

LL.B. VI Term

JURISPRUDENCE-II

Compiled and Edited by

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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.

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PART A (Legal Concepts)

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- Dharma, Artha, Kama, Moksha; their interrelationship and relevance to law.
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- Concept of "Righteous Law" (Dharma Vyavastha).
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- Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* (LexisNexis Publication, 1st edn., 2022).
- S.N. Dhyani, *Fundamentals of Jurisprudence: The Indian Approach* (Central Law Agency, 2019).
- Seema Singh & Raman Mittal, *Law and Spirituality* (Kitabwale, New Delhi, 2024).
- Ronald Dworkin, *Taking Rights Seriously,* Chapter 7, pp. 184-205.
- Allen Buchanan, "What is so Special about Rights," *Social Policy & Philosophy,* pp. 61-75 (1984).
- S. Ganesh, "Vedic Concept of Dharma" *Purvamimamsa*, Vol 12 (2021).
- Hohfeld's Contributions to the Science of Law Walter Wheeler Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* by Wesley Newcomb Hohfeld, pp. 1-15 and pp. 27-73 (1919).

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- Law of Possession & Ownership of Property by Arindam Mitra, published by Sodhi Publication, 2024.
- Property Law: Rules, Policies, and Practices, by Joseph William Singer, published by Wolter Kluwer, 2017.
- The Constitutional mandate for social welfare – systemic differences and links between property, land rights and housing rights by AJ van der Walt &S Viljoen, available at; https://scielo.org.za/pdf/pelj/v18n4/10.pdf

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- Kautilya -Theories of Punishment, Kautilya Arthashastra – Udayveer Shastri.
- A Theory of Justice: by John Rawls, Harvard University Press, 2009.
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- Nozick's Libertarian Theory of Justice Peter Vallentyne, University of Missouri, in Anarchy, State, and Utopia—A Reappraisal, edited by Ralf Bader and John Meadowcroft (Cambridge University Press: 2011), pp. 145-67. available at https://klinechair.missouri.edu/docs/nozicks_theory_of_justice.pdf
- Robert Nozick: Property, Justice, and the Minimal State, by Jonathan Wolff, Stanford University Press, 1991.

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- Mimansa darshanam by Jaimini, published by Chaukhamba Publications, Varanasi.
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- Inside Chanakya's Mind: Ānvīkṣikī and the Art of Thinking, by Radhakrishnan Pillai,

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- Concept of Anekantavada (many-sidedness of truth) in Jainism: Impact of multiple perspectives on legal interpretation and decision-making
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- Meaning &Interpretation of:

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  Yato Dharmastato Jayah -Where there is dharma there will be victory– Motto of Supreme Court in context of Srimad Bhagvad Gita.

  Dharma Chakra Pravartanaya – Setting the wheel of dharma (Law)– Motto of Parliament House in the context of Mahabharata and Buddhism.

  Ashryahsarva-Dharmanam-Sasvadanviksikismrta – Jurisprudence (Logic) is the resource of all actions and the shelter of all virtues in the context of Kautilya Arthashastra.

  Satyam Shivam Sundaram- The Truth, the Auspicious and the Beautiful – Motto of Television in the context of Indian Culture.

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- Satish Chandra Chatterjee and Dhirendra Mohan Dutta, *An Introduction to Indian Philosophy*.
- Max Weber, The *Religion of India: The Sociology of Hinduism and Buddhism,*
- B K Matilal, *The word and the world: India's Contribution to Philosophical Studies.*

CONCEPT OF PURUSHARTHA

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PURUSHA

The word *Purusha* is derived from *pṛḥ* (पुरः) meaning *pura* (पुरं) (body) and *śarīram* (शरीरं). *Puri śete iti puruṣaḥ* (पुरि शेते इति पुरुषः) – meaning, the sentient being who resides in this *pura* (body), who has entered and is situated in the body, is called *Purusha*. According to this etymology, the composite meaning of the word *Purusha* is any living being. However, in scriptural references such as *Purushatve chāvistaramātmā* (पुरुषत्वे चाविस्तरामात्मा), *Purushatve cha māṁ dhīrāḥ* (पुरुषत्वे च मां धीराः[1]), *Bahvayaḥ santi puraḥ sṛṣṭāstāsaṁ me pauruṣī priyā* (बह्वयः सन्ति पुरः सृष्टास्तासां मे पौरुषी प्रिया[2]), and *Puraṁ puruṣamātmavān* (पुरं पुरुषमात्मवान्), the word *Purusha* is primarily used to refer to a human being rather than a general living entity. Hence, in such scriptural contexts, the word *Purusha* does not mean just any living being but specifically refers to a human. Accordingly, in the term *Purushartha*, the word *Purusha* denotes a human being, meaning both men and women.

PURUSHARTHA

The etymology of *Artha* (अर्थ) is derived as *Arthyate prārthyate sarvaiḥ iti arthaḥ* (अर्थ्यते प्रार्थ्यते सर्वैः इति अर्थः), meaning that which is desired or sought after by all is called *Artha* (goal or object of pursuit). Similarly, *Purushāṇām arthaḥ puruṣārthaḥ* (पुरुषाणाम् अर्थः पुरुषार्थः) – that which is the goal or pursuit of human beings is *Purushartha*. Another etymology states, *Purushaiḥ arthyate iti puruṣārthaḥ* (पुरुषैः अर्थ्यते इति पुरुषार्थः[3]), meaning that which is desired or sought after by humans is called *Purushartha*. From this perspective, almost everything in the world is desired by human beings. However, in the Vedas, scriptures, and the entire Sanskrit literary tradition, among all the desired goals of human life, only four are considered primary and essential—**Dharma (righteousness), Artha (wealth), Kama (desires), and Moksha (liberation)**. These four alone are known as the *Chaturvarga* or the four *Purusharthas*. The ability to accomplish these pursuits is present only in human beings; hence, all living beings cannot engage in them. Only humans can pursue these goals, which is why they are termed *Purushartha*.[4]

The desires of human beings, whether for happiness or the means to attain happiness, are called *Purushartha*. In reality, whatever a human being aspires for upon being born in this world ultimately falls into one of these four categories. Some individuals prioritize *Dharma* (righteousness), some seek the fulfillment of *Kama* (desires), and others long for *Moksha* (liberation). The Supreme Lord bestows these fourfold rewards upon beings according to their aspirations.

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[1] Śrīmadbhāgavata 11.7.21
[2] Śrīmadbhāgavata 7.11.22
[3] Śrīmadbhāgavata 3.20.50
[4] Puruṣaḥ means the desired objectives of human society. Puruṣeṇa prārthānī śreyāṁsi (phalāni).

Puṁsām amāyināṁ samyag bhajatāṁ bhāva-vardhanaḥ |
śreyo diśaty abhimataṁ yad dharmādiṣu dehinām ||
(*Shrimad Bhagavatam 4.8.60*)

Thus, in this world, Dharma (righteousness), Artha (wealth), Kama (desires), and Moksha (liberation)—these four objectives (*Chaturvarga*) are the ultimate goals of all human endeavors.

The relevance of *Manavadharmashastra* (the scripture on human duties) was as significant in the past as it is today. For the proper organization of the entire human society, Lord Manu established traditional, Dharma-compliant rules and duties in the form of this *Manavadharmashastra*[5], which have governed social conduct since ancient times. The *Dharmashastra* serves as the ultimate authority in determining what is to be done (*Vihita Karma* - duties) and what is not to be done (*Avihita Karma* - non-duties). Therefore, it has been stated:

Prāmāṇyaṁ hi dharmaśāstrasya kāryākārya-vyavasthitau

Just as the term *Shruti* refers to the Vedas, the term *Smriti* refers to *Dharmashastra*. There are many *Smritis*, but *Manusmriti* holds the highest significance because the Dharma prescribed by Lord Manu is entirely based on the Vedas. He himself is omniscient.[6]

Human life has four goals—Dharma, Artha, Kama, and Moksha. These four *Purusharthas* have been expounded in *Manusmriti*, along with the prescribed means to attain them. By following these prescribed paths and performing actions accordingly, one achieves *Purushartha* and maintains social order. On the other hand, actions that contradict these regulations lead to disorder and insecurity in society.

DHARMA

The first and foremost objective (*Abhīṣṭa*) of a human being is *Dharma*. Hence, the first *Purushartha* (goal of life) is *Dharma*. It is the inherent nature of every sentient being to always feel a sense of deficiency in its current state and to long for a higher state of existence. Therefore, in this world, wherever a person is and in whatever circumstances they may be, they are always eager to rise above their current condition and achieve progress—this longing for advancement is known as *Abhyudaya* (worldly prosperity). The means by which a person attains this desired progress is called *Dharma*[7], whereas the opposite of this, which leads to a person's downfall and degradation, is known as *Adharma*.

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[5] Svāyambhuvo manurdhīmānidaṁ śāstramakalpayat. (Manusmṛti 1.102)
[6] Yaḥ kaścit kasyacid dharmo manunā parikīrtitaḥ, sa sarvo'bhihito vede sarvajñānamayo hi saḥ. (Manusmṛti 2.7)
[7] That is, the unseen merit (puṇya) generated from good deeds. This Dharma itself is the cause of all kinds of progress for a human.

For this reason, Sage *Kapila* has explained that human progress and decline are the results of *Dharma* and *Adharma*, respectively:

Dharmeṇa gamanam ūrdhvaṁ, gamanam adhastāt bhavaty adharmeṇa.
(*Sankhya Karika*)

This concept is also mentioned in the *Vayu Purana*:

Dhāraṇād dhṛtir ity arthād dhātor dharmaḥ prakīrtitaḥ ।
Adhāraṇe 'amahattve ca, adharma iti cocyate ।।

There are two types of progress (*Unnati*):

1. **Abhyudaya**[8] – The prosperity a person attains through virtuous conduct and good deeds while remaining within the realm of the universe, the material world, and the sphere of nature (*Prakriti*).

2. **Nihśreyasa**[9] – The supreme bliss and infinite joy beyond the confines of nature and the universe, leading to the ultimate realization of *Brahman* (the Absolute). This state is known as *Tripaad Vibhuti*—the transcendental and boundless divine bliss.

The one and only means to attain both these forms of progress is called *Dharma*.[10] *Dharma* possesses immense power. It enables a person to achieve both *Abhyudaya* (worldly success) and *Nihśreyasa* (spiritual liberation). The practice of *Dharma* leads to the full development of human potential. Hence, *Dharma* is the key to all *Purusharthas* (goals of life). The conduct (*Achara*) established by *Shruti* (Vedic scriptures) and *Smriti* (sacred traditions) is regarded as the supreme *Dharma*. Those who desire the welfare of all beings[11] must adhere to this *Achara Dharma* (righteous conduct).[12] In this context, *Dharma* has been elaborated under various classifications, such as:

- *Varnadharma* (duties based on social classification)
- *Ashramadharma* (duties based on stages of life)
- *Varnashramadharma* (the combined system of *Varna* and *Ashrama*)
- *Gunadharma* (duties based on inherent qualities)

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[8] Abhyudayaḥ – abhitaḥ + udayaḥ. Abhyudaya means complete advancement, overall progress, and elevation.
[9] Niḥśreyasa means definite supreme good—an eternal, unchanging goal, leading to ultimate bliss, supreme attainment, realization of Bhagavān, or liberation (mokṣa).
Or, that which is the highest good, beyond which there is nothing greater.
[10] The word Dharma originates from the root "dhūñ dharaṇe," meaning that which upholds, nourishes, or supports.
[11] Sarvabhūtahite ratāḥ. (Gītā 5.25, 12.4)
[12] Ācāraḥ paramo dharmaḥ śrutyuktaḥ smārta eva ca, tasmādasmin sadā yukto nityaṁ syādātmavān dvijaḥ. (Manusmṛti 1.108)

- *Nimittadharma* (duties based on specific circumstances)
- *Samanya Dharma* (universal moral duties)

The scriptures also elaborate on the merits and demerits of actions, as well as the traditional, eternal conduct of the four *Varnas* (social groups).[13] Among these, ten fundamental *Samanya Dharmas* (universal virtues) are considered essential for the proper functioning of society:

> *Dhriti* (patience), *Kshama* (forgiveness), *Dama* (self-control), *Asteya* (non-stealing), *Shaucha* (purity), *Indriya Nigraha* (control over senses), *Dhi* (wisdom—knowledge of scriptures and principles), *Vidya* (self-knowledge), *Satya* (truthfulness), *Akrodha* (absence of anger)

These ten virtues are absolutely essential for social harmony.[14] All wise individuals are well aware of them. Those who study and practice these tenfold *Dharmas* ultimately attain the supreme goal—*Moksha* (liberation).[15]

ARTHA

The greatest and most excellent quality of Artha is that it becomes the centre of attraction for virtues and virtuous individuals. All virtues and virtuous people naturally gravitate toward those who possess Artha, as if they were servants. Moreover, the faults of wealthy individuals also turn into virtues, meaning they become concealed. Shukracharya has said:

Tiṣṭhanti sadhanadvāre guṇinaḥ kiṅkarā iva ।
Doṣā api guṇāyante ।। *(Shukraniti 1.79)*

For this reason, the scriptures extol the greatness of Artha. It is even said that great scholars, ascetics, and elders stand at the door of a wealthy person like humble servants, with folded hands:

Vidyāvṛddhās tapovṛddhā vayovṛddhās tathaiva ca ।
Sarve te dhanavṛddhasya dvāri tiṣṭhanti kiṅkarāḥ ।।

Thus, everything is attainable through Artha:

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[13] Asmin dharmo'khilenokto guṇadoṣī ca karmaṇām, caturṇāmapi varṇānāmācāraścaiva śāśvataḥ. (Manusmṛti 1.107)
[14] Dhṛtiḥ kṣamā damo'steyaṁ śaucamindriyanigrahaḥ, dhīrvidyā satyamakrodho daśakaṁ dharmalakṣaṇam. (Manusmṛti 6.92)
[15] Daśa lakṣaṇāni dharmasya ye viprāḥ samadhīyate, adhītya cānuvartante te yānti paramāṁ gatim. (Manusmṛti 6.93)

Yasyārthās tasya mitrāṇi yasyārthās tasya bāndhavāḥ ।
Yasyārthāḥ sa sukhī loke yasyārthāḥ sa ca paṇḍitaḥ ।।

For this reason, the sage Chanakya has said that a wealthy person is highly respected by everyone:

Arthavān sarvalokasya bahusammataḥ ।
(Chanakya Sutras 4/22)

Artha also possesses a unique power—it subjugates everyone but remains independent itself. Even fruitless trees incline[16] toward Artha with desire, so what to say of human beings? Acharya Somadeva has said:

Artheṣu upabhogarahitās taravo'pi sābhilāṣāḥ kiṁ punar manuṣyāḥ?

