the same outcome would have been achieved by solely relying on rules of modern statutory interpretation as well. Of course, this is also due to the fact that while the British Courts were dealing with Sanskrit texts on Hindu Law, most of the recent cases pertain to the interpretation of modern statutes in English. In a few decisions, while the Court has explained the *Mīmāṃsā* rules, the application of the same to the facts of the case is unclear.

Hon'ble B. N. Srikrishna, J. has discussed the challenges faced in applying *Mīmāṃsā* principles to modern statutory interpretation:

i. Accurate application of *Mīmāṃsā* requires precise knowledge of Sanskrit and appreciation of the *Sutra* [147] An "…attempt to understand the *Mīmāṃsā Sutras* without a good working knowledge of Sanskrit would be counter-productive".[148] Further, many technical Sanskrit terms do not have accurate translations / counterparts in English. This adds to the challenges of applying Sanskrit *Sutras* while interpreting English statutes.

ii. Generations of lawyers have internalised jurisprudential parlance in English over centuries, substituting the same with *Mīmāṃsā*"…may be attempted only after at least two generations of lawyers are well-trained in the discipline of *Mimamsa*".[149]

iii. Many terms in *Mīmāṃsā* have acquired conventional meanings. Lack of familiarity with such technical meanings would impede the accurate application of the principles, resulting in chaos.[150]

iv. If the *Mīmāṃsā* principles are introduced in the higher judiciary – the Supreme Court and the High Courts, it would be hard for the subordinate courts to follow the principles laid down by the higher courts.[151]

v. The "…*Nyayas* and maxims of *Mimamsa*need to be formally reduced into universally identified rules" for application by lawyers and judges.[152]

While the aforementioned concerns are well-founded, the application of *Mīmāṃsā* rules in decisions like *Beni Prasad inter alia* by British judges, goes to show that it is very much possible to appreciate the nuances of *Mīmāṃsā*, with the help of Sanskrit scholars.There is a need for engagement with Sanskrit scholars and *Mīmāṃsā* experts to assist the lawyers and the judiciary to appreciate and accurately apply the principles of *Mīmāṃsā*.

In many recent decisions, one finds that the Learned Judge *suo motu* applied the principles of *Mīmāṃsā*. If the lawyers are trained in this system, they could assist the Court in better applying the principles. Law students could be introduced to these principles and the basics of Sanskrit language in law schools, as suggested by Hon'ble B. N. Srikrishna, J.[153]In this regard, it may be noted that while law students don't necessarily study Latin, Latin maxims are used very frequently in law treatises, while addressing arguments, and in Court decisions. The familiarity with Latin maxims has led to their application in the legal system.

Introduction of *Mīmāṃsā*, along with modern statutory interpretation in legal studies would be a step forward in familiarising law students, lawyers and judges with the indigenous system of India, which could be applied in cases where it is most suitable.

## CONCLUSION

The *Mīmāṃsā* system of interpretation has immense intrinsic and instrumental value – intrinsic value as a *Darshana* / school of philosophy and instrumental value as an effective, methodical tool of interpretation, relevant for interpreting modern statutes and contracts as well. As noted by K. L. Sarkar, "…the Mimamsa rules have never been a dead letter. They were living principles…applicable to the construction of any system of law, ancient or modern, and can be extended to the interpretation of contracts and deeds…"[154]*Mīmāṃsā* principles have to be adapted to the modern legal system, with the combined efforts of connoisseurs of law, Sanskrit and *Mīmāṃsā.*

*Mīmāṃsā* and the modern principles of statutory interpretation are not mutually exclusive. In fact, they are complementary, and their application in appropriate instances, would lead to better evolution of laws and ensure greater certainty in interpretation. Consistent and accurate application of *Mīmāṃsā* principles by the higher judiciary, will lead to the development of an authoritative body of precedents, thereby contributing to the development of jurisprudence of statutory interpretation.

## ENDNOTES

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[1] Sarkar, K. L. (2013). *K. L. Sarkar's Mimansa Rules of Interpretation, Tagore Law Lectures – 1905* (M. Katju J, Ed.; 4th ed.). Thomson Reuters. (Original work published 1909).("**Sarkar, 1909/2013**"). P. 33.
[2] M Rama Jois. (2004). *Legal and constitutional history of India: ancient legal, judicial and constitutional system*. Universal Law Pub. ("**M Rama Jois, 2004**").P. 434.
[3] Apte, V. S. (2010). *The Practical Sanskrit English Dictionary* (4th ed.). Motilal Banarsidass.("**Apte, 2010**") P. 762
[4] *Uttaramīmāṃsā* or *Jñānamīmāṃsā* also known as *Vedānta* pertains to the study of the *Upaniṣads* and mostly deals with the "nature of the *Brahman*…" Apte, 2010. P. 762.
[5] Apte, 2010. P. 762.
[6] M Rama Jois, 2004. PP. 434-435.
[7] Srikrishna J, B.N. (2004). Maxwell v. Mimamsa. *Student Bar Review*, *16*, 1-14. ("**Srikrishna J, B.N. 2004**")P. 4.
[8] M Rama Jois, 2004. P. 434.
[9] Kishori Lal Sarkar. (2018 Classic Reprint Series. Forgotten Books). *An introductory lecture on the subject of the rules of interpretation in Hindu law, with special reference to the Mimânsâ aphorisms as applied to Hindu law.* Calcutta, S.L. Sarkar. (Original work published 1903).("**Kishori Lal Sarkar, 1903/2018**") P. 2.
[10] M Rama Jois, 2004. P. 436.