Shukraniti places great emphasis on the acquisition of Artha. Sage Shukracharya opines that in this world, all men are servants of wealth, but wealth is not the servant of anyone. Therefore, one must always strive to acquire Artha:

Arthasya puruṣo dāso dāsas tv artho na kasyacit ।
Atorthāya yatetaiva sarvadā yatnam āsthitaḥ ।। (Shukraniti 2.83)

This same principle has been affirmed by Bhishma Pitamah in the Mahabharata. He told King Yudhishthira:

Arthasya puruṣo dāso dāsas tv artho na kasyacit ।
Iti satyaṁ mahārāja baddho'smy arthen kauravaiḥ ।।
(Mahabharata, Bhishma Parva)

Indeed, even if a man possesses numerous vices, Artha has the power to elevate even those without virtues to the status of highly revered individuals. With the acquisition of Artha, even a most insignificant person becomes great, and even one without noble lineage is considered noble. Acharya Somadeva has said:

Na khalu kulācārābhyāṁ puruṣaḥ sarvo'pi sevyatām eti, kintu vittenaiva ।
Sa khalu mahān kulīnaś ca yasya dhanam anūnam ।।
(Neetivakyamrita - Artha Samuddesha)

That is why even renunciant ascetics become flatterers of the wealthy. Acharya Somadeva has said:

[16] Wherever wealth is buried in the ground, the branches of trees near it lean in that direction.

Dhanino yatayo'pi cāṭukārāḥ।
(Neetivakyamrita - Vyavahara Samuddesha 44)

On the other hand, a person without Artha is disregarded by all, even if he is none other than Indra, the king of the gods. People do not respect a person devoid of Artha:

Māhendram api arthahīnaṁ na bahumanyate lokaḥ.
(Chanakya Sutras 4/33)

Even bees, which seek out fragrance, do not honour a mango tree that lacks blossoms. Moreover, a wealthy person is respected by all, even if he gives nothing to anyone. Chanakya has said:

Adātāram api arthavantam ardhinō na tyajanti.
(Chanakya Sutras 426)

Upon entering the householder stage of life, Artha is required for the journey of life, the sustenance of the family, the performance of daily and occasional rituals, hospitality, and the execution of charitable and virtuous deeds. However, Artha should never be accumulated for indulgence. Even Artha obtained through just means should not be excessively hoarded.

Therefore, Manu has instructed Brahmins to live a life of austerity and renunciation. A Brahmin should be *Ashvastanika*[17] (possessing only daily necessities), *Tryaihika*[18] (possessing sustenance for three days), *Kumbhidhanyaka*[19] (storing only a small measure of grain), or, at most, *Kusuladhanyaka*[20] (having just enough for short-term needs. Manu has stated that contentment is the root of happiness, while discontent is the cause of suffering. Therefore, one should practice restraint in accumulating wealth.[21]

KĀMA

The third puruṣārtha (goal of life) is called *kāma*. Just as Dharma (righteousness) and Artha (wealth) are both of supreme value as the primary means for the stability of the world, similarly, *kāma* is also of utmost importance, as it serves as the principal means of procuring pleasurable materials essential for the sustenance of life. Without *kāma*, the creation of living beings, their survival, and the attainment of happiness would be impossible.

[17] One who has food provisions only for one day is called an aśvastanika (living without future concerns).
[18] One who has food for three days is called tryaihika
[19] One who has grain sufficient for a year is called kumbhīdhānyaka.
[20] One who has grain for three years is called kusūladhānyaka.
[21] Santoṣaḥ paramāsthāya sukha-arthī saṁyataḥ bhavet, santoṣa-mūlaṁ hi sukhaṁ duḥkha-mūlaṁ viparyayaḥ. (Manusmṛti 4.12)

According to its etymology— *"Kāmyate iti kāmaḥ"*, that which is desired, *kāma* primarily refers to the mental joy arising from the contact between the senses and their respective objects.

Our senses continually assist us in performing our essential activities. Although the primary duty of each of our senses is to aid us in our necessary tasks, at the same time, each sense also derives its own individual pleasure from the contact with its respective objects. The eyes, created for seeing, experience the joy of form when they behold a beautiful object. The ears, created for hearing, take pleasure in sound when they listen to melodious music. While consuming food to satisfy hunger, the tongue, through taste perception, experiences the pleasure of flavour. Similarly, the nose, created for smelling, enjoys fragrances as it perceives pleasant scents. The skin, which senses touch, experiences the delight of softness when lying on a comfortable bed during sleep. Likewise, in the life of a householder, the reproductive organ derives pleasure from its respective contact for the purpose of procreation.

Thus, while fulfilling their primary objectives through the five sense organs—eyes, ears, nose, tongue, and skin—humans experience mental joy upon contact with the five sense objects—form, taste, smell, sound, and touch. This very joy is called *kāma*, and it is considered the supreme reward of virtuous actions.

Indriyāṇāṁ ca pañcānāṁ manaso hṛdayasya ca,
Viṣaye vartamānānāṁ yā prītirupajāyate,
Sa kāma iti me buddhiḥ karmaṇāṁ phalamuttamam.
(*Mahābhārata, Vana Parva*)

This *kāma* is a resolve of the mind; its nature is extremely subtle. Therefore, it can only be perceived through experience. That is why the Mahābhārata states:

Dravyārthasparśasaṁyoge yā prītirupajāyate,
Sa kāmaś cittasaṁkalpaḥ śarīraṁ nāsya dṛśyate.
(*Vana Parva 33-3*)

Meaning, the special delight that arises in the mind upon contact with beloved objects such as garlands, sandalwood, women, or the attainment of wealth like gold, is *kāma*, a mental resolve. It is extremely subtle, and its form and shape are not visible.

The Supreme Lord, residing within the intellect of beings in the form of their desires, manifests as bliss and is perceived as the result of actions.

Pradhānakālāśayadharmasaṅgrahe śarīra eṣa pratipadya cetanām,
Kriyāphalatvena vibhur vibhāvyate yathānalo dāruṣu tadguṇātmakaḥ.
(*Bhāgavata Purāṇa 4-21-35*)

Thus, the scriptures declare:

Etasyaivānandasya anyāni bhūtāni mātrām upajīvanti.

Just as butter is the essence of curd, similarly, *kāma* is the essence of Dharma and Artha. Just as oil is superior to oil cake, ghee is superior to buttermilk, and a tree's flowers and fruits are superior to its wood, in the same way, *kāma* is superior to Dharma and Artha.

Navanītaṁ yathā dadhnaḥ tathā kāmo'rthadharmataḥ,
Śreyaḥ tailaṁ hi piṇyākād ghṛtaṁ śreya udaśvataḥ,
Śreyaḥ puṣpaphalaṁ kāṣṭhāt kāmo dharmārthayor varaḥ.
(*Uttara Purāṇa, Prajā Parva 37-35*)

Thus, the joy derived from sensory experiences through the sense organs and processed in the mind is called *kāma*.

In summary, the mental pleasure obtained through the five sense organs—eyes, ears, nose, tongue, and skin—upon experiencing their respective sense objects—form, taste, smell, sound, and touch—is called *kāma*. It is a mental resolve, extremely subtle, and can only be experienced.

The means by which *kāma* (mental joy) is attained through the contact of senses and objects—such as the desirable things people long for—are also called *kāma* according to the etymology *"Kāmyante iti kāmāḥ."* Based on this, objects that are useful for the body and senses, such as wife, children, house, land, wealth, food grains, fruits, eatables, beverages, music, dance, clothes, ornaments, and other desirable worldly and spiritual objects, are also termed *kāma*. By this same definition, supernatural attainments like *aṇimā* (the power to become minute) and other mystical perfections are also referred to as *kāma*.

The subtle mental pleasure obtained through the contact of subjects and senses, as well as the means of sensual pleasure—such as wife, children, home, land, wealth, food and drink, dance and music, clothing, ornaments, and all desired objects useful for the body and senses—are also called *kāma* because they serve as the means of sensual fulfillment. Therefore, both the object of desire as an end and the object of desire as a means are called *kāma*. That is,

1. The pleasure derived from the enjoyment of sensory objects, and
2. The means of that pleasure—both are referred to as *kāma*.
3. Additionally, the mental determination that drives beings towards obtaining this pleasure and the materials of enjoyment—i.e., the desire for sensory objects, longing, or craving—is also called *kāma*, according to the derivation "*kāmitam kāmaḥ*" (that which is desired is called *kāma*). Because:

Vaikārikād vikuṛvāṇān manastattvamajāyata
Yatsankalpavikalpābhyāṁ vartate kāma sambhavaḥ (Bhāgavata 3.26.27)

Meaning, from the resolutions and deliberations of the mind arise *kāma*, i.e., desire, longing, craving, aspiration, etc. The word *kāma* means desire, thirst, craving, aspiration, etc. This subtle desire (*vāsanā-rūpa kāma*) is the seed of the entire world. The *Ṛgveda* states:

Kāmas tadagre samavartatādhi manaso retaḥ prathamaṁ yadāsīt
Sati bandhum asati nirabhindan hṛdā pratīcyā kavayo manīṣā (Ṛgveda...)

That is, *kāma* is the seed of the mind (*manaso retaḥ*). It has eternally existed in the desireless heart of the Supreme Being. Wise sages, through deep contemplation, have realized this *kāma* within their hearts as the fundamental force of all. The *Śiva Purāṇa* states:

Kāmaḥ sarvamayaḥ puṁsāṁ svasankalpa samudbhavaḥ
Kāmāt sarve pravartante līyante vṛddhibhāgatāḥ (Dharma Saṁhitā, 8th Adhyāya)

Thus, the word *kāma* primarily has three meanings:

1. Pleasure,
2. The means of pleasure, and
3. The desire for pleasure.

The term *kāma* is used in scriptures with different meanings depending on the context—sometimes for pleasure, sometimes for its means, and sometimes for the desire for pleasure. According to this reasoning, since *kāma* is the essence of pleasure or its primary means, it is highly desirable for living beings. Additionally, as it is the primary means of satisfying and nourishing the body and senses, it is extremely essential in worldly life. Because:

Sukhārthāḥ sarvabhūtānāṁ matāḥ sarvāḥ pravṛttayaḥ

That is, all activities of all beings are solely for the pursuit of happiness. Hence, for the attainment of pleasure through sensory gratification, *kāma* is indispensable. The result of *kāma* is health and well-being. Hence, the *Śruti* states:

Yadā vai sukhaṁ labhate 'tha karoti, nāsukhaṁ labdhvā karoti, mukham eva babdhvā karoti.

The primary goal of the *pravṛtti-mārga* (path of worldly engagement) is *kāma*-derived pleasure. There is no fault in enjoying these pleasures according to righteousness (*dharma*), because the satisfaction of the mind and senses is itself considered the result of sensory enjoyment. *Somadeva Sūri* states:

Indriya-prasādana-phalā hi vibhūtayaḥ. (*Nīti-Vākyāmṛta Kāma-Samuccaya 06*)

Similarly, *Maharṣi Kāmandaka* states:

Seveta viṣayān kāle muktvā tatparatāṁ vaśī
Sukhaṁ hi phalamarthasya tannirodhe vṛthā śriyaḥ (*Nīti Sāra*)

With the same understanding, *Maharṣi Kauṭilya* also states in his *Arthaśāstra*:

Dharmārthāvirodhena kāmaṁ seveta na niḥsukhaḥ syāt
Pañcame divasasya aṣṭame vā bhāge svairavihāram iti. (*Kauṭilya Arthaśāstra 1-7-3*)

Kāma is of two types:

1. *Divya* (transcendental, heavenly), and
2. *Mānuṣa* (worldly, earthly).

Among these, in comparison to *divya kāma*, human sensual pleasures are like a drop of water hanging on the tip of a blade of grass in front of an ocean! That is why *Jain Tīrthaṅkara Mahāvīra Swāmī* states:

Jahā kusagge udagṁ samuddeṇa samaṁ miṇe
Evaṁ mānusaggā kāmā devakāmāṇa antie.

Just as a drop of water hanging on the tip of *kuśa* grass is negligible compared to the ocean, similarly, human pleasures are insignificant compared to the pleasures of celestial beings.

Emphasizing the role of *kāma* as a fundamental human pursuit, *Bhagavān Manu* states:

Dvitīyam āyuṣo bhāgaṁ kṛtadāro gṛhe vaset.[22]

That is, after completing education while following celibacy in the first quarter of life, one should enter *gārhasthya* (householder life) in the second quarter through lawful marriage. One should remain devoted only to one's lawful spouse and engage in conjugal relations only in the appropriate season.[23] By following these principles, many pressing social problems can be resolved, and billions spent wastefully in the name of family planning can be prevented.

MOKSHA

The fourth Purushartha (goal of life) is called Moksha. It is also referred to as the supreme Purushartha. Generally, in the dazzling allure of Artha (wealth) and Kama (desires), most ignorant people consider Moksha to be dry and unappealing. Upon merely hearing its name, they become fearful. They think, *"What joy can there possibly be in Moksha? There will be no body, nor will there be any dear objects of pleasure. The soul will simply merge into the Supreme Being. Then what bliss will we derive from it?"*

[22] Manusmṛti 4.1
[23] Ṛtukālābhigāmī syāt svadāraniraḥ sadā, parvavarja vrajecchainā tadvato ratikāmyayā. (Manusmṛti 3.45)

However, all the Vedas, scriptures, the greatest sages, saints, seers, and enlightened beings—those endowed with extraordinary wisdom—after thoroughly investigating, analyzing, and experiencing all forms of worldly happiness, have unanimously and unequivocally established one undeniable and eternal truth:

The highest, most blissful, and most desirable goal of all is Moksha—an infinite and unbroken state of supreme bliss. For this reason, the *Vishnu Purana* states:

Iti samsara-duḥkhārka-tāpa-tāpita-chetasam |
Vimukti-pādapachchhāyāmṛte kutra sukhaṁ nṛṇām || (Vishnu Purana 6.5.57)

"For those whose hearts are scorched by the scorching sun of worldly suffering, where else can they find true happiness apart from the cool shade of the tree of liberation (Moksha)?"

Thus, Moksha is the ultimate sovereign of all goals and all forms of happiness. Its attainment is extremely rare and is only achieved by a few fortunate souls. For the majority, it remains an ideal.

The definition of Moksha is:

Mucyate sarvair duḥkha-bandhanaiḥ yatra saḥ Mokṣaḥ?

"That state wherein a being is completely liberated from all forms of suffering and bondage is called Moksha."

For this reason, it is also referred to as Mukti (liberation). The word Mukti is derived from the root *'muc'* (to release), combined with the suffix *'ktin'*, meaning the release of a bound soul from all forms of bondage. What is Bondage? Bondage is dependency. Is the soul free or dependent? The answer is that the soul is bound. Although the body and the soul are distinct, the soul is deeply entangled within the limitations of the body and the senses, making it completely dependent. As Goswami Tulsidas states:

Paravash jīva, svavash Bhagavanta

"The soul is dependent, whereas God is fully independent."

Even the greatest of emperors cannot break free from this bondage by mere willpower. Once their time is up, they cannot extend their stay in this body by even a single hour at their discretion. Thus, to take on a body itself is the greatest bondage for the soul. As long as this bondage exists, the soul cannot experience eternal bliss and absolute happiness. Moksha as the Final Goal

After extensively describing Varnashrama Dharma, Rajadharma, Apaddharma, and various other aspects of life, Sage Manu ultimately defines Moksha as the final goal of human life.