[11] Sarkar, 1909/2013. P. 38 cited from *Colebrooke's Miscellaneous Essays*, Vol. 1, P. 342.
[12] Kishori Lal Sarkar, 1903/2018. PP. 23-31.
[13] "Austin defines law as the command which obliges a person to a course of conduct"; according to *Jaimini*, "what is to be done as characterised by a command is Dharma" (चोदनालक्षणोऽर्थोधर्मः। – *codanālakṣaṇo'rthodharmaḥ*– *Jamini* I. i. 2). In both the definitions of *Jaimini* and Austin, "(L)aw and legal duty are counterparts of each other".Kishori Lal Sarkar, 1903/2018. PP. 23-24.
[14] Kishori Lal Sarkar, 1903/2018. P. 27.
[15] Kishori Lal Sarkar, 1903/2018. P. 28.
[16] Kishori Lal Sarkar, 1903/2018. P. 30.
[17] Kishori Lal Sarkar, 1903/2018. P.30.
[18] Srikrishna J, B.N. 2004. P. 4.
[19] *MuthukrishnaNaicken* v. *Ramachandra Naicken and Ors*., (1919) 37 MLJ 489.
[20] *Beni Prasad* v. *Hardai Bibi and Ors*., (1892) ILR 14 All 67;*BalusuGurulingaswami and Ors*. v. *BalusuRamalakshmamma and Ors*., (1899) ILR 21 460; *Bhagwan Singh and Ors*. v. *Bhagwan Singh*, (1895) ILR 17 All 294.
[21] In *SagiliPedda Rami Reddi and Ors.* v. *NarreddiGangireddi*, AIR 1925 Mad 807, Mutha Venkatasubba Rao J. made a reference to "*Kramas*" – *Shruti-krama, Arthakrama* and *Padakrama* in *Mimamsa Sutras* while deciding the order of succession (Paras. 52-54). In *Narayan PundlikValanju*v. *Lakshman DajiSirsekar*, AIR 1927 Bom 456, the principle of *Atidesha* was applied by the Court in deciding on the succession to the property of a prostitute.
[22] *Madhavrao Raghavendra and Ors.* v. *Raghavendrarao and Ors*., AIR 1946 Bom 377.
[23] As remarked by Hon'ble M Katju, J., "It is deeply regrettable that in our law courts today these principles are not cited. Today, our so-called educated people are largely ignorant about the great intellectual achievements of our ancestors, and the intellectual treasury which they have bequeathed to us. The Mimansa Rules of Interpretation are one of these great achievements, but regrettably they are hardly ever used in our law courts. It may be mentioned that it is not stated anywhere in the Constitution of India that only Maxwell's Principles of Interpretation can be utilised. We can utilise any system of interpretation which can help to resolve a difficulty. Principles of interpretation are not principles of law but are only a methodology for explaining the meaning of words used in a text. There is no reason why we should not use Mimansa Principles of Interpretation in appropriate occasions" – see *B. Premanand and Ors*. v. *Mohan Koikal and Ors.* AIR 2011 SC 1925.Paras. 34, 35.
[24] M Rama Jois, 2004. P. 436.
[25] Sarkar, 1909/2013. P. 67.
[26] Sarkar, 1909/2013. P. 67.
[27] Sarkar, 1909/2013. P. 67.
[28] Sarkar, 1909/2013. P.71.
[29] M Rama Jois, 2004. P. 448.
[30] M Rama Jois, 2004. P. 448.
[31] M Rama Jois, 2004. P. 448.
[32] Sarkar, 1909/2013. P. 71.
[33] M Rama Jois, 2004. P. 449, Sarkar, 1909/2013. P. 71.
[34] Sarkar, 1909/2013. P. 71.
[35] Sarkar, 1909/2013. P. 71.
[36] Sarkar, 1909/2013. P. 71.
[37] Sarkar, 1909/2013. P. 72;M Rama Jois, 2004. P. 460.
[38] M Rama Jois, 2004. P.461.
[39] M Rama Jois, 2004. P. 453.
[40] Sarkar, 1909/2013. P. 72.
[41] M Rama Jois, 2004. P. 457.
[42] M Rama Jois, 2004. P. 458.
[43] M Rama Jois, 2004. P. 459.
[44] M Rama Jois, 2004. P. 460.
[45] Sarkar, 1909/2013. P. 72.
[46] Sarkar, 1909/2013. P. 73.
[47] M Rama Jois, 2004. P. 465;Sarkar, 1909/2013. P.127.
[48] M Rama Jois, 2004. P. 465; Sarkar, 1909/2013. P.127.
[49] Sarkar, 1909/2013. P.127.
[50] M Rama Jois, 2004. P. 465.
[51] Sarkar, 1909/2013. P.127.
[52] M Rama Jois, 2004. P. 465.
[53] Sarkar, 1909/2013. PP.127, 128.
[54] M Rama Jois, 2004. P. 469.
[55] Srikrishna J, B.N. 2004. P.12.
[56] M Rama Jois, 2004. P.469.
[57] This Nyaya flows from a *Nishedha*नकलञ्जंभक्षयेत् (*nakalañjaṃbhakṣayet*);M Rama Jois, 2004. P. 472.
[58] M Rama Jois, 2004. P. 472.
[59] This Nyaya literally means "lamp in the centre". M Rama Jois, 2004. P. 472.
[60] M Rama Jois, 2004. P. 472.
[61] Srikrishna J, B.N. 2004. P. 4.
[62] (1892) ILR 14 All 67.
[63] *Beni Prasad*.Para. 3.
[64] *Beni Prasad*.Para. 3.
[65] *Beni Prasad*.Para. 10.
[66] *Beni Prasad.* Para. 12.
[67] *Beni Prasad.* Para.87.