Through actions (Pravritti Dharma), a person attains the status of celestial beings in heavenly realms. However, by following the path of renunciation (Nivritti Dharma), one transcends the limitations of the five elements and attains Moksha.[24] A soul who perceives all living beings within itself and itself within all living beings attains Brahmanhood—the sovereignty of the Supreme Being, which is Moksha.[25] Sage Manu summarizes this in the following verse:

Evaṁ yaḥ sarvabhūteṣu paśyatyātmānamātmanā |
Sa sarva-samatāmetya brahmābhyeti paraṁ padam || (Manusmriti 12.125)

"He who sees the soul in all beings and all beings in the soul attains the highest state of Brahman."

The Manusmriti provides a comprehensive exposition on the fourfold Purusharthas (goals of life) and delineates the righteous means for their attainment. Thus, questioning its relevance stems only from ignorance. The Manusmriti remains eternally applicable as a universal guide to human life.

[24] Pravṛttaṁ karma saṁsevya devānāmeti sāmyatām, nivṛttaṁ sevamānastu bhūtānyatyeti pañca vai. (Manusmṛti 12.90)
[25] Sarvabhūteṣu cātmānaṁ sarvabhūtāni cātmani, samaṁ paśyannātmayājī svārājyamadhigacchati. (Manusmṛti 12.91)

(Concept of "Purushaarth")

पुरुषार्थ–चतुष्टय की अवधारणा

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पुरुष

'पुरुष' शब्द की व्युत्पत्ति है – पृः – पुरं, शरीरं च । पुरि शेते इति – पुरुषः। अर्थात् जो इस पुर में–शरीर में सोया हो, प्रवेश किया हो, शरीर में अवस्थित हो, उस चैतन्यांश जीव को 'पुरुष' कहते हैं। इस व्युत्पत्ति के अनुसार पुरुष शब्द का यौगिक अर्थ तो जीवमात्र है। किन्तु **'पुरुषत्वे चाविस्तरामात्मा।' 'पुरुषत्वे च मां धीराः।**[1] **'बह्व्यः सन्ति पुरः सृष्टास्तासां मे पौरुषी**[2] **प्रिया।' पुरं पुरुषमात्मवान्।**[3] इत्यादि प्रसङ्गों में योग–रुढ़ि के अनुसार पुरुष–शब्द मुख्यतया मनुष्यवाची है। अतः ऐसे शास्त्रीय प्रसङ्गों में पुरुष शब्द का अर्थ जीव–साधारण न होकर मनुष्य होता है। इसके अनुसार 'पुरुषार्थ' पद में जुड़ा हुआ पुरुष शब्द मनुष्यवाची है। इसलिए यहाँ पुरुष शब्द का अर्थ मनुष्य अर्थात् नर–नारी है।

पुरुषार्थ

'अर्थ्यते प्रार्थ्यते सर्वैः इति अर्थः' इस व्युत्पत्ति के अनुसार अभिलषित फल को अर्थ कहते हैं और **'पुरुषाणाम् अर्थः पुरुषार्थः।'** अथवा – **'पुरुषैः अर्थ्यते इति पुरुषार्थः।'** इस व्युत्पत्ति के अनुसार जो पुरुषों से चाहा जाय, अर्थात् मनुष्य जिस फल की इच्छा करें, उसका नाम है – 'पुरुषार्थ।' इस दृष्टि से तो प्रायः संसार भर के सभी विषय पुरुषों के अभिलषित हैं, परन्तु वेद, शास्त्र एवं तदितर सम्पूर्ण संस्कृत वाङ्मय में पुरुष के, मनुष्य जीवन के, सभी अभीष्टों में मुख्य अभीष्ट केवल चार ही बतलाये गये हैं। धर्म, अर्थ, काम और मोक्ष। अतः इन्हीं को चार पुरुषार्थ कहते हैं। इनके सम्पादन करने की शक्ति केवल पुरुष में ही विद्यमान है[4], अतः सभी जीव इनका सम्पादन नहीं कर सकते हैं। केवल पुरुष ही इनका सम्पादन कर सकते हैं। इसीलिए इन्हें 'पुरुषार्थ'[5] कहा जाता है।

मनुष्य जिन–जिन सुख और सुख के साधनों की विशेष अभिलाषा करते हैं, उनको पुरुषार्थ कहते हैं। वास्तव में मनुष्य संसार में उत्पन्न होकर जो भी चाहता है, उन सभी का लक्ष्य इन चारों में से कोई न कोई होता है। कोई मनुष्य धर्म को लक्ष्य करता है, कोई काम की सिद्धि को चाहता है, और कोई मोक्ष की अभिलाषा करता है। भगवान् उनकी इच्छानुसार उन्हें यह चतुर्वर्ग फल प्रदान करते हैं।

'पुंसाममायिनां सम्यग् भजतां भाववर्धनः।

श्रेयो दिशत्यभिमतं यद् धर्मादिषु देहिनाम्।।' (श्रीमद्भाग0 4–8–60)

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[1] – श्रीमद्भागवत 11–7–21
[2] – श्रीमाद्भागवत 7–11–22
[3] – श्रीमद्भागवत 3–20–50
[4] – अर्थात् मनुष्य में।
[5] – पुरुषों अर्थात् मानव समाज के अभिलषित विषय। पुरुषेण प्रार्थ्यानि श्रेयांसि (फलानि)।

अतः जगत् में धर्म, अर्थ, काम और मोक्ष यह चतुर्वर्ग ही समस्त पुरुषों की सम्पूर्ण चेष्टाओं का लक्ष्य है।

मानवधर्मशास्त्र की प्रासङ्गिकता जिस प्रकार कल थी, उसी प्रकार आज भी है। सम्पूर्ण मानव–समाज की सुव्यवस्था के लिये भगवान् मनु ने परम्परा–प्राप्त धर्मानुकूल नियमों–कर्तव्यों का इस 'मानवधर्मशास्त्र' के रुप में प्रवर्तन किया है[6], जिससे सामाजिक व्यवहार चलता आ रहा है। विहित–अविहित कर्म अर्थात् कर्तव्य और अकर्तव्य में निर्णायक धर्मशास्त्र ही होता है। अतएव कहा गया है –

'प्रामाण्यं हि धर्मशास्त्रस्य कार्याकार्यव्यवस्थितौ।'

'श्रुति' शब्द से जैसे वेद का बोध होता है, वैसे ही 'स्मृति' शब्द से धर्मशास्त्र का। स्मृतियाँ अनेक हैं, इनमें मनुस्मृति का सर्वाधिक महत्त्व है, क्योंकि भगवान् मनु ने जिसका जो धर्म बतलाया है, वह सब कुछ वेदमूलक ही है, वे स्वयं सर्वज्ञानमय[7] हैं।

मानव–जीवन के चार लक्ष्य हैं– धर्म, अर्थ, काम और मोक्ष। इन चारों पुरुषार्थों का प्रतिपादन मनुस्मृति में किया गया है और इन्हें प्राप्त करने के लिये विहित मार्गों का निर्देश भी दिया गया है। इस नियम–निर्देश के अनुसार किये गये कर्मों से पुरुषार्थ की प्राप्ति होती है और सामाजिक सुव्यवस्था बनी रहती है। नियम–विरुद्ध व्यवहार करने से समाज में अव्यवस्था और असुरक्षा पैदा होती है।

धर्म

पुरुष का पहला अभीष्ट धर्म है। अतः पहला पुरुषार्थ धर्म है। प्रत्येक चेतन का यह स्वभाव है कि वह अपनी वर्तमान परिस्थिति में सदैव न्यूनता का अनुभव करता है और उससे उच्च परिस्थिति को प्राप्त करने के लिए लालायित रहता है। अतः संसार में जो मनुष्य जहां भी, जिस परिस्थिति में है, वहां से ऊपर उठने की, उन्नति को प्राप्त करने की, अर्थात् अपने अभ्युदय की लालसा उसको लगी रहती है। मनुष्य की उस अभिलषित उन्नति का जो मनुष्य साधन है, वही धर्म[8] है, और जो इसके विपरीत फलवाला है, मनुष्य की अवनति का–अधोगति का कारण है, उसका नाम अधर्म है। इसीलिए महर्षि कपिल ने मनुष्य की उन्नति और अवनति को धर्म और अधर्म का फल बतलाया है –

'धर्मेण गमनमूर्ध्वं गमनमधस्तात् भवत्यधर्मेण।' (सांख्य–कारिका)

यही बात वायुपुराण में भी कही है –

'धारणाद् धृतिरित्यर्थाद् धातोर्धर्मः प्रकीर्तितः।

अधारणेऽमहत्त्वे च, अधर्म इति चोच्यते।।'

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[6] – स्वायम्भुवो मनुर्धीमानिदं शास्त्रमकल्पयत्। (मनुस्मृति 1/102)

[7] – यः कश्चित् कस्यचिद् धर्मो मनुना परिकीर्तितः। स सर्वोऽभिहितो वेदे सर्वज्ञानमयो हि सः।। (मनु0 2/7)

[8] – अर्थात् सत्कर्म से उत्पन्न होने वाला 'अपूर्व' (पुण्य) नामक आत्म–गुण। यह धर्म ही मनुष्य की सर्वविध उन्नति का कारण है।

उन्नति दो प्रकार की होती है। एक का नाम है – अभ्युदय[9] और दूसरे का नाम है – निःश्रेयसः[10]। विश्व में, ब्रह्माण्ड के अन्दर, प्रकृति मण्डल में अर्थात् प्रकृति के दायरे में रहकर मनुष्य अपने सदाचरण से, सत्कर्म से, जिस उन्नति को प्राप्त करता है, उसको 'अभ्युदय' कहते हैं, और प्रकृति की सीमा को भेदन करके प्रकृति की परिधि से, परिच्छिन्नता से हटकर ब्रह्माण्ड के बाहर जो अपार सुखराशि है, अर्थात् ब्रह्म की निःसीम, निरतिशय सुखानन्द–स्वरुप जो त्रिपाद् विभूति है, उसकी प्राप्ति को ही निःश्रेयस कहते हैं। इन दोनों प्रकार की उन्नतियों को प्राप्त करने का जो एकमात्र साधन है, उसी को 'धर्म'[11] कहते हैं।

धर्म में अपार शक्ति है। वह मनुष्य को उसके अभ्युदय और निःश्रेयस इन दोनों प्रकार की उन्नतियों में पहुँचा देता है। धर्म के परिपालन से ही मनुष्य की मानवता का विकास होता है। अतः धर्म सभी पुरुषार्थों की कुंजी है।

श्रुति और स्मृति द्वारा प्रतिपादित आचार को परम धर्म माना गया है। आत्महित अर्थात् सबका हित चाहने वालों को[12] इस आचार धर्म का अनुपालन अवश्य करना चाहिये।[13] प्रसंगतः इसमें वर्णधर्म, आश्रमधर्म, वर्णाश्रमधर्म, गुणधर्म, निमित्तधर्म तथा सामान्य धर्म का विशद प्रतिपादन किया गया है। कर्मों के गुण एवं दोष और चारों वर्णों के परम्परागत सनातन आचार बतलाये गये हैं।[14] इन धर्मों में धृति, क्षमा, दम, अस्तेय, शौच, इन्द्रियनिग्रह, धी (शास्त्र आदि का तत्वज्ञान), विद्या (आत्मज्ञान), सत्य अक्रोध–ये दस सामान्य धर्म हैं जो सामाजिक सुव्यवस्था के लिये नितान्त आवश्यक हैं।[15] इसे सभी विवेकी व्यक्ति भलीभाँति जानते हैं। इन दशविध धर्मों का अध्ययन करके आचरण करने वाले परम गति–मोक्ष को प्राप्त करते हैं।[16]

अर्थ

अर्थ में एक सबसे महान्, सबसे उत्तम गुण यह है कि वह गुणों एवं गुणीजनों के आकर्षण का केन्द्र है। अर्थ वालों के पास सब गुण और गुणीजन किंकरों की तरह दौड़–दौड़कर स्वयमेव पहुँच जाते हैं। इसके साथ ही साथ अर्थवान् मनुष्यों के दोष भी गुण बन जाते हैं, अर्थात् छिप जाते हैं। शुक्राचार्य ने कहा है –

तिष्ठन्ति सधनद्वारे गुणिनः किंकरा इव।

दोषा अपि गुणायन्ते.....।।' (शु0नी0 1,79)

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[9] – अभ्युदय का अर्थ है – अभितः उदम– अर्थात् सब तरह से आगे बढ़ना, उन्नति को प्राप्त होना।

[10] – निःश्रेयस का अर्थ है – 'निश्चितं श्रेयः निःश्रेयसम्।' निश्चित फल अर्थात् जो कभी भी क्षीण नहीं होता ऐसे परम आनन्द की, सर्वोच्च लक्ष्य की प्राप्ति, भगवत्प्राप्ति अथवा मोक्ष की प्राप्ति। अथवा, नास्ति श्रेयान् यस्मात् तत् निःश्रेयसम् जिससे बढ़कर और कोई उत्तम फल न हो।

[11] – धर्म शब्द धृञ् धरणे, इस धातु से बना है। इसका अर्थ होता है धारण करने वाला, पालन–पोषण करने वाला। अथवा अवलम्बन देने वाला।

[12] – सर्वभूतहिते रताः (गीता 5/25, 12/4)

[13] – आचारः परमो धर्मः श्रुत्युक्तः स्मार्त एव च। तस्मादस्मिन् सदा युक्तो नित्यं स्यादात्मवान् द्विजः।। (मनु0 1/108)

[14] – अस्मिन् धर्मोऽखिलेनोक्तो गुणदोषौ च कर्मणाम्। चतुर्णामपि वर्णानामाचारश्चैव शाश्वतः।। (मनु0 1/107)

[15] – धृतिः क्षमा दमोऽस्तेयं शौचमिन्द्रियनिग्रहः। धीर्विद्या सत्यमक्रोधो दशकं धर्मलक्षणम्।। (मनु0 6/92)

[16] – दश लक्षणानि धर्मस्य ये विप्राः समधीयते। अधीत्य चानुवर्तन्ते ते यान्ति परमां गतिम्।। (मनु0 6/93)

इसी से शास्त्रों में अर्थ की बड़ी महिमा गायी है। यहाँ तक कह दिया है कि 'बड़े–बड़े विद्यावृद्ध, तपोवृद्ध और वयोवृद्ध पुरुष भी धनवृद्ध के दरवाजे पर किंकरों के समान, हाथ जोड़े खड़े, रहते हैं –

'विद्यावृद्धास्तपोवृद्धा वयोवृद्धास्तथैव च।

सर्वे ते धनवृद्धस्य द्वारि तिष्ठन्ति किंकराः।।'

अतः अर्थ से सब कुछ सुलभ है –

'यस्यार्थास्तस्य मित्राणि यस्यार्थास्तस्य बान्धवाः।

यस्यार्थाः स सुखी लोके यस्यार्थाः स च पण्डितः।।'

इसी से महर्षि चाणक्य ने कहा है कि, अर्थवान् का सभी लोग विशेष सम्मान करते हैं –

'अर्थवान् सर्वलोकस्य बहुसम्मतः।' (चा0सू0 4/22)

अर्थ में यह भी एक विलक्षण सामर्थ्य है, कि वह सभी को अपने अधीन कर लेता है और स्वयं किसी के अधीन नहीं होता। इसी से अर्थ की ओर उपभोग–रहित वृक्ष भी साभिलाष हो जाते हैं– झुक[17] जाते हैं, तब फिर मनुष्यों की तो बात ही क्या है? श्री सोमदेव सूरी ने कहा है –

'अर्थेषु उपभोगरहितास्तरवोऽपि साभिलाषाः किं पुनर्मनुष्याः?'

शुक्रनीति में अर्थ के उपार्जन पर बड़ा जोर दिया गया है। महर्षि शुक्राचार्य का मत है कि 'संसार में सभी मनुष्य अर्थ के दास हैं, परन्तु अर्थ किसी का दास नहीं होता। अतः मनुष्य को अर्थोपार्जन के लिए सदैव प्रयत्न करना चाहिए' –

'अर्थस्य पुरुषो दासो दासस्त्वर्थो न कस्यचित्।

अतोऽर्थाय यतेतैव सर्वदा यत्नमास्थितः।।' (शु0 नी0 2/83)

इसी बात को महाभारत में भीष्म पितामह ने भी पुष्ट किया है। उन्होंने राजा युधिष्ठिर से कहा है कि 'महाराज, मनुष्य अर्थ का दास है। परन्तु अर्थ किसी का दास नहीं है, यह बात बिल्कुल सत्य है, क्योंकि मुझ सरीखे विरक्त दृढ़व्रत, आबाल ब्रह्मचारी अर्थात् जितेन्द्रिय–पुरुष को भी कौरवों ने अधर्मियों ने, अर्थ से बाँध लिया है– अपने अधीन कर लिया है'–

'अर्थस्य पुरुषो दासो दासस्त्वर्थो न कस्यचित्।

इति सत्यं महाराज बद्धोऽस्म्यर्थेन कौरवैः।।' (म0भा0, भीष्मपर्व)

ठीक ही है। मनुष्यों में चाहे कितने ही दुर्गुण क्यों न भरे हों, अर्थ में वह शक्ति है कि वह गुण–विहीन, व्यक्तियों को भी बड़े–बड़े गुणवानों का आश्रयणीय (पूजनीय) बना देता है। अर्थ प्राप्त

[17] – भूमि में जहां पर धन गड़ा हो, या कोई निधि हो, तो उसके पास के वृक्षों की शाखाएं उस ओर झुक जाती है।

हो जाने से अतिक्षुद्र व्यक्ति भी महान् और अकुलीन भी कुलीन बन जाते हैं। सोमदेव सूरी ने कहा है कि –

'न खलु कुलाचाराभ्यां पुरुषः सर्वोऽपि सेव्यतामेति, किन्तु वित्तेनैव।'

'स खलु महान् कुलीनश्च यस्य धनमनूनम्।' (नीतिवाक्यामृत–अर्थ–समूद्देश)

अर्थात् सभी मनुष्य उत्तम–कुल एवं सदाचार मात्र से ही लोकाराध्य नहीं हो सकते, अपितु केवल एक वित्त से ही मनुष्य लोक–पूज्य हो सकता है। इसलिए संसार में सबसे महान् और कुलीन वही गिना जाता है, कि जिसके पास धन की कमी न हो।

इसी कारण विरक्त संन्यासी भी धनवान् लोगों के चाटुकार बन जाते हैं। सोमदेव सूरी ने कहा है –

'धनिनो यतयोऽपि चाटुकाराः।' (नी0वा0व्यव0समु044)

इसके विपरीत अर्थ–विहीन व्यक्ति को कोई भी नहीं पूछता चाहे वह देवराज इन्द्र ही क्यों न हो, लोग उसका आदर नहीं करते –

'महेन्द्रमपि अर्थहीनं न बहुमन्यते लोकः।' (चा0 सू0 4/33)

अर्थहीन मनुष्य को और तो क्या, साक्षात् उसकी सहधर्मिणी, पत्नी भी अपमानित करती है। महर्षि चाणक्य ने कहा है कि –

'अधनः स्वभार्ययापि अवमन्यते' (चा0सू0 4/60)

निर्धन मनुष्य चाहे कितनी भी अच्छी बात क्यों न कहे, परन्तु उसे कोई भी ग्रहण नहीं करता–

'हितमप्यधनस्य वाक्यं न गृह्यते।' (चा0सू0 459)

गुणग्राही भ्रमर भी पुष्प–विहीन आम्र–वृक्ष का समादर नहीं करते। इसके अतिरिक्त अर्थवान् व्यक्ति यदि किसी को कुछ भी न दे, तो भी सभी लोग उसका बड़ा सम्मान करते हैं। चाणक्य ने कहा है कि –

'अदातारमपि अर्थवन्तम् अर्धिनो न त्यजन्ति।' (चा0सू0 426)

गृहस्थाश्रम में आने पर जीवन यात्रा, परिवार के भरण–पोषण तथा नित्य–नैमित्तिकादि कर्मों के अनुष्ठान और अतिथि–सत्कार एवं दानादि सत्कर्मों के सम्पादन के लिये धन की आवश्यकता होती है। भोगों के लिए कदापि अर्थ का संग्रह न करे। न्याय्य–वृत्तियों से प्राप्त धन का भी अधिक संचय करना निषिद्ध है। अतः मनु ने ब्राह्मण को तपस्या एवं त्याग–वृत्ति से रहने का निर्देश दिया है। उसे अश्वस्तनिक[18] या त्र्यैहिक[19] अथवा कुम्भीधान्यक[20] वा अधिक से अधिक कुसूलधान्यक[21] होना

[18] – केवल एक दिन के लिए जिसके पास भोजन–सामग्री हो वह अश्वस्तनिक है।

चाहिये। द्विजाति से भिन्न के लिए भी धन–संचय का निषेध करते हुए उन्होंने कहा है कि संतोष ही सुख का मूल और असंतोष ही दुःख का कारण है। अतः अधिक संग्रह करने में संयमी बने।[22]

काम

तीसरे पुरुषार्थ का नाम काम है। जिस प्रकार धर्म और अर्थ ये दोनों पुरुषार्थ लोक–स्थिति के मुख्य साधन होने से परम उपादेय हैं, उसी प्रकार 'काम' भी प्राणियों की लोकयात्रा (अर्थात् जीवन निर्वाह) में उपयोगी सुख–सामग्रियों का मुख्य साधन होने से अत्यन्त उपादेय है। काम के बिना प्राणियों की उत्पत्ति, जीवन–निर्वाह एवं सुख की प्राप्ति ही असम्भव है।

'काम्यते इति कामः' इस व्युत्पत्ति के अनुसार विषय और इन्द्रियों के सम्पर्क से उत्पन्न होने वाला मानसिक आनन्द ही मुख्यतया काम कहलाता है।

हम लोगों के अपेक्षित कार्यों को करने के लिए इन्द्रियाँ हमारी सहायता करती रहती हैं। हमारी प्रत्येक इन्द्रिय का प्रधान कर्तव्य हमारे आवश्यक कार्यों में हमारी सहायता करना होने पर भी उसके साथ ही साथ हमारी प्रत्येक इन्द्रिय को, अपने–अपने विषय के सम्पर्क से एक–एक निजी सुखानुभव भी प्राप्त होता है। देखने के लिए बने हुए नेत्र सुन्दर वस्तु को देखकर रुप के आनन्द का अनुभव करते हैं। सुनने के लिए बने हुए हमारे श्रोत्र मधुर संगीत को सुनकर शब्द का आनन्द लेते हैं। क्षुधा–शान्ति के लिए किये जाने वाले भोजन में हमारी रसनेन्द्रिय, आहार के स्वाद को ग्रहण करते समय रस के आनन्द का अनुभव करती है। ऐसे ही सूँघने के लिए बनी हुई हमारी नासिका–इन्द्रिय सुन्दर गन्ध को ग्रहण करती हुई उसका आनन्द लेती है। स्पर्श ज्ञान के लिए बनी हमारी त्वगिन्द्रिय निद्रा के समय सुन्दर शय्या के मार्दव का अनुभव करती हुई सुख का रस लेती है, और सन्तान प्राप्त करने के लिए किये जाने वाले गृहस्थाश्रम के जीवन में गृह्यन्द्रिय अपने विषय का आनन्द लेती है।

इस प्रकार आँख, कान, नासिका, रसना और त्वचा इन पाँच ज्ञानेन्द्रियों के द्वारा अपने प्रधान उद्देश्य को सम्पन्न करते समय रुप, रस, गन्ध, शब्द और स्पर्श इन पाँच विषयों के सम्पर्क से मिलने वाले मानसिक आनन्द को ही काम कहते हैं। यह काम प्राणियों के पुण्य–कर्मों का उत्तम फल है –

'इन्द्रियाणां च पञ्चानां मनसो हृदयस्य च।

विषये वर्तमानानां या प्रीतिरुपजायते।

स काम इति मे बुद्धिः कर्मणां फलमुत्तमम।।' (म0भा0वन प0)

यह काम चित्त का एक संकल्प है, इसका स्वरुप अत्यन्त ही सूक्ष्म है। अतएव वह केवल अनुभव–गम्य है। इसीलिए महाभारत में कहा है कि –

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[19] – केवल तीन दिनों के लिये भोजन–सामग्री रखने वाला त्र्यैहिक कहलाता है।

[20] – वर्ष भर निर्वाह–योग्य धान्यवाले को कुम्भीधान्यक कहा गया है।

[21] – तीन वर्षों तक निर्वाह–योग्य धान्यवाला कुसूलधान्यक कहलाता है।

[22] – संतोषं परमास्थाय सुखार्थी संयतो भवेत्। संतोषमूलं हि सुखं दुःखमूलं विपर्ययः।। (मनु0 4/12)

'द्रव्यार्थस्पर्शसंयोगे या प्रीतिरुपजायते।

स कामश्चित्तसंकल्पः शरीरं नास्य दृश्यते।' (वनपर्व 33–3)

अर्थात्, स्त्रक, चन्दन, वनिता आदि प्रिय–पदार्थों के स्पर्श और सुवर्णादि धन का संयोग (लाभ) होने पर मन में जो एक विशेष प्रीति उत्पन्न होती है, वह चित्त का एक संकल्प ही काम है। वह अत्यन्त सूक्ष्म है। उसका रुप आकार दिखलायी नहीं पड़ता।

भगवान् ही प्राणियों के शरीर में विषयाकार बनी हुई बुद्धि में अवस्थित होकर उसमें अभिव्यक्त आनन्दरुप हो करके कर्मों के फल के रुप में प्रतीत होते हैं –

'प्रधानकालाशयधर्मसङ्ग्रहे शरीर एष प्रतिपद्य चेतनाम्।

क्रियाफलत्वेन विभुर्विभाव्यते यथानलो दारुषु तद्गुणात्मकः।। (भाग0 4–21–35)

इसलिए श्रुति कहती है कि –

'एतस्यैवानन्दस्य अन्यानि भूतानि मात्रामुपजीवन्ति।'

जैसे दही का सार मक्खन है, उसी प्रकार धर्म और अर्थ का सार 'काम' है। जैसे खली से श्रेष्ठ तेल है, तक्र से श्रेष्ठ घृत है और वृक्ष के काष्ठ से श्रेष्ठ उसका फूल और फल है, उसी प्रकार धर्म और अर्थ से श्रेष्ठ काम है –

'नवनीतं यथा दध्नस्तथा कामोऽर्थधर्मतः।

श्रेयस्तैलं हि पिण्याकाद् घृतं श्रेय उदश्वितः।

श्रेयः पुष्पफलं काष्ठात् कामो धर्मार्थयोर्वरः।।' (उ0प्र0प्रजा0 पर्व 37–35)

इस रीति से इन्द्रियों द्वारा अन्तः करण में प्राप्त होने वाले विषय सुखोपभोग के आनन्द को ही काम कहते हैं।

सारांश, आँख, कान, नासिका, जिह्वा और त्वचा इन पांच ज्ञानेन्द्रियों द्वारा रुप, रस, गन्ध, शब्द और स्पर्श इन पांच विषयों के उपभोग से मिलने वाले मानसिक आनन्द को काम कहते हैं। यह चित्त का संकल्प रुप है। इसका स्वरुप अत्यन्त सूक्ष्म है। अतः यह अनुभवगम्य है।

पूर्वोक्त विषय और इन्द्रियों के सम्पर्क से प्राप्त होने वाले काम के (मानसिक आनन्द के) जो साधन हैं, यानि इस काम को (मुख्य सुख को) प्राप्त करने के लिए लोग जिन–जिन अभिलषित वस्तुओं की इच्छा करते हैं, उन्हें भी **'काम्यन्ते इति कामाः'** इस व्युत्पत्ति के अनुसार काम कहते हैं। इस प्रसिद्धि के अनुसार शरीर और इन्द्रियों के उपयोग में आने वाले स्त्री, पुत्र, गृह, क्षेत्र, धन–धान्य, फल–फूल, भक्ष्य–भोज्य, लेह्य–चोष्य, पेय, नृत्य, गीत, वस्त्र, अलंकार आदि–जो शरीर और इन्द्रियों के उपयोगी ऐहलौकिक और पारलौकिक अभिलषित पदार्थ हैं, उनको भी काम कहते हैं। इसी व्युत्पत्ति के अनुसार अणिमा आदि सिद्धियों को भी काम कहते हैं।

इस प्रकार विषय और इन्द्रियों के सम्पर्क से प्राप्त होने वाले मानसिक सूक्ष्म आनन्द और उस काम सुख के साधनभूत जो स्त्री, पुत्र, गृह, क्षेत्र, धन–धान्य, भक्ष्य–भोज्य, पान, नृत्य–गीत, वस्त्र, अलंकार आदि शरीर और इन्द्रियों के उपयोगी समस्त इच्छित पदार्थ हैं, उनको भी कामरुप पुरुषार्थ के साधन होने से, कार्य और कारण की अभेद–विवक्षा से काम कहते हैं। अतः फलत्वेन इच्छा के विषय तथ साधनत्वेन इच्छा के विषय ये दोनों ही काम कहलाते हैं। यानी 1. विषयों के उपभोग से प्राप्त होने वाला आनन्द और 2. उसके साधन इन दोनों को ही काम कहते हैं। 3. साथ ही प्राणियों को इस सुख और सुखोपभोग की सामग्रियों के सम्पादन की ओर प्रेरित करने वाला जो मानसिक संकल्प है अर्थात् विषयाभिलाषरुप इच्छा, कामना अथवा वासना है, उसको भी **'कामितं कामः'** इस व्युत्पत्ति के अनुसार काम कहते हैं। क्योंकि –

'वैकारिकाद् विकुर्वाणान्मनस्तत्वमजायत।

यत्संकल्पविकल्पाभ्यां वर्तते काम–संभवः।।' (भाग0 3/26,27)

अर्थात् मन के ही संकल्प और विकल्प से काम अर्थात् इच्छा, कामना, वासना, मनोरथ आदि आन्तरिक काम की उत्पत्ति (जागृति) होती है। इस काम शब्द का अर्थ है इच्छा, तृष्णा, वासना, एषणा आदि। यह वासनारुप सूक्ष्म काम ही सारे संसार का बीज है। ऋग्वेद में कहा है कि –

'कामस्तदग्रे समवर्तताधि मनसो रेतः प्रथमं यदासीत्।

सती बन्धुमसति निरभिन्दन् हृदा प्रतीच्या कवयो मनीषा।।' (ऋग्वेद.....)