[68] *Beni Prasad.* Para.33.
[69] Srikrishna J, B.N. 2004. P. 6.
[70] (2014) 14 SCC 286 ("***GUI-ATI and Company***").
[71] The Entry in question read thus: "56. Milk powder, condensed milk, baby milk, baby food and all other foodstuffs or products, whether used as such or after mixing them with any other foodstuff or beverage, when sold in sealed or tinned containers." *GUI-ATI and Company.*Para 3.
[72] *GUI-ATI and Company.*Para. 1.
[73] *GUI-ATI and Company.*Para. 12.
[74] *GUI-ATI and Company.*Para. 15.
[75] AIR 2011 SC 1925.
[76] *Premanand*.Para. 14.
[77] *Premanand*.Para. 35.
[78] The Court went on to state thus: "…There is the vedic verse: "*Aindryagarhapatyamupatishthate*", which means "By the Mantra addressed to Indra establish the household fire." This verse can possibly have several meanings viz. (1) worship Indra (2) worship Garhapatya (the household fire) (3) worship both, or (4) worship either". "However, since the word 'Garhapatyam' is in the objective case, the verse has only one meaning, that is, 'worship Garhapatya'. The word 'Aindrya' means 'by Indra', and hence the verse means that by verses dedicated to Indra one should worship Garhapatya. The word 'Aindrya' in this verse is a Linga, (in Mimansa Linga means the suggestive power of a word), while the words 'GarhapatyamUpatishthate' are the Shruti. According to the Mimamsa principles, the Shruti (literal meaning) will prevail over the Linga (suggestive power)." *Premanand*. Paras 36-37.
[79] (2009) 9 SCC 92.
[80] *Vijay Narayan*.Para. 5.
[81] *Vijay Narayan*.Para. 5.
[82] "Where the leading clause of a passage contains a general direction for the performance of a certain act and there is a prohibition of it under certain circumstance, the prohibition is to be taken as a legitimate exception or proviso (*Paryudasa*). *Sabara* discusses this principle and holds that if one provision conflicts with another in all respects, then there would be the option to accept one or the other (*Vikalpa*), but if a provision only excepts a particular situation out of a general rule, *i.e.*, permits contravention of the rule in a given situation, such a provision must be treated as a *Paryudasa*, applicable to the situation specified therein". M Rama Jois, 2004. P. 469.
[83] "For example, the prohibitory clause 'Do not eat fermented (stale) food (*nakalanjambhakshayet*) is a *Pratishedha*; while the prohibition 'those who have taken the *Prajapati* vow must not see the rising sun' is a *Paryudasa*. In the second place, *Pratishedhas* are divided practically into two sub-clauses viz. those which prohibit a thing without any reference to the manner in which it may be used, and those which prohibit it only as regards a particular mode of using. For instance, 'Do not eat fermented food' prohibits the use of it under all circumstances, while 'Do not use the *Sorasi* vessel at dead of night' forbids the use of the vessel only at the dead of night". *Vijay Narayan*. Para.10.
[84] "These are the four classes of negative clauses. The first class, of which the *Kalanja* (fermented food) clause is an example, may well be called a condemnatory prohibition. The second class consists also of absolute prohibitions of things under certain circumstances, as in the case of the *Sorasi* vessel. The third class consists of prohibitions in relation to persons in a given situation, as in the case of the *Prajapati* vow. The fourth class restricts the scope of action of persons engaged in fulfilling an injunction, as regards the time, place or manner of carrying out the substantive element of the injunction. Thus we see that in the Mimansa system as regards negative injunctions (such as the one contained in the proviso to Section 6 of Land Acquisition Act) there is a much deeper discussion on the subject than that done by Western Jurists. The Western writers on the subject of interpretation (like Maxwell, Craies, etc.) only say that ordinarily negative words are mandatory, but there is no deeper discussion on the subject, no classification of the kinds of negative injunctions and their effects". *Vijay Narayan*. Paras. 11,12.
[85] *Vijay Narayan*. Para. 16.
[86] In *Ganpatrao and Ors.* v. *State of Maharashtra and Ors.*, 2018 (1) CCC 157, the High Court of Bombay had to interpret Section 9 (1-C) of the Transplantation of Human Organs and Tissues Act, 1994, which prohibited the removal of organs or tissues from a mentally challenged person before his death. The Court relied on the decision of the Supreme Court in *Vijay Narayan*.Applying the *Kalanja* principle, the Court held that Section 9(1-C) was a prohibition against the world at large.Further, as the language of the statute was plain and clear, literal rule had to be adopted.*Ganpatrao*. Para. 16.
[87] M Rama Jois, 2004. P. 472.
[88] *Vijay Narayan*. Para. 17.
[89] *Vijay Narayan*. Para. 19.
[90] *Surjit Singh* v. *Mahanagar Telephone Nigam Ltd*., AIR 2008 SC 2226.
[91] "443. Default of payment — If, on or before the due date, the rent or other charges in respect of the telephone service provided are not paid by the subscriber in accordance with these rules, or bills for charges in respect of calls of phonograms or other dues from the subscriber are not duly paid by him, any telephone or telephones or any telex service rented by him, may be disconnected without notice…". Rule 443, Indian Telegraph Rules".*Surjit Singh*. Para. 7.
[92] *Surjit Singh*. Para. 8.
[93] According to Francis Bennion, "A purposive construction of an enactment is one which gives effect to the legislative purpose by- (a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive and strained construction)".[93] – *Hindustan Lever Ltd* v. *Ashok Vishnu Kate and* Ors, 1996 ILLJ 899 SC as cited in *Surjit Singh*. Para. 25.
[94] *Surjit Singh.*Para. 28.
[95] "Usually the literal meaning is followed, but sometimes, the suggestive or figurative meanings are adopted. As regards the suggestive meaning (Lakshana), the oft-quoted example is '*GangayamGoshah*', i.e, "I live on the Ganges". This sentence cannot be literally interpreted because no one can live on the surface of the Ganges River. Hence, it has to be interpreted to mean "I live on the bank of the Ganga River". As regards the third meaning *Vyanjana*, the oft-quoted example is '*GatoAstamarka*' which means: "the sun has set". Here the real meaning has in fact nothing to do with the sun or its setting, but it really means "light the lamp" or "let us go home" (because the sun has set)". *Surjit Singh.*Para 27.
[96] *Surjit Singh*. Paras. 38,39.
[97] AIR 1988 SC 2239.
[98] *Surjit Singh*. Paras. 41,42.

[99*Surjit Singh*. Paras. 53-56.
[100] *Udai Shanker Singh* v. *Branch Manager, L.I.C. and Ors.*, 1998 (33) ALR 302 ("***Udai Shanker Singh***").
[101] *Udai Shanker Singh*. Para. 12.
[102] *Udai Shanker Singh*. Para. 13.
[103] *Udai Shanker Singh*.Para. 13.
[104] Srikrishna J, B.N. 2004. P.9.
[105] (2008) 9 SCC 284 ("***Rajbir Singh***").
[106] *Rajbir Singh*.Para. 21.
[107] *Rajbir Singh*.Para. 21.
[108] *Mahabir Prasad Dwivedi* v. *State of Uttar Pradesh and Ors*., AIR 1992 All 351 ("***Mahabir Prasad***").
[109] "The anusanga principle (or elliptical extension) states that an expression occurring in one clause is often meant also for a neighbouring clause, and it is only for economy that it is only mentioned in the former (see Jaimini 2,2,16). The anusanga principle has a further sub-categorisation. If a clause which occurs in a subsequent sentence is to be, read into a previous sentence it is a case of Tadapakarsha, but when it is vice versa it is case of Tadutkarsha, Jaimini deprecates Tadapakarsha (i.e. transference backwards) and permits it only in exceptional cases. However, there is no deprecation of Tadutakarsha. Since in the present case relating to the second proviso to S. 7A(1) of the U.P. Town Areas Act we are concerned with Tadutkarsha such transference can be readily accepted". *Mahabir Prasad*. Para. 33.
[110] Srikrishna J, B.N. 2004. P. 12.
[111] Srikrishna J, B.N. 2004. P. 12.
[112] Srikrishna J, B.N. 2004. P. 12.
[113] (2008) 4 SCC 755 ("***Gujarat Urja***").
[114] *Gujarat Urja*.Para. 16.
[115] *Gujarat Urja*.Para. 39.
[116] *Gujarat Urja*. Paras. 39, 40.
[117] *Gujarat Urja*. Para. 41.
[118] *Gujarat Urja*.Paras. 41-43.
[119] *Gujarat Urja*.Para. 48.
[120] (2006) 12 SCC 583.
[121] *IspatIndustries*.Para. 17.
[122] *Ispat Industries*. Para. 19.
[123] 1994 (68) FLR 533.
[124] *Amit Plastic*. Paras. 13-23.
[125] *Amit Plastic*. Paras. 24-26.
[126] Srikrishna J, B.N. 2004. P. 11.
[127] Srikrishna J, B.N. 2004. P. 11.
[128] (2007) 13 SCC 246 ("***UPAICLtd***.").
[129] *UPAIC Ltd*. Para. 11.
[130] *UPAIC Ltd*. Para. 13.
[131] *UPAIC Ltd*. Para. 14.
[132] *UPAIC Ltd*. Para. 16.
[133] *Craft Interiors Pvt. Ltd.* v. *Commissioner of Central Excise, Bangalore and Ors.*, (2006) 12 SCC 250 ("***Craft Interiors***").
[134] *Craft Interiors*. Para. 5.
[135] *Craft Interiors*. Para. 6.
[136] *Craft Interiors*. Para. 7.
[137] *Craft Interiors*. Para. 8.
[138] *Yogendra Nath Naskar* v. *Commissioner of Income Tax, Calcutta*, (1969) 1 SCC 555 ("***Yogendra Nath***").
[139] *Yogendra Nath*. Para. 2.
[140] *Yogendra Nath.* Para. 5.
[141] *Yogendra Nath*. Para 7.
[142] *AmitkumarDineshchandraRaval*v.*Managing Director, Madhya Gujarat Vij Company Ltd.*, MANU/GJ/0272/2022 ("***Amitkumar***").
[143] *Amitkumar*. Paras. 5,6.
[144] *Amitkumar*. Para. 6.
[145] *Amitkumar*. Para. 6.3.
[146] *Amitkumar*. Para. 6.3.
[147] Srikrishna J, B.N. 2004. P.13.
[148] Srikrishna J, B.N. 2004. P.13.
[149] Srikrishna J, B.N. 2004. P.14.
[150] Srikrishna J, B.N. 2004. P.13.
[151] Srikrishna J, B.N. 2004. P.14.
[152] Srikrishna J, B.N. 2004. P.14.
[153] Srikrishna J, B.N. 2004. P.14.
[154] Kishori Lal Sarkar, 1903/2018. P. 19.