अर्थात् काम मन का, चित्त का बीज है (मनसो रेतः) वह परमात्मा के निष्काम हृदय में पहले सदा से ही, वर्तमान है। तत्ववेत्ता मनीषियों ने गहरी खोज करके अपने हृदय में सबके बन्धु इस काम को देखा है। शिव पुराण में कहा है कि –

'कामः सर्वमयः पुंसां स्वसंकल्प समुद्भवः।

कामात् सर्वे प्रवर्तन्ते लीयन्ते वृद्धिभागताः।।' (धर्म सं0प0 8 अ0)

इस तरह से काम शब्द के मुख्यतया ये तीन अर्थ होते हैं – 1. सुख, 2. सुख के साधन और 3. सुख की कामना। इस प्रकार से काम–शब्द शास्त्रों में, प्रसंगानुसार भिन्न–भिन्न स्थलों में, भिन्न–भिन्न अभिप्राय से व्यवहृत होता है। यानी कहीं पर सुख के लिए, कहीं पर सुख के साधनों के लिए और कहीं पर सुख की कामना के लिए।

उक्त रीति के अनुसार काम सुखस्वरुप अथवा सुख का मुख्य–साधन होने के कारण प्राणियों को अत्यन्त ही अभीष्ट होता है। साथ ही वह देह, इन्द्रियों की तृप्ति एवं परिपुष्टिका भी मुख्य साधन होने से प्राणियों की लोक यात्रा में भी अत्यन्त अपेक्षित हैं। क्योंकि –

'सुखार्थाः सर्वभूतानां मताः सर्वाः प्रवृत्तयः'

अर्थात् सम्पूर्ण प्राणियों की समस्त प्रवृत्तियां एकमात्र सुख के लिए ही होती हैं। अतएव सुख की प्राप्ति के लिए प्राणियों को काम नितान्त अपेक्षित है। काम का फल है – इन्द्रिय–तृप्तिपूर्वक आरोग्यलाभ। इसी से श्रुति कहती है –

'यदा वै सुखं लभतेऽथ करोति, नासुखं लब्ध्वा करोति, मुखमेव बब्ध्वा करोति।'

प्रवृत्तिमार्ग का प्रधान–उद्देश्य 'काम–सुख' ही है। इन सुखों को धर्मानुसार भोगने में कोई दोष नहीं है क्योंकि चित्त और इन्द्रियों की प्रसन्नता ही विषयोपभोग का फल माना गया है। सोमदेव सूरी ने कहा है कि –

'इन्द्रिय–प्रसादनफला हि विभूतयः।' (न0व0काम–समु06)

इसीलिए महर्षि कामन्दक ने कहा है कि –

'सेवेत विषयान् काले मुक्त्वा तत्परतां वशी।

सुखं हि फलमर्थस्य तन्निरोधे वृथा श्रियः'।। (नी0 सा0)

इसी अभिप्राय से महर्षि कौटिल्य ने भी अपने अर्थशास्त्र में कहा है कि –

'धर्मार्थाविरोधेन कामं सेवेत न निःसुखः स्यात्।

पंचमे दिवसस्याष्टमे वा भागे स्वैरविहारमिति।।' (कौ0अ0 1–7–3)

काम दो प्रकार का होता है 1. दिव्य (अर्थात् पारलौकिक–स्वर्गीय) और 2. मानुष (अर्थात् ऐहलौकिक काम)। इनमें से दिव्य काम के सामने मानुष सुखोपभोग ऐसे हैं, जैसे कि समुद्र के सामने कुशाग्र पर लटका हुआ जलबिन्दु! इसी से जैन तीर्थंकर महावीर स्वामी ने कहा है कि –

'जहा कुसग्गे उदगं समुद्देण समं मिणे।

एवं मानुस्सगा कामा देवकामाण अन्तिए।।'

अर्थात् जैसे कुश नामक तृण के अग्रभाग पर लटका हुआ जल समुद्र की तुलना में नगण्य होता है, उसी तरह मनुष्यों के काम भोग देवताओं के कामभोगों के सामने नगण्य हाते हैं।

कामरुप पुरुषार्थ का प्रतिपादन करते हुए भगवान् मनु ने कहा है कि –

'द्वितीयमायुषो भागं कृतदारो गृहे वसेत्।'[23]

अर्थात् जीवन के प्रथम चतुर्थ भाग में ब्रह्मचर्य पूर्वक अध्ययन समाप्त करके द्वितीय भाग में धार्मिक विधि से विवाह करके गार्हस्थ्यजीवन व्यतीत करे। उसे केवल स्वदार–निरत होकर ऋतुकालाभिगामी होना चाहिये।[24] इन नियमों–निर्देशों के अनुपालन से अनेक सामाजिक ज्वलन्त

[23] – मनुस्मृति 4/1

[24] – ऋतुकालाभिगामी स्यात् स्वदारनिरः सदा। पर्ववर्जं व्रजेच्चैनां तद्व्रतो रतिकाम्यया।।(मनु0 3/45)

समस्याओं का समाधान हो सकता है। परिवार–कल्याण के नाम पर अरबों रुपयों के व्यय–अपव्यय को रोका जा सकता है।

मोक्ष

चतुर्थ पुरुषार्थ का नाम है 'मोक्ष'। इसे 'परम पुरुषार्थ' भी कहते हैं। प्रायः अर्थ और काम की चकाचौंध के सामने अधिकांश, अविवेकी मनुष्य मोक्ष को शुष्क और नीरस समझकर उसका नाम ही सुनकर घबड़ा जाते हैं। वे लोग समझते हैं कि भला, मोक्ष में क्या आनन्द मिलेगा ? वहां न तो यह शरीर ही रहेगा और न ये प्रियतम विषय ही मिलेंगे, केवल यह आत्मा परमात्मा में विलीन हो जायेगा। तब इससे हमें आनन्द क्या मिलेगा ?

परन्तु समस्त वेद, शास्त्र, महान् से महान् ज्ञानी ऋषि–महर्षि, सन्त, मुनि–महात्मा आदि लोकोत्तर प्रतिभाशाली सभी महापुरुषों ने संसार भर के एक से एक सुखों को छान–बीन करके, उन्हें खूब अच्छी तरह से परख–परख करके, अन्त में बिना मतभेद के सभी ने एक स्वर से, यही एक अकाट्य, अटल सिद्धान्त सुस्थिर कर दिया है कि –

वास्तव में सबसे उत्तम सबसे सुखमय और सबके अभीष्ट और चाहने योग्य निरवधिक अखण्ड आनन्दमय महान् सरस पुरुषार्थ 'मोक्ष' ही है। इसीलिए विष्णु–पुराण में कहा है कि –

'इति संसार दुःखार्क ताप तापित चेतसाम्।

विमुक्ति पादपच्छायामृते कुत्र सुखं नृणाम्।। (6 अंश0 5 अ0 57)

अर्थात् सांसारिक दुःखरुपी प्रचण्ड सूर्य के ताप से जिनका अन्तः करण सन्तप्त हो रहा है, उन पुरुषों को मोक्षरुपी कल्पवृक्ष की शीतल छाया को छोड़कर और कहां सुख मिल सकता है ?

अतएव मोक्ष ही समस्त पुरुषार्थों और समस्त सुखों का सम्राट है। इसकी प्राप्ति किसी–किसी विरले ही भाग्यशाली को हो पाती है, अधिकांश लोगों के लिए तो यह एक आदर्शमात्र है।

मोक्ष का अर्थ है – **मुच्यते सर्वैर्दुःखबन्धनैर्यत्र सः मोक्षः ?** अर्थात् जिस पद को पाकर जीव आध्यात्मिक आदि सम्पूर्ण दुःख बन्धनों से मुक्त हो जाता है– उसे मोक्ष कहते हैं। इसीलिए इसका नाम मुक्ति भी है। मुक्ति शब्द भी 'मुच्लृ मोचने' इस धातु से 'क्तिन्' प्रत्यय होकर बना है। इसका अर्थ होता है – (बंधे हुए प्राणी का) बन्धनों से छूट जाना। बन्धन क्या है ? परतन्त्रता । तो जीव स्वतन्त्र है कि परतन्त्र ? इसका उत्तर है कि जीव परतन्त्र है। यद्यपि देह भिन्न है और देही आत्मा (जीव) भिन्न है, परन्तु देही देह के अन्दर देह और इन्द्रियों के बन्धनों से खूब जकड़ा हुआ है, अतएव वह बिल्कुल परतन्त्र है। गोस्वामी जी ने कहा है कि –

'परवश जीव स्ववश भगवन्ता'

इसीलिए और तो क्या, बड़े से बड़ा सम्राट भी अपनी इच्छा से इस बन्धन को तोड़ नहीं सकता। समय समाप्त हो जानें पर वह स्वेच्छा से एकआध घण्टे भर भी फिर इस देह में नहीं रह सकता। अतः देह धारण करना ही जीव का महान् बन्धन है। देहवान् होते हुए इन जन्म–मरण और

कर्मभोगों की परतन्त्रता से छुटकारा कोई भी नहीं पा सकता। जब तक यह बन्धन है, तब तक जीव को परम आनन्द अर्थात् अखण्ड सुख मिल ही नहीं सकता।

वर्णधर्म, आश्रमधर्म, राजधर्म, आपद्धर्म आदि सभी विषयों का विशद वर्णन करने के बाद भगवान् मनु ने मानव–जीवन के अन्तिम लक्ष्य मोक्ष का अन्त में निरुपण किया है।

मानव प्रवृत्त कर्मों के द्वारा स्वर्गादिलोकों में देवों की समानता प्राप्त करता है और निवृत्तकर्मों के सेवन से पंचभूतों का अतिक्रमण करता हुआ मोक्ष प्राप्त करता है।[25] सम्पूर्ण जीवों में आत्मा को आत्मा में सम्पूर्ण चराचर को देखता हुआ आत्मयाजी स्वाराज्य ब्रह्मत्व अर्थात् मोक्ष को प्राप्त करता है।[26] इसी का उपसंहार करते हुए उन्होंने कहा है –

एवं यः सर्वभूतेषु पश्यत्यात्मानमात्मना।

स सर्वसमतामेत्य ब्रह्माभ्येति परं पदम्।। (मनु0 12/125)

अर्थात् इस तरह सम्पूर्ण जीवों में स्थित आत्मा को आत्मा के द्वारा जो देखता है, वह सर्वसमता को पाकर ब्रह्मरुप परमपद को पा जाता है।

जिस मानव–धर्मशास्त्र में मानव के पुरुषार्थचतुष्टय का ऐसा उत्तम प्रतिपादन हो, जिसमें उसकी प्राप्ति के धर्मानुकूल साधनों का स्पष्ट निरुपण हो, उसकी प्रासंगिकता में संदेह करना अज्ञानमूलक ही है, अतः मनुवाद–मानवधर्मशास्त्र की प्रासंगिकता सार्वकालिक है।

[25] – प्रवृत्तं कर्म संसेव्य देवानामेति साम्यताम्। निवृत्तं सेवमानस्तु भूतान्यत्येति पंच वै।। (मनु0 12/90)
[26] – सर्वभूतेषु चात्मानं सर्वभूतानि चात्मनि। समं पश्यन्नात्मयाजी स्वाराज्यमधिगच्छति।। (मनु0 12/91)

EXPLORING THE CONCEPT OF *DHARMA* IN BHARATIYA JURISPRUDENCE: WITH SPECIAL REFERENCE TO RULE OF LAW

Seema Singh[*] *& Vinayak Sharma*[**]

The ancient Bharatiya philosophy encompasses the fundamental concept of *Dharma* in its roots, which incorporated a comprehensive framework that governed various aspects enumerated in Dharmashastras, namely, *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 seeks to delve into the fundamental concept of *Dharma* by elucidating the various *'sloka'* to provide nuanced interpretations of *Dharma* in the 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 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.

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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]

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

[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.*
[6] Upendra Baxi, "The Rule of Law in India" 6 *SUR – International Journal on Human Rights* 7 (2007).
[7] *Id.* at 7-8.

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 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

[8] *Id.* at 9.
[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).

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 **अतिस्तुसुहुसृधृक्षिक्षुभायोपदियक्षिनोभ्यो मन् ॥१-१२७॥**।[12]

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.

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[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).
[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.

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 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।*

धारणाद्धर्ममित्याहुर्धर्मेण 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 धर्मवित्ताओं 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

[15] Constituent Assembly Debates on December 06, 1948 *available at:* http://library.bjp.org/jspui/handle/123456789/136 (last visited on August 25, 2024).
[16] *Mahabharata Shanti Parva* 109:9-11 (Geeta Press, Gorakhpur, 2013).

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*

1. 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:

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 ।
धर्मान्नातिंदुश्चर तस्मांद्धर्मे 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।*

[17] Swami Vimalananda (ed.), *Mahanarayana Upanishad* 79:7 (Advaita Ashrama, 1968).
[18] *Ibid.*
[19] *Id.* at 78:6.

"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]

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]

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[20] *Ibid.*
[21] Ganganath Jha (ed.), *The Purva Mimamsa Sutra of Jaimini* 1:1:2 (The Panini office Bhuvaneswari 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).

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 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.

2. 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।*

A. 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]

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[26] *Ibid.*
[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.

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.

B. 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 धर्मशास्त्रयोजकाः॥[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.

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[32] *Supra* note 25 at 2:13.
[33] *Supra* note 30.
[34] *Yajnavalkya Smriti* 1:4, 1:5 (Maharishi University of Management).
[35] *Supra* note 25 at 12:95.
[36] *Ibid.*

C. 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]

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*).

D. 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]

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[37] *Supra* note 25 at 2:17.
[38] *Supra* note 25 at 2:18.
[39] *Supra* note 30.
[40] *Supra* note 25 at 2:1.
[41] *Ibid.*

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]

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.

3. Factors contributed to evolution of Dharma

[42] *Supra* note 25 at 12:113.
[43] *Ibid.*
[44] *Supra* note 25 at 12:37.
[45] *Ibid.*
[46] *Supra* note 25 at 12:38.
[47] *Ibid.*

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 काचिद्दश्यते 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 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.

[48] *Supra* note 25 at 2:4.
[49] *Supra* note 11 at 5.

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

4. 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।*

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[50] *Ibid*.
[51] *Supra* note 25 at 6:92.
[52] *Ibid.*
[53] *Supra* note 25 at 10:63.

"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]
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

[54] *Ibid.*
[55] *Mahabharata Shanti Parva*, 60:7 (Geeta Press, Gorakhpur, 2013).
[56] *Id.* at 60:8.
[57] *Id.* at 60:7, 60:8.
[58] *Supra* note 25 at 12:83.
[59] *Ibid.*

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]

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

[60] *Supra* note 11 at 5.
[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.

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 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:

धर्मार्थविुच्यते 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 लोकसङ्क्रुष्टमेव 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

[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.*

behavior, the adherence to which was seen as essential for the well-being of both the individual and society.

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.*

[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

Bonham's Case, [73] Coke suggests that 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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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 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|

[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).

आरुरोह रथम् हृष्टः शत्रुघ्नेन समन्वितः || २-११३-१[83]

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]

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

Meaning: *प्रजा के सुख में राजा का सुख, प्रजा के कल्याण में उसका कल्याण निहित है। राजा को 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 Bhartiya 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 save *Dharma*, and *Dharma* will save you and thus

[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).