## Buddhist Logico-Epistemology*

Buddhist logico-epistemology is a term used in Western scholarship for pramana-vada (doctrine of proof) and Hetu-vidya (science of causes). Pramana-vada is an epistemological study of the nature of knowledge; Hetu-vidya is a system of logic. These models developed in India during the 5th through 7th centuries.

The early Buddhist texts show that the historical Buddha was familiar with certain rules of reasoning used for debating purposes and made use of these against his opponents. He also seems to have held certain ideas about epistemology and reasoning, though he did not put forth a logico-epistemological system. The structure of debating rules and processes can be seen in the early Theravada text the Kathavatthu.

The first Buddhist thinker to discuss logical and epistemic issues systematically was Vasubandhu in his Vada-vidhi ("A Method for Argumentation"), who was influenced by the Hindu work on reasoning, the Nyaya-sutra.

A mature system of Buddhist logic and epistemology was founded by the Buddhist scholar Dignaga (c. 480- 540 CE) in his magnum opus, the Pramana-samuccaya. Dharmakirti further developed this system with several innovations. Dharmakirti's Pramanavarttika ('Commentary on Valid Cognition') became the main source of epistemology and reasoning in Tibetan Buddhism.

### Definition

Scholars such as H.N. Randle and Fyodor Shcherbatskoy (1930s) initially employed terms such as "Indian Logic" and "Buddhist Logic" to refer to the Indian tradition of inference (anumana), epistemology (pramana) and 'science of causes' (hetu-vidya). This tradition developed in the orthodox Hindu tradition known as Nyaya as well as in Buddhist philosophy. Logic in classical India, writes Bimal Krishna Matilal, is "the systematic study of informal inference-patterns, the rules of debate, the identification of sound inference vis-a-vis sophistical argument, and similar topics". As Matilal notes, this tradition developed out systematic debate theory (vadavidya):

> Logic as the study of the form of correct arguments and inference patterns, developed in India from the methodology of philosophical debate. The art of conducting a philosophical debate was prevalent probably as early as the time of the Buddha and the Mahavira (Jina), but it became more systematic and methodical a few hundred years later.

'Indian Logic' should be understood as being a different system of logic than modern classical logic (e.g. modern predicate calculus), but as anumana-theory, a system in its own right. 'Indian Logic' was also influenced by the study of grammar, whereas Classical Logic which principally informed modem Western Logic was influenced by the study of mathematics.