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 ।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतोऽवधीत् ॥ [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 *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.

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[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.*
[90] *Supra* note 11 at 8.

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, 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]

[91] *Mahabharata Udyoga Parva*, 5:39:7 (Geeta Press, Gorakhpur, 2013).
[92] *Mahabharata Anushasan Parva*, 13:153:39 (Geeta Press, Gorakhpur, 2013).
[93] *Supra* note 2.
[94] *Ibid.*

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 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.

[95] *Supra* note 86.
[96] *Ibid.*
[97] *Supra* note 2.
[98] *Supra* note 86.
[99] *Supra* note 2.

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.

धर्म की अवधारणा

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धर्म शब्द 'धृञ् धारणे' धातु के आगे 'मन्' प्रत्यय लगाने से निष्पन्न होता है। व्याकरण की दृष्टि से इसकी व्युत्पत्ति तीन प्रकार से की जा सकती है –

(क) घ्रियते लोकोऽनेनेति धर्मः अर्थात् जिससे लोक धारण किया जाय वह धर्म है।

(ख) धरति धारयति वा लोकमिति धर्मः अर्थात् जो लोक को धारण करे, वह धर्म है।

(ग) घ्रियते यः स धर्मः अर्थात् जो दूसरों से धारण किया जाय, वह धर्म है।

विश्वामित्रस्मृति कहती है –

यमार्याः क्रियमाणं हि शंसन्त्यागमवेदिनः।

स धर्मो यं विगर्हन्ति तमधर्मं प्रचक्षते।[1]

अर्थात् आगमवेत्ता आर्यगण जिस कार्य की प्रसंशा करते हैं, वह धर्म है और जिसकी निन्दा करते हैं, वह अधर्म है।

धर्म मनुष्य की एक सार्वभौम अपरिहार्य भावना है। उसने मनुष्य को हित कल्याण एवं श्रेय की ओर अग्रसर किया है। भारतीय दृष्टिकोण से धर्म का अपना अलग महत्त्व है। भारत को धर्मप्राण देश कहा जाता है। उसका सारा अस्तित्व धर्म के अस्तित्व पर आधारित है। इस दृष्टि से भारत में धर्म की अपनी विशेष परिकल्पना एवं परम्परा है। भारतीय धर्म–चिन्तकों ने समस्त चराचर चेतन तथा जड़ जितने भी पदार्थ हैं, उन सबका अस्तित्व धर्म के अस्तित्व पर आधारित माना है। संसार में प्रत्येक पदार्थ की जो आन्तरिक विधायक वृत्ति है, वही उसका धर्म है। प्रत्येक पदार्थ जिस वृत्ति पर आधारित होता है, वही उस पदार्थ का धर्म होता है। धर्म की वृद्धि से प्रत्येक पदार्थ का संवर्द्धन होता है और धर्म की न्यूनता से प्रत्येक पदार्थ का ह्रास होता है।

वेद से लेकर वैदिक साहित्य, महाभारत, पुराणों और स्मृतियों के धर्मचिन्तकों ने 'धर्म' के स्वरुप का किस रुप में प्रतिपादन किया है, वह विचारणीय है। ऋग्वेद में अनेक ऐसे स्थल हैं, जिनमें धर्म का उल्लेख हुआ है। कहीं तो 'धर्म' शब्द का प्रयोग पुल्लिंग में और कहीं नपुंसकलिंग में हुआ है। ऋग्वेद[2] की कुछ ऋचाओं में 'धर्म' शब्द स्पष्टतः धार्मिक क्रिया–कलापों या धार्मिक विधियों के रुप में प्रयुक्त हुआ है। कुछ ऋचाएँ[3] ऐसी हैं, जिनमें धर्म का नियम, सिद्धान्त व्यवस्था प्रचलन आदि का अर्थ ध्वनित होता है। इस रुप

[1] – विश्वामित्रस्मृति वी0 मि0 31

[2] . ऋग्वेद – 1/22/18, 5/26/6, 7/43/24

[3] . ऋग्वेद – 4/52/3, 5/63/7, 6/70/1 एवं 3/3/1

में यह शब्द 'धृ' धातु के मूल अर्थ 'धारण करना', या 'पालन करना' अर्थ को प्रकट करता है। (यथा – **'द्यावापृथिवी वरुणस्य धर्मणा विष्कभिते अजरे भूरिरेतसा'**)। ऋग्वेद के ये मंत्र अथर्ववेद में भी प्रयुक्त हुए हैं, जहाँ 'धर्म' के साथ 'धर्मन्' का भी प्रयोग मिलता है। वहाँ उसे धार्मिक क्रिया–कलापों के रुप में ग्रहण किया गया है। (यथा– 'ऋतं सत्यं तपो राष्ट्रं श्रमो धर्मस्य कर्म च'), 'वाजसनेय संहिता'[4] में 'धर्म' शब्द का इसी अर्थ में प्रयोग किया गया है।

संहिताओं के पश्चात् ब्राह्मण ग्रन्थों में 'धर्म' शब्द का प्रयोग बहुलता से हुआ है, जो कि अधिक स्पष्ट एवं उपादेय है। 'ऐतरेयब्राह्मण'[5] में उसे समस्त धार्मिक विषयों का पर्याय माना गया है। 'शतपथब्राह्मण'[6] में कहा गया है कि 'धर्म भगवान् की देन है। वह राजाओं का राजा है। उससे अधिक शक्तिशाली दूसरा नहीं है। उसके आश्रय एवं बल से अशक्त भी शक्तिशाली से अपना अधिकार प्राप्त कर लेता है ।

उपनिषद् यद्यपि मूलतः तत्त्वविद्या के ग्रन्थ हैं, तथापि उनमें भी तत्त्वज्ञान के लिए धर्म की अपेक्षा स्वीकार की गई है। 'छान्दोग्य उपनषिद्'[7] में धर्म को त्रिस्कन्धात्मक कहा गया है **त्रयो धर्मस्कन्धा यज्ञोऽध्ययनं दानमिति प्रथमस्तप एवेति द्वितीयो ब्रह्मचर्याचार्यकुलवासी तृतीयोऽत्यन्तमात्मानमाचार्यकुलेऽवसादयन्**। प्रथम स्कन्ध के अन्तर्गत गृहस्थ धर्म, द्वितीय स्कन्ध के अन्तर्गत तापस धर्म (वानप्रस्थाश्रम) और तृतीय के अन्तर्गत ब्रह्मचर्य धर्म (ब्रह्मचर्याश्रम) का समावेश किया गया है। 'तैत्तिरीय उपनिषद्'[8] में स्नातक ब्रह्मचारी को धर्मानुचरण (धर्मं चर) का उपदेश दिया गया है।

धर्मसूत्रों, उनके व्याख्यान ग्रन्थों और स्मृतियों में 'धर्म' का प्रयोग अधिक व्यापक तथा स्पष्ट अर्थ में किया गया है। वहाँ उसे न्यायिक व्यवस्था या विधान अथवा संहिता के रुप में ग्रहण किया गया है। धर्मसूत्रों और स्मृतियों में ही धर्म की विस्तार से व्याख्या की गई और आज के भारतीय समाज में धर्मानुशासन के जो विधि–विधान हैं, उनका दिग्दर्शन किया गया है। 'मनुस्मृति'[9] में कहा गया है कि 'मुनियों के आग्रह पर मनु ने उन्हें समस्त वर्ण–धर्मों का उपदेश दिया' 'याज्ञवल्क्य स्मृति'[10] में धर्म के मनु–प्रोक्त धर्म–स्वरुप का यथावत् वर्णन किया है, धर्मशास्त्र के क्षेत्र में ये दोनों स्मृतियाँ ऐसी हैं, जो आज भी लोकप्रचलित हैं और जिनमें प्रथम बार मानव समाज को धर्म की विधि–व्यवस्था में आबद्ध किया गया है।

धर्मसूत्र तथा स्मृतियों के टीकाकारों एवं निबन्धकारों ने धर्म के उत्तरोत्तर विकसित एवं लोकव्याप्त स्वरुप को अपने–अपने ढंग से प्रतिपादित किया है। 'मनुस्मृति' के टीकाकार मेधातिथि तथा गोविन्दराज और

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[4]. वाजसनेय संहिता – 10/29
[5]. ऐतरेयब्राह्मण – 7/17
[6]. शतपथब्राह्मण – 14/4/2/26
[7]. छान्दोग्य उपनिषद् – 2/23
[8]. तैत्तिरीय उपनिषद् – 1/11
[9]. भगवन् सर्ववर्णानां यथावदनुपूर्वशः। अन्तरप्रभवाणां च धर्मान्नो वक्तुमर्हसि।। मनुस्मृति –1/2
[10]. योगीश्वरं याज्ञवल्क्यं संपूज्य मुनयोऽब्रुवन्। वर्णाश्रमेतराणां नो बूहि धर्मानशेषतः।। याज्ञवल्क्यस्मृति – आ0/1

'गौतम धर्मसूत्र' के व्याख्याता हरिदत्त ने स्मृतिकारों द्वारा प्रतिपादित धर्म के विभिन्न रुपों को उपनिबद्ध करके उसके पाँच प्रमुख विभाग किये हैं –

1. वर्णधर्म, 2. आश्रमधर्म, 3. वर्णाश्रमधर्म, 4. नैमित्तिकधर्म तथा 5. गुणधर्म

धर्म के इन विभागों की सूक्ष्म विवेचना भी उक्त टीकाकारों ने की है। इस प्रकार परम्परा से प्रवर्तित धर्म की स्थापना मानव के विशेषाधिकारों, कर्तव्यों, नियमों और आचार–पद्धतियों के रुप में हुई और उनको आज भी समाज में मान्य समझा जाता है। भगवान् मनु कहते हैं –

विद्वद्भिः सेवितः सद्भिर्नित्यमद्वेषरागिभिः।
हृदयेनाभ्योनुज्ञातो यो धर्मस्तं निबोधत।।[11]

अर्थात् धर्मात्मा एवं रागद्वेष से रहित विद्वानों द्वारा सर्वदा सेवित और हृदय से अच्छी तरह जाना गया जो धर्म है उसे सुनो।

धर्म के परम्परागत स्वरुप का उत्तरोत्तर ज्यों–ज्यों विकास होता गया, उसकी सीमा और उसके विधि–विधान उतने ही व्यापक होते गये। उसके परवर्ती व्याख्याताओं ने धर्म को प्रजाहित में सन्निवेशित करके मत–मतान्तर से उसका व्याख्यान किया। 'महाभारत' में धर्म के मूलस्वरुप के सम्बन्ध में मौलिक विचार किया गया है। वहाँ (कर्णपर्व) धर्म की व्युत्पत्ति धारणार्थक 'धृ' धातु से मानी गई है। उसका लक्षण निश्चित करते हुए कहा गया है कि 'जिसको प्रजा धारण करती है और जिसके द्वारा समस्त प्रजा का धारण होता है, वही धर्म है' –

धारणाद्धर्ममित्याहुः धर्मो धारयते प्रजाः।

यस्माद्धारणसंयुक्ताः स धर्म इति निश्चयः।।[12]

'मनुस्मृति' में चार लक्षण बताये गये हैं, जिनके द्वारा धर्म की पहचान होती है, अथवा जिन पर धर्म आधारित है। ये चार लक्षण हैं – श्रुति, स्मृति, सदाचार और अपनी आत्मा का सन्तोष –

वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।

एतच्चतुर्विधं प्राहुः साक्षाद् धर्मस्य लक्षणम्।।[13]

वेद और स्मृति, दोनों धर्मनिष्ठ भारतीय समाज की आस्थाओं एवं विश्वासों के मूल आधार हैं, असन्दिग्ध, अपरिहार्य प्रमाण है। किन्तु सदाचार और आत्मतुष्टि अर्थात् परम्पराएँ और प्रत्येक व्यक्ति की

[11]. मनुस्मृति – 2/1
[12]. महाभारत शान्ति पर्व 101/11
[13] मनुस्मृति 2/12

आत्मचेतना, आत्मसाक्ष्य या नैतिकता और आत्मनिष्ठा समस्त विश्व के मानव–समाज के धार्मिक पाथेय हैं। श्रुति तथा स्मृतियों की मान्यताओं से असहमत एवं विमुख चार्वाक्, जैन और बौद्ध आदि धर्मों में भी सदाचार और आत्मतुष्टि या आत्मसाक्ष्य अथवा आत्मसन्तोष दोनों को स्वीकार किया है। इन अवैदिक धर्मों की संहिताओं में भी 'मनुस्मृति' के उक्त सदाचार तथा आत्मचेतना पर बल दिया गया है।

धर्म के चतुर्विध लक्षणों में वेद अर्थात् श्रुति का प्रथम स्थान है। श्रुति में किसी वर्ग विशेष, जाति विशेष तथा देशकाल–विशेष के नीति–नियमों का निरुपण न होकर, वे एक ऐसे आत्मचेता, प्रबुद्ध एवं तप–तेज–सम्पन्न मनस्वियों के अनुभव, साक्षात्कृत विचारों का संकलन है, जो अनादि हैं और जिसमें मानवमंगल तथा आत्महित का सार निहित है। स्मृतियों में श्रुतियों की व्याख्या है और मानव–समाज की रक्षा–व्यवस्था तथा उसके उत्थान के लिए नीति–नियम वर्णित हैं। यह व्यापक मानव–समाज परस्पर अविरोधी एवं अबाधक होकर अपनी–अपनी आस्थाओं तथा विश्वासों का, अपनी नैतिक तथा आध्यात्मिक निष्ठाओं का परिपालन करता हुआ अभ्युदय की और अग्रसर है। उसको परम्परा से यह मान्यता प्राप्त है कि जहाँ श्रुति तथा स्मृति में विरोध दिखाई दे, श्रुति निर्देश मान्य हैं।

स्मृतिकारों ने कर्तव्यों के अनुसार धर्म के अनेक विभागों का उल्लेख किया है, जिनमें मुख्य हैं – नित्य, नैमित्तिक, काम्य और आपद्धर्म। जिनके न करने से पाप होता है। ऐसे अनिवार्य कर्तव्यों का सम्पादन ही 'नित्यधर्म' है। विशेष परिस्थतियों या अवसरों पर जिस धर्ममार्ग का अनुसरण किया जाता है, उसे नैमित्तिक धर्म' कहते हैं। किसी विशेष उद्देश्य की सिद्धि के लिए जिन कर्तव्यों का पालन किया जाता है, किन्तु जिनके न करने से कोई दोष नहीं होता है, उन्हें 'काम्यकर्म' कहा गया है। इसी प्रकार 'आपद्धर्म' उसे कहते हैं, जिसका अनुसरण संकटापन्न समय में विवेकानुसार किया जाता है। किन्तु नियमानुकूलता उसमें भी अपेक्षित है।

कुछ विशेष परिस्थितियों में जब अपने वर्ण तथा आश्रम के विहित कर्तव्यों का पालन नहीं हो सकता है, उस परिस्थिति में धर्मशास्त्र में उसके विकल्प बताये गय हैं, जो कि शास्त्र विहित होने के कारण धर्मानुकूल है, उसे 'आपद्धर्म' कहा गया है। उदाहरण के लिए यदि ब्राह्मण पठन–पाठन–भजन आदि अपने नियमित कर्तव्यों का, विशेष परिस्थितियों के कारण निर्वाह नहीं कर सकता है, तब वह क्षत्रिय के कर्तव्यों को अपना सकता है। किन्तु परिस्थिति विशेष के समाप्त हो जाने पर उसे 'आपद्धर्म' त्याग कर अपने नियमित वर्णाश्रम धर्म को अपना लेना चाहिए। जब धर्मराज युधिष्ठिर को आत्मीयों के संहार से वैराग्य उत्पन्न हो गया था, तब शर–शय्या पर पड़े भीष्म पितामह ने राजधर्म की व्याख्या करते हुए उन्हें 'आपद्धर्म' का उपदेश दिया था।[14]

[14]. शांतिपर्व – 68/30, 69/6

विश्व के सभी धर्मों और दर्शनों का एक ही अन्तिम लक्ष्य रहा है – निःश्रेयस् की प्राप्ति। निःश्रेयस् अर्थात् अपवर्ग, मोक्ष अथवा सब प्रकार के त्रिविधि दुःखों–तापों की आत्यन्तिक निवृत्ति। ऐसी निवृत्ति, जिसके बाद कभी भी किसी भी प्रकार के दुःखानुभव की आशंका नहीं रह जाती है। महर्षि कणाद ने धर्म के इसी चरम लक्ष्य को 'वैशेषिकसूत्र' के प्रथम अध्याय में निरुपित करते हुए लिखा है – 'जो सबको समान रुप से, अभ्युदय की ओर ले जाये और सब को कल्याण का मार्ग दिखाये, वही धर्म है'

यतोऽभ्युदयनिः श्रेयससिद्धिः सः धर्मः[15]। रहन–सहन तथा आचार–विचार की परिशुद्धता ही अभ्युदय है और संसारिक सुखों से जुड़े हुए दुःखों के बन्धनों से सर्वथा मुक्त हो जाना ही निःश्रेयस् है। महर्षि कणाद का अभिमत है कि धर्माचरण से उत्पन्न द्रव्यादि पदार्थों के साधर्म्य–वैधर्म्य द्वारा निष्पन्न जो तत्त्वज्ञान है, वही धर्म है और उसके आचरण से ही मोक्ष की उपलब्धि होती है।

मीमांसादर्शन में धर्म के तीन विशेषण बताये गये हैं – प्रयोजन, वेदबोधिता और अर्थता। धर्म का प्रयोजन है अभ्युदय और निःश्रेयस् की सिद्धि। वेदबोधिता, अर्थात् विधि अर्थवाद तथा नामधेय उसके बोधक हैं। इसी प्रकार अर्थता, अर्थात् वह अनर्थरहित है। अनर्थता, अर्थात् हिंसा का प्रतियोगी ही अर्थता है। इस अर्थता को स्पष्ट करने के लिए मीमांसाकार का अभिमत है कि किसी का अपघात करने के बाद धर्म का यह विधान नहीं है कि अमुक अनुष्ठान से उसकी दोष–निवृत्ति या शुद्धि हो जाती है।

धर्म, क्योंकि अदृष्ट है, इन्द्रिय ग्राह्य विषय नहीं है। अतः प्रत्यक्षादि प्रमाणों से उसे न तो सिद्ध किया जा सकता है और न जाना जा सकता है।

अनादि काल से चले आ रहे धर्म को ही 'सनातन–धर्म' कहा गया है। धर्म, नित्य और निश्चल है। वह अनादि काल से मानवता द्वारा वरण किया जाता रहा है। 'भगवद्गीता' में उसे नित्य और अचल कहा गया है – **'नित्यः सर्वगतःस्थाणुरचलोऽयं सनातनः'**[16]। ये दोनों विशेषण आत्मा के हैं, जिसका स्वभाव, प्रभाव और गुण–कर्म सनातन अविचल और नित्य है। यही उसकी सनातनता है। जो धर्म और दर्शन आत्मा में सन्निहित होकर चलते हैं, जिनमें आत्मा का स्वभाव तथा आत्मा की प्रकृति समन्वित होती है, उसी के द्वारा व्यक्ति और समाज का कल्याण तथा हित होता है। समस्त पुरातन वाङ्मय में धर्म के महत्त्व पर विस्तार से विचार किया गया है। वेदों, पुराणों और धर्मशास्त्रीय ग्रन्थों में धर्म को मानव के हित और कल्याण का साधन कहा गया है। उसका आदि, मध्य और अन्त सभी कुछ कल्याणमय एवं श्रेयस्कर है।

वर्तमान विश्व की जितनी भी अनन्त धर्म शाखाएँ हैं, उनका मूल स्रोत एक ही है और उसे ही 'सनातन' कहा गया है। बाद में कुछ लोगों ने 'सनातन' को एक वर्ग विशेष में सीमित करके प्रचारित किया। किन्तु धर्म की सनातनता का उसे पर्याय तथा आशय नहीं माना जा सकता है।

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[15]. वैशेषिकसूत्र – 1.1.12

[16]. श्रीमद्भगवद्गीता – 2/24

शिष्टों के विचार ही धर्म के मूल हैं। यदि धर्म के सम्बन्ध में कोई संशय उत्पन्न हों, अर्थात् यदि देश, काल, परिस्थिति ऐसी उत्पन्न हो जाये कि जिसके समाधान या निर्णय के लिए प्राचीन धर्मग्रन्थों की व्यवस्था चरितार्थ न हो, तो शिष्ट ब्राह्मण सम्यक् विचार करके जो निर्णय दें, उसे ही निरतिशय रुप में, आशंका रहित होकर धर्म स्वीकार कर लेना चाहिए –

'यं शिष्टा ब्राह्मणा ब्रूयुः स धर्मः स्यादशंकितः'।[17]

शिष्ट ब्राह्मण के सम्बन्ध में मनु ने कहा है – जो इतिहास पुराणों के सहित धर्ममूलक वेदों के ज्ञाता हों और जिन्होंने वेदोक्त धर्म–कर्म ज्ञान को अपने जीवन में चरितार्थ या प्रत्यक्ष किया हो, उन्हें शिष्ट समझना चाहिए –

धर्मेणाधिगतो यैस्तु वेदः सपरिबृंहणः।
ते शिष्टा ब्राह्मणा ज्ञेयाः श्रुतिप्रत्यक्षहेतवः।।[18]

'याज्ञवल्क्यस्मृति' में कहा गया है कि देश, काल आदि की दृष्टि से मनुष्य आवश्यकतानुसार धर्म का निर्धारण कर सकता है। वेद पर प्रतिष्ठित जो धर्म है, उसके ज्ञाता चार व्यक्तियों या सांगोपांग तीन वेदों के ज्ञाता जनों की परिषद्, अथवा एक ही अध्यात्मवेत्ता ब्रह्मनिष्ठ जो भी निर्णय कर दे, उसी को धर्म मानना चाहिए।

चत्वारो वेदधर्मज्ञाः पर्शत्त्रैविद्यमेव वा।
सा ब्रूते यं स धर्मः स्यादेको वाऽध्यात्मवित्तमः।।[19]

'शिष्ट' की इस अवधारणा के अनुसार यदि आज के समाज में धर्म–व्यवस्था या धर्म–निर्णय का आचरण किया जाय, तो अनेक समस्याएँ स्वयमेव सुलझ सकती है। आज के समाज में धर्माचरण तथा धर्म–निर्धारण की दृष्टि में भले ही परिवर्तन लक्षित हो, किन्तु सर्व–धर्म–समन्वय की शाश्वत स्थिति तभी लाई जा सकती है, जब धर्म के निर्धारण करने वाले शिष्टों का आदर–सम्मान हो।

यहाँ 'धर्म' शब्द आश्रमों के विलक्षण कर्त्तव्यों की ओर संकेत कर रहा है। इस प्रकार हम देखते हैं कि 'धर्म' शब्द का अर्थ समय–समय पर परिवर्तित होता रहा है। किन्तु अन्त में यह मानव के विशेषाधिकारों, कर्त्तव्यों, बन्धनों का द्योतक, आर्य जाति के सदस्य की आचार–विधि का परिचायक एवं वर्णाश्रम का द्योतक हो गया। तैत्तिरीयोपनिषद् में छात्रों के लिए जो 'धर्म' शब्द प्रयुक्त हुआ है, वह इसी अर्थ में है, यथा ''सत्यं वद'', ''धर्म चर''.....आदि। भगवद्गीता के 'स्वधर्मे' निधनं श्रेयः' में भी 'धर्म' शब्द का यही अर्थ है। धर्मशास्त्र–साहित्य में 'धर्म' शब्द इसी अर्थ में प्रयुक्त हुआ है। मनुस्मृति के अनुसार मुनियों ने मनु से सभी वर्णों के धर्मों की शिक्षा देने की लिए प्रार्थना की थी । यही अर्थ याज्ञवल्क्यस्मृति में पाया जाता है।

[17] . मनुस्मृति 12/108
[18] मनुस्मृति 12/109
[19] याज्ञवल्क्यस्मृति 1/9

तन्त्रवार्तिक के अनुसार धर्मशास्त्रों का कार्य है वर्णों एवं आश्रमों के धर्मों की शिक्षा देना।[20] मनुस्मृति के व्याख्याता मेधातिथि के अनुसार स्मृतिकारों ने धर्म के पाँच स्वरुप माने है – वर्णधर्म, आश्रमधर्म, वर्णाश्रम धर्म, नैमित्तिक धर्म तथा गुणधर्म।

'धर्म' की कतिपय मनोरम परिभाषाओं की ओर संकेत करना अपेक्षित है। पूर्वमीमांसासूत्र में जैमिनि ने धर्म को 'वेदविहित प्रेरक' लक्षणों के अर्थ में स्वीकार किया है, अर्थात् वेदों में प्रयुक्त अनुशासनों के अनुसार चलना ही धर्म है। धर्म का सम्बन्ध उन क्रिया–संस्कारों से है, जिनसे आनन्द मिलता है और जो वेदों द्वारा प्रेरित एवं प्रशंसित है।[21] वैशेषिकसूत्रकार ने धर्म की यह परिभाषा की है – धर्म वही है जिससे आनन्द एवं निःश्रेयस की सिद्धि हो।[22] इसी प्रकार कुछ एकांगी परिभाषाएँ भी हैं, यथा 'अहिंसा परमो धर्मः' अनुशासनपर्व, 'आनृशंस्यं परो धर्मः', 'आचारः परमो धर्मः'। हारीत ने धर्म को श्रुति प्रमाणक माना है।[23] बौद्ध धर्म–साहित्य में धर्म शब्द कई अर्थों में प्रयुक्त हुआ है। कभी–कभी इसे भगवान् बुद्ध की सम्पूर्ण शिक्षा का द्योतक माना गया है। इसे अस्तित्व का एक तत्त्व अर्थात् जड़ तत्त्व, मन एवं शक्तियों का एक तत्त्व भी माना गया है।[24]

गौतमधर्मसूत्र के अनुसार वेद धर्म का मूल है।[25] जो धर्मज्ञ हैं, जो वेदों को जानते हैं, उनका मत ही धर्म–प्रमाण है, ऐसा आपस्तम्ब का कथन है।[26] ऐसा ही कथन वसिष्ठधर्मसूत्र का भी है।[27] मनुस्मृति के अनुसार धर्म के उपादन पाँच हैं – 1. सम्पूर्ण वेद, 2. वेदज्ञों की परम्परा, 3. व्यवहार, 4. साधुओं का आचार तथा 5. आत्मसंतुष्टि[28]।

ऐसी ही बात याज्ञवल्क्यस्मृति में भी पायी जाती है – वेद, स्मृति (परम्परा से चला आया हुआ ज्ञान), सदाचार (भद्र लोगों के आचार–व्यवहार), जो अपने को प्रिय लगे तथा उचित संकल्प से उत्पन्न अभिकांक्षा या इच्छा तथा परम्परा से चले आये हुए धर्मोपादान हैं।[29] उपर्युक्त प्रमाणों से स्पष्ट है कि धर्म के मूल उपादान है वेद, स्मृतियाँ तथा परम्परा से चला आया हुआ शिष्टाचार (सदाचार)। वेदों में स्पष्ट रुप से धर्म–विषयक विधियाँ नहीं प्राप्त होतीं, किन्तु उनमें प्रासंगिक निर्देश अवश्य पाये जाते हैं और कालान्तर के धर्मशास्त्र–सम्बन्धी प्रकरणों की ओर संकेत भी मिलता है। वेदों में लगभग पचास ऐसे स्थल हैं, जहाँ विवाह, विवाह–प्रकार, पुत्र–प्रकार, गोद–लेना, सम्पत्ति–बँटवारा, रिक्थलाभ (वसीयत), श्राद्ध, स्त्रीधन जैसी विधियों

[20] 'सर्वधर्मसूत्राणां वर्णाश्रमधर्मोपदेशित्वात्', वर्णाश्रमधर्मोपदेशित्वात्', पृष्ठ 237। याज्ञवल्क्यस्मृति – 1.11, 1.2

[21] चोदनालक्षणोऽर्थो धर्मः (पूर्वमीमांसा सूत्र, 1.1.2)।

[22] अथातो धर्म व्याख्यास्यामः। यतोऽभ्युदयनिःश्रेयससिद्धिः स धर्मः (वैशेषिक सूत्र)।

[23] अथातो धर्म व्याख्यास्यामः। श्रुतिप्रमाणको धर्मः। श्रुतिश्च द्विविधा, वैदिको तान्त्रिकी च। कुल्लूक द्वारा मनु0 (2–1) में उद्धृत, अनुशासनपर्व, 115.1, वनपर्व, 373.76, मनुस्मृति, 1.108

[24] An element of existence, of existence, i.e. of matter, mind and forces. vide Dr. Stcherbatsky's monograph on the central conception of Buddhism (1923), P.73.