A key difference between Western Logic and Indian Logic is that certain epistemological issues are included within Indian Logic, whereas in modem Western Logic they are deliberately excluded. Indian Logic includes general questions regarding the 'nature of the derivation of knowledge', epistemology, from information supplied by evidence, evidence which in turn may be another item of knowledge.l9l For this reason, other scholars use the term "logico-epistemology" to refer to this tradition, emphasizing the centrality of the epistemic project for Indian logical reasoning. According to Georges Dreyfus, while Western logic tends to be focused on formal validity and deduction:

> The concern of Indian "logicians" is quite different. They intend to provide a critical and systematic analysis of the diverse means of correct cognition that we use practically in our quest for knowledge. In this task, they discuss the nature and types of pramana. Although Indian philosophers disagree on the types of cognition that can be considered valid, most recognize

* *available at:* https://www.du.ac.in/du/uploads/departments/BuddhistStudies/Study%20Material/21052020_401B_Buddhist%20logic-epistemology.pdf (last visited on January 10, 2026).

perception and inference as valid. Within this context, which is mostly epistemological and practically oriented, topics such as the nature and types of correct reasoning that pertain to logic in the large sense of the word are discussed.

**Pramana**

Pramana (Tib. *tshad ma*) is often translated as "valid cognition" or "instrument of knowledge" and refers to epistemic ways of knowing, Decisive in distinguishing Buddhist pramana from what is generally understood as Orthodox Hindu philosophy is the issue of epistemological justification. All schools of Indian logic recognize various sets of 'valid justifications for knowledge' or promono. Buddhist logico-epistemology was influenced by the Nyaya School's methodology, but where the Nyaya recognised a set of four pramanas-perception, inference, comparison and testimony-the Buddhists (i.e. the school of Dignaga) only recognized two: perception and inference. For Dignaga, comparison and testimony are just special forms of inference.

Most Indic pramanavada accept 'perception' (Sanskrit: pratyaksha) and 'inference' (Sanskrit: anumana), but for some schools of orthodox Hinduism the 'received textual tradition' (Sanskrit: agamah) is an epistemological category equal to perception and inference. The Buddhist logical tradition of Dignaga and Dharmakirti accept scriptural tradition only if it accords with pratyaksha and anumana. This view is thus in line with the Buddha's injunction in the *Kalama Sutta* not to accept anything on mere tradition or scripture.

**OVERVIEW**

**Early Buddhist background**

**Epistemology**

The time of the Buddha Gautama was a lively intellectual culture with many differing philosophical theories. KN Jayatilleke, in his "Early Buddhist Theory of Knowledge", uses the Pali Nikayas to glean the possible epistemological views of the historical Buddha and those of his contemporaries. According to his analysis of the Sangarava Sutta, during the Buddha's time, Indian views were divided into three major camps with regards to knowledge:

- The Traditionalists (Anussavika) who regarded knowledge as being derived from scriptural sources (the Brahmins who upheld the Vedas).
- The Rationalists (Takki Vimamsi) who only used reasoning or takka (the skeptics and materialists).
- The "Experientialists" who held that besides reasoning, a kind of supra-normal yogic insight was able to bring about unique forms of knowledge (the Jains, the middle and late Upanishadic sages).

The Buddha rejected the first view in several texts such as the Kalama sutta, arguing that a claim to scriptural authority (sadda) was not a source of knowledge, as was claimed by the later Hindu Mimamsa school. The Buddha also seems to have criticized those who used reason (takka). According to Jayatilleke, in the Pali Nikayas, this term refers "primarily to denote the reasoning that was employed to construct and defend metaphysical theories and perhaps meant the reasoning of sophists and dialecticians only in a secondary sense". The Buddha rejected metaphysical speculations, and put aside certain questions which he named the unanswerables (avyakatas), including questions about the soul and if the universe is eternal or not.

The Buddha's epistemological view has been a subject of debate among modem scholars. Some such as David Kalupahana, have seen him first and foremost as an empiricist because of his teaching that knowledge required verification through the six sense fields (avatanas). The Kalama sutta states that verification through one's own personal experience (and the experiences of the wise) is an important means of knowledge.

However, the Buddha's view of truth was also based on the soteriological and therapeutic concern of ending suffering. In the "Discourse to Prince Abhaya" (MN.1.392-4) the Buddha states that

a belief should only be accepted if it leads to wholesome consequences. This has led scholars such as Mrs Rhys Davids and Vallee-Poussin to see the Buddha's view as a form of Pragmatism. This sense of truth as what is useful is also shown by the Buddha's parable of the arrow.

K. N. Jayatilleke sees Buddha's epistemological view as empirically based which also includes a particular view of causation (dependent origination): "inductive inferences in Buddhism are based on a theory of causation. These inferences are made on the data of perception. What is considered to constitute knowledge are direct inferences made on the basis of such perceptions. Jayatilleke argues the Buddhas statements in the Nikayas tacitly imply an adherence to some form of correspondence theory, this is most explicit in the 'Apannaka Sutta'. He also notes that Coherentism is also taken as a criterion for truth in the Nikayas, which contains many instances of the Buddha debating opponents by showing how they have contradicted themselves. He also notes that the Buddha seems to have held that utility and truth go hand in hand, and therefore something which is true is also useful (and vice versa, something false is not useful for ending suffering). Echoing this view, Christian Coseru writes:

> Canonical sources make quite clear that several distinct factors play a crucial role in the acquisition of knowledge. These are variously identified with the testimony of sense experience, introspective or intuitive experience, inferences drawn from these two types of experience, and some form of coherentism, which demands that truth claims remain consistent across the entire corpus of doctrine. Thus, to the extent that Buddhists employ reason, they do so primarily in order further to advance the empirical investigation of phenomena.

**Debate and analysis**

The Earl Buddhist Texts show that during this period many different kinds of philosophers often engaged in public debates *(vivada).* The early texts also mention that there was a set procedure *(patipada)* for these debates and that if someone does not abide by it they are unsuitable to be debated. There also seems to have been at least a basic conception of valid and invalid reasoning, including, according to Jayatilleke, fallacies *(hetvabhasah)* such as *petitio* principii. Various fallacies were further covered under what were called *nigrahasthana* or "reasons for censure" by which one could lose the debate. Other *nigrahasthanas* included *arthantaram* or "shifting the topic", and not giving a coherent reply.

According to Jayatilleke, 'pure reasoning' or 'a priori' reasoning is rejected by the Buddha as a source of knowledge. While reason could be useful in deliberation, it could not establish truth on its own.

In contrast to his opponents, the Buddha termed himself a defender of 'analysis' or 'vibhajjavada'. He held that after proper rational analysis, assertions could be classified in the following way:

- Those which can be asserted or denied categorically *(ekamsika)*
- Those which cannot be asserted or denied categorically *(anekamsika),* which the Buddha further divided into:
  - Those which after analysis *(vibhajja)* could be known to be true or false.
  - Those like the avyakata-theses, which could not be thus known.

This view of analysis differed from that of the Jains, which held that all views were *anekamsika* and also were relative, that is, they were true or false depending on the standpoint one viewed it from (anekantavada).

The early texts also mention that the Buddha held there to be 'four kinds of explanations of questions".

- a question which ought to be explained categorically
- a question which ought to be answered with a counter question
- a question which ought to be set aside *(thapaniya)*
- a question which ought to be explained analytically

The Buddha also made use of various terms which reveal some of his views on meaning and language. For example, he held that many concepts or designations (pannatti) could be used in conventional everyday speech while at the same time not referring to an thing that exists ultimately (such as the pronouns like "l" and "Me") Richard Hayes likewise points to the Potthapada sutta as an example of the Early Buddhist tendency towards a nominalist perspective on language and meaning in contrast to the Brahmanical view which tended to see language as reflecting real existents.

The Buddha also divided statements (bhasitam) into two types with regards to their meaning: those which were intelligible, meaningful (sappatihirakatam) and those meaningless or incomprehensible (appatihirakatam) According to Jayatilleke, "in the Nikayas it is considered meaningless to make a statement unless the speaker could attach a verifiable content to each of its terms." This is why the Buddha held that statements about the existence of a self or soul (atman) were ultimately meaningless, because they could not be verified.

The Buddha, like his contemporaries, also made use of the "four corners" (catuskoti) logical structure as a tool in argumentation. According to Jayatilleke, these "four forms of predication" can be rendered thus:

1. S is P, e.g. atthi paro Joko (there is a nex1 world).
2. S is not P, e.g. natthi paro loko (there is no next world).
3. S is and is not P, e.g. atthi ca natthi ca paro loko (there is and is no next world).
4. S neither is nor is not P, e.g. n'ev'atthi na natthi paro loko (there neither is nor is there no next world).

The Buddha in the Nikayas seems to regard these as "the four possible positions' or logical alternatives that a proposition can take". Jayatilleke notes that the last two are clear non-Aristotelian in nature. The Buddhists in the Nikayas use this logical structure to analyze the truth of statements and classify them. When all four were denied regarding a statement or question it was held to be meaningless and thus set aside or rejected (but not negated).

**Two levels of Truth**

The earl texts mention two modes of discourse used by the Buddha. Jayatilleke writes:

> When he is speaking about things or persons we should not presume that h is speaking about entities or substances; to this extent bis meaning is to be inferred (neyattha), but when he is pointing out the misleading implications of speech or using language without these implications, his meaning is plain and direct and nothing is to be inferred (nitattha). This is a valid distinction which certain holds good for the Nikayas at least, in the light of the above statement.

The later commemarial and Abhidharma literature began to use this distinction as an epistemic one. They spoke of two level of truth, the conventional (samutti), and the absolute (paramattha). This theory of double truth became very influential in later Buddhist epistemic discourse.

**Kathavatthu**

The Theravada Kathavatthu (points of controversy) is a Pali Buddhist text which discusses the proper method for critical discussions on doctrine. Its date is debated by scholars but it might date to the time of Ashoka (C. 240 BC). Western scholarship by Schayer and following him A.K. Warder have argued that there is an "anticipations of propositional logic" in the text. However, according to Jonardon Ganeri "the leading concern of the text is with issues of balance and fairness in the conduct of a dialogue and it recommends a strategy of argumentation which guarantees that both parties to a point of controversy have their arguments properly weighed and considered.

In the Kathavatthu, a proper reasoned dialogue (vadayutti) is structured as follows: there is a point of contention - whether A is B; this is divided into several 'openings' (atthamukha):

1. Is AB?
2. Is A not B?

3. Is A B everywhere?
4. Is A B always?
5. Is A B in everything?
6. Is A not B everywhere?
7. Is A not B always?
8. Is A not B in everything?

These help clarify the attitude of someone towards their thesis in the proceeding argumentative process. Jonardon Ganeri outlines the process thus:

> Each such opening now proceeds as an independent dialogue, and each is divided into five stages: the way forward (anuloma), the way back (patikamma), the refutation (niggaha), the application (upanayana) and the conclusion (niggamana). In the way forward, the proponent solicits from the respondent the endorsement of a thesis, and then tries to argue against it. In the way back, the respondent turns the tables, soliciting from the proponent the endorsement of the counter-thesis, and then trying argue against it. In the refutation, the respondent, continuing, seeks to refute the argument that the proponent had advanced against the thesis. The application and conclusion repeat and reaffirm that the proponent's argument against the respondent's thesis is unsound, while the respondent's argument against the proponent's counter-thesis is sound.

**Milinda-panha**

Another Buddhist text which depicts the standards for rational debate among Buddhists is the Milindapanha ("Questions of Menander", 1st century BCE) which is a dialogue between the Buddhist monk Nagasena and an Indo-Greek King. In describing the art of debate and dialogue, Nagasena states:

> When scholars talk a matter over one with another, then is there a winding up, an unravelling, one or other is convicted of error, and he then acknowledges his mistake; distinctions are drawn, and contra-distinctions; and yet thereby they are not angered.

The various elements outlined here make up the standard procedure of Buddhist debate theory. There is an 'unravelling' or explication (nibbethanam) of one's thesis and stances and then there is also a 'winding up' ending in the censure (niggaho) of one side based on premises he has accepted and the rejoinders of his opponent.

**Abhidharma**

The Buddhist Abhidharma schools developed a classification of four types of reasoning which became widely used in Buddhist thought. The Mahayana philosopher Asanga in his Abhidharma-samuccaya, outlines these four reasons (yukti) that one may use to inquire about the nature of things. According to Cristian Coseru these are:

1. The principle of dependence (apeksayukti), which takes into account the fact that conditioned things necessarily arise in dependence upon conditions: it is a principle of reason, for instance, that sprouts depend on seeds.
2. The principle of causal efficacy (karyakaranayukti), which accounts for the difference between things in terms of the different causal conditions for their apprehension: it is a principle of reason, thus, that, in dependence upon form, a faculty of vision, and visual awareness, one has visual rather than, say, auditory or tactile experiences.
3. The realization of evidence from experience (saksatkriyasadhanayukti). We realize the presence of water from moisture and of fire from smoke.
4. The principle of natural reasoning, or the principle of reality (dharmatayukti), which concerns the phenomenal character of things as perceived (for instance, the wetness and fluidity of water).

According to Coseru “what we have here are examples of natural reasoning or of reasoning from experience, rather than attempts to use deliberative modes of reasoning for the purpose of justifying a given thesis or arguing for its conditions of satisfaction.”

**Nyaya**

The Nyaya Sutras of Gotama (c. 1st or 2nd century CE) is the founding text of the Nyaya School. The text systematically lays out logical rules for argumentation in the form of a five step schema and also sets forth a theory of epistemology. According to Jonardon Ganeri, the Nyaya sutra brought about a transformation in Indian thinking about logic. First, it began a shift away from interest in argumentation and debate towards the formal properties of sound inference. Secondly the Nyaya sutra led a shift to rule governed forms of logical thinking.

BK Matilal outlines the five steps or limbs of the Nyaya method of reasoning as follows:

1. There is fire on the hill. [thesis]
2. For there is smoke. [reason]
3. (Wherever there is smoke, there is fire), as in the kitchen. [example]
4. This is such a case (smoke on the hill).
5. Therefore, it is so, i.e., there is fire on the hill.

Later Buddhist thinkers like Vasubandhu would see several of these steps as redundant and would affirm that only the first two or three were necessary.

The Naiyayikas (the Nyaya scholars) also accepted four valid means (pramana) of obtaining valid knowledge (pramana) - perception (pratyaksha), inference (anumana), comparison (upamana) and word/testimony of reliable sources (sabda).

The systematic discussions of the Nyaya School influenced the Medieval Buddhist philosophers who developed their own theories of inferential reasoning and epistemic warrant (pramana). The Nyaya became one of the main opponents of the Buddhists.

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