[25] वेदो धर्ममूलम। तद्विदां च स्मृतिशीले। (गौतमधर्मसूत्र, 1.1.2)

[26] धर्मज्ञसमयः प्रमाणं वेदाश्च। (आपस्तम्ब–धर्मसूत्र, 1.1.1.2)

[27] श्रुतिस्मृतिविहितो धर्मः। तदलाभे शिष्टाचारः प्रमाणम्। शिष्टः पुनरकामात्मा। वसिष्ठधर्मसूत्र–1.4.6

[28] वेदोऽखिलोधर्ममूलं स्मृतिशीले च तद्विदाम्। आचारश्चैव साधूनामात्मनस्तुष्टिरेव च।। मनु0 2.6।

[29] श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः। सम्यक् संकल्पजः कामो धर्ममूलमिदं स्मृतम्। याज्ञवल्क्य, 1.7।

पर प्रकाश पड़ता है।[30] वेदों की ऋचाओं से यह स्पष्ट होता है कि भ्रातृविहीन कन्या को वर मिलना कठिन था।[31] कालान्तर में धर्मसूत्रों एवं याज्ञवल्क्य–स्मृति में भ्रातृविहीन कन्या के विवाह के विषय में जो चर्चा हुई है, वह वेदों की परम्परा से गुँथी हुई है।[32] विवाह के विषय में ऋग्वेद वाली ऋचा आज तक गायी जाती है और विवाह–विधि में प्रमुख स्थान रखती है।[33] धर्मसूत्रों एवं मनुस्मृति में वर्णित ब्राह्म विवाह–विधि की झलक वैदिक समय में भी मिल जाती है।[34] वैदिक काल में आसुर विवाह अज्ञात नहीं था।[35] गान्धर्व विवाह की भी चर्चा वेद में मिलती है।[36] औरस पुत्र की महत्ता की भी चर्चा आयी है। ऋग्वेद में लिखा है – अनौरस पुत्र, चाहे वह बहुत ही सुन्दर क्यों न हो, नहीं ग्रहण करना चाहिए, उसके विषय में सोचना भी नहीं चाहिए।[37] तैत्तिरीय संहिता में तीन ऋणों के सिद्धान्त का प्रतिपादन किया गया है।[38] धर्मसूत्रों में वर्णित क्षेत्रज पुत्र की चर्चा प्राचीनतम वैदिक साहित्य में भी हुई है।[39] तैत्तिरीय संहिता में आया है कि पिता अपने जीवन–काल में ही अपनी सम्पत्ति का बँटवारा अपने पुत्रों में कर सकता है।[40] इसी संहिता में यह भी आया है कि पिता ने अपने ज्येष्ठ पुत्र को सब कुछ दे दिया।[41] ऋग्वेद में यह आया है कि भाई अपनी बहन को पैतृक सम्पत्ति का कुछ भी भाग नहीं देता।[42] प्राचीन एवं अर्वाचीन धर्मशास्त्र–लेखकों ने तैत्तिरीय संहिता के एक कथन पर विश्वास रखकर स्त्री को रिक्थ (वसीयत) से अलग कर दिया है।[43] ऋग्वेद ने विद्यार्थी–जीवन (ब्रह्मचर्य) की प्रशंसा की है, शतपथब्राह्मण ने ब्रह्मचारी के कर्तव्यों की चर्चा की है, यथा मदिरा–पान से दूर रहना तथा संध्याकाल में अग्नि में समिधा डालना।[44]

तैत्तिरीय संहिता में आया है कि जब इन्द्र ने यतियों को कुत्तों (भेड़ियों) के (खाने के) लिए दे दिया, तो प्रजापति ने उसके लिए प्रायश्चित्त की व्यवस्था की।[45] शतपथब्राह्मण ने राजा तथा विद्वान् ब्राह्मणों को पवित्र अनुशासन पालन करने वाले (धृतव्रत) कहा है।[46] तैत्तिरीय संहिता में कहा है – 'अतः शूद्र यज्ञ के

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[30] देखिए, जर्नल ऑफ दि बाम्बे ब्रांच, रायल एशियाटिक सोसायटी (J.B.B.R.A.S.), जिल्द 26 (1922), पृ0 57.82।

[31] अमाजूरिव पित्रोः सचा सती समानादा सदसस्त्वामिये भगम्। ऋग्वेद, 2.17.7। देखिए, ऋग्वेद 1.124.7, 6.5.5, अथर्ववेद, 1.17.1 तथा निरुक्त, 3.4.5।

[32] अरोगिणीं भ्रातृमतीमसमानार्षगोत्रजाम्। याज्ञवल्क्य, 1.53, देखिए, मनुस्मृति 3.11।

[33] गृभ्णामि ते सोभगत्वाय (ऋग्वेद, 10.85.36) देखिए, आपस्तम्ब–गृह्यसूत्र, 2.4.14।

[34] गौतमधर्मसूत्र 4.4, बौधायनधर्मसूत्र 1.2.2, आपस्तम्बधर्मसूत्र, 2.5.11.17, मनुस्मृति, 3.27।

[35] वसिष्ठधर्मसूत्र 1.36.37, देखिए, आपस्तम्बधर्मसूत्र 2.6.13.11, जहाँ कन्या–क्रय की व्याख्या की गयी है और देखिए, पूर्वमीमांसासूत्र, 6.1.15 – 'कयस्य धर्ममात्रत्वम्।

[36] भद्रा वधूर्भवति यत्सुपेशाः स्वयं सा मित्रं वनुते जने चित्। ऋग्वेद, 10.27.12।

[37] न हि ग्रभायारणः सुशेवो अन्योदर्यो मनसा मन्तया उ। ऋग्वेद, 7.5.8।

[38] जायमानो वै ब्राह्मगस्त्रिभिर्ऋणवान् जायते, ब्रह्मचर्येण ऋषिभ्यो यज्ञेन देवेभ्यः प्रजसा पितृभ्यः। तैत्तिरीय संहिता, 6.3.10.5

[39] को वां शयुत्रा विधवेव देवरं मर्य न योषा कृणुते सधस्थ आ। ऋग्वेद, 10.40.2।

[40] मनुः पुत्रेभ्यो दायं व्यभजत्। तैत्तिरीय संहिता, 3.1.9.4। आपस्तम्बधर्मसूत्र (2.6.14.11) तथा बोधायनधर्मसूत्र (2.6.14.12) तथा बौधायनधर्मसूत्र (2.2.5) ने संकेत किया है।

[41] तस्माज्ज्येष्ठं पुत्रं धनेन निरवसाययन्ति। तैत्तिरीय संहिता 2.5.2.7। इस कथन की ओर आपस्तम्बधर्मसूत्र (2.6.14.12) तथा बौधायनधर्मसूत्र (2.2.5) ने संकेत किया है।

[42] न जामये तान्वो रिक्थमार्रेक् – ऋग्वेद, 3.31.2। देखिए निरुक्त (3.53) का व्याख्या।

[43] तस्मात् स्त्रियो निरिन्द्रिया अदायादोरपि पापात्पुंसउपस्थिततरं वदन्ति। तैत्तिरीय संहिता, 6.5.8.2।

[44] ब्रह्मचारो चरति वेविषद्विषः स देवानां भवत्येकमगंम्। ऋग्वेद 10.109.5। शतपथब्राह्मण (11.5.4.18) में आया है – 'तदाहुः'। न ब्रह्मचारी सन्मध्वश्नीयात्। तुलना कीजिए, मनुस्मृति, 2.177। 'समिध्' के लिए देखिए शतपथब्राह्मण (11.3.3.1)

[45] इन्द्री यतान् शालावृकेभ्यः प्रायच्छत्। मेधातिथि (मनुस्मृति, 11.45) ने इसका उद्धरण दिया है।, देखिए, ऐतरेयब्राह्मण, 7.28, ताण्ड्यमहाब्राह्मण, 8.1.4, 13.4.17 तथा अथर्ववेद, 2.5.3।

[46] एष च श्रोत्रियश्चैती ह वै द्वौ मनुष्येषु धृतव्रतौ। शतपथब्राह्मण, 5.4.4.5

योग्य नहीं है।'[47] ऐतेरेय ब्राह्मण का कथन है कि जब राजा या कोई अन्य योग्य गुणी अतिथि आता है तो लोग बैल या गो–संबंधी उपहार देते हैं।[48] शतपथब्राह्मण ने वेदाध्ययन को यज्ञ माना है और तैत्तिरीयारण्यक ने उन पाँच यज्ञों का वर्णन किया है, जिनकी चर्चा मनुस्मृति में भली प्रकार हुई है।[49] ऋग्वेद में गाय, घोड़ा, सोने तथा परिधानों के दान की प्रशंसा की गयी है।[50] ऋग्वेद ने उस मनुष्य की भर्त्सना की है, जो केवल अपना ही स्वार्थ देखता है।[51] ऋग्वेद में 'प्रपा' की चर्चा हुई है, यथा– 'तू मरुभूमि में प्रपा के सदृश है।'[52] जैमिनि के व्याख्याता शबर तथा याज्ञवल्क्य के व्याख्याता विश्वरुप ने 'प्रपा' (वह स्थान जहाँ यात्रियों को जल मिलता है) के लिए व्यवस्था बतलायी है।

उपर्युक्त विवेचन से यह स्पष्ट हो जाता है कि कालान्तर में धर्मसूत्रों एवं धर्मशास्त्रों में जो विधियाँ बतलायी गयीं, उनका मूल वैदिक साहित्य में अक्षुण्ण रुप में पाया जाता है। धर्मशास्त्रों ने वेद को जो धर्म का मूल कहा है, वह उचित ही है। किन्तु यह सत्य है कि वेद धर्म–सम्बन्धी निबन्ध नहीं है, वहाँ तो धर्म–सम्बन्धी बातें प्रसंगवश आती गयी हैं। वास्तव में धर्मशास्त्र–सम्बन्धी विषयों के यथातथ्य एवं नियमनिष्ठ विवेचन के लिए हमें स्मृतियों की ओर ही झुकना पड़ता है।

धर्मशास्त्र का क्षेत्र अत्यन्त व्यापक है। श्रुति–स्मृति, पुराण और इतिहास आदि आर्षग्रन्थों में जो विषय प्रतिपादित हैं, वे मानवमात्र का मार्गदर्शन करते हैं। मनुष्य को जन्म से लेकर मृत्युपर्यन्त प्रतिक्षण कब क्या करना चाहिये और क्या नहीं करना चाहिए, साथ ही प्रातः जागरण से लेकर रात्रि–शयनपर्यन्त की सम्पूर्ण चर्या और क्रियाकलाप ही धर्मशास्त्र के प्रतिपाद्य विषय हैं।

हमारे धर्मशास्त्र इन सम्पूर्ण विषयों का विस्तृत विवेचन प्रस्तुत करते हैं और प्राणिमात्र का कल्याण कैसे हो, इसका मार्ग प्रशस्त करते हुए मनुष्यमात्र के कर्तव्य का निर्णय करते हैं। साथ ही ऐहलौकिक जीवन की सार्थकता के लिये सत्कर्म करने की प्रेरणा देते हैं। इसीलिए धर्मशास्त्र के प्रतिपाद्य विषयों में मनुष्य की दीनचर्या, सामान्य धर्म, विशेष धर्म, स्वधर्म, वर्णाश्रम–धर्म, संस्कार, सदाचार, शौचाचार, विचार, यम–नियम, दान, श्राद्ध–तर्पण, पंच महायज्ञ, स्वाध्याय, सत्संग, अतिथिसेवा, देवोपासना, संध्या–वन्दन, गायत्री–जप, यज्ञ, व्रतोपवास, इष्टापूर्त, शुद्धितत्त्व, आशौच, पातक, महापातक, कर्मविपाक, प्रायश्चित्त, पुरुषार्थ–चतुष्टय, भक्ति, आध्यात्मज्ञान आदि विषय समाहित हैं।

'धर्मशास्त्रं तु वै स्मृतिः' – इत्यादि वचनों से 'धर्मशास्त्र' शब्द से मुख्यरुप से स्मृतियों की वेदमूलकता भी स्वयं सिद्ध है। स्मृतियाँ मुख्य रुप से वेदार्थ की प्रतिपादन करती हैं तथा वैदिक धर्म की ही

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[47] तस्माच्छूद्रो यज्ञेऽनवक्लृप्तः। तैत्तिरीय संहिता, 7.1.1.6

[48] तद्यथैवादो मनुष्यराज आगतेऽन्यस्मिन्वार्हत्युक्षाणं वा वेहतं वा क्षदनत एवमस्मा एतत्क्षदनते यदग्निं मथ्नन्ति। ऐतरेय ब्राह्मण, 1.15। तुलना कीजिए – वसिष्ठधर्मसूत्र, 4.8।

[49] पञ्च वा एते महायज्ञाः सतति प्रतायन्ते सतति सन्तिष्ठनते देवयज्ञः पितृयज्ञो भूतयज्ञो मनुष्ययज्ञो ब्रह्मयज्ञः। तैत्तिरीयारण्यक, 2.10.7।

[50] उच्चा दिवि दक्षिणावन्ती अस्थुर्ये अश्वदाः सह ते सूर्येण। हिरण्यदा अमृतत्वं भजन्ते वासोदाः सोम प्रतिरन्त आयुः। ऋग्वेद, 10.107.2।

[51] केवलाघो भवति केवलादी। ऋग्वेद, 10.117.6।

[52] धन्वन्निव प्रपा असि त्वमग्न इयक्षवे पूरवे प्रत्न राजन्। ऋग्वेद, 10.4.1।

व्याख्या करती हैं। स्मृतियाँ आर्ष भारतीय मनीषा के दिव्य चमत्कारिक, प्रातिभ ज्ञान एवं विशिष्ट स्मृति का अवबोध कराती हैं। इनमें मुख्य रुप से धर्माचरण एवं सदाचार का पाठ पढ़ाया गया है। स्मृतियों के साथ ही वेदधारा के सूत्र–साहित्य का भी इसमें विशिष्ट योगदान है। सूत्र – साहित्य में श्रौतसूत्र, गृह्यसूत्र, धर्मसूत्र तथा कल्पसूत्र ग्रन्थों का परिगणन है। धर्मसूत्र तथा गृह्यसूत्र स्मृतियों के पूर्व पीठिका के रुप में प्रसिद्ध हैं। स्मार्त सूत्रों की संरचना स्मृति के आधार पर तथा स्मृतियों की संरचना धर्मसूत्रों के आधार पर मानी गयी है।

धर्मसूत्रों में गौतम, आपस्तम्ब, वसिष्ठ, बौधायन, हिरण्यकेशी, हारीत, वैखानस तथा शंखलिखित–धर्मसूत्र विशेष प्रसिद्ध एवं मान्य हैं। इन समस्त सूत्रों में धर्मशास्त्र का व्यापक विवेचन–विश्लेषण हुआ है। इन सूत्रों का मुख्य ध्येय है आचार, विधि – नियम (कानून) तथा क्रिया–संस्कारों की विधिवत् चर्चा करना।

स्मृति–साहित्य विशाल तथा विस्तृत रुप में परिलक्षित है। इनमें विषय– बाहुल्य अथवा व्याख्या–विवेचन की दृष्टि से मनुस्मृति में आचार एवं याज्ञवल्क्य में व्यवहार (कानून) से सम्बन्धित विषयों की प्रधानता है। समान्यतः स्मृतियों में तीन प्रधान विषयों पर विवेचन हुआ है – 1. आचार, 2. व्यवहार एवं 3. प्रायश्चित्त ।

आचार के अर्न्तगत चारों वर्णों के कर्तव्यों–कर्मों का विधान हुआ है।, गृहस्थ का कर्तव्य अन्य आश्रमों के प्रति उसका व्यवहार, वानप्रस्थ का जीवन एवं उसका कर्तव्य, संन्यासी का लक्षण, उसका धर्म और उसके दैनिक आचार, उसकी वृत्ति, ऐसे अनेक विषयों का रोचक वर्णन स्मृतियों में हैं। विद्यार्थी के रहन–सहन, कर्तव्य और व्यवहार, आदि का वर्णन भी आचार के अन्तर्गत हुआ है। इन विषयों के अतिरिक्त राजा के कर्तव्य, प्रजा के प्रति उसके व्यवहार, उसके द्वारा दण्ड–विधान के पालन आदि का भी विस्तृत विवेचन है। स्मृतियों में वर्णित दूसरा विषय – 'व्यवहार' है। वर्तमान परिप्रेक्ष्य में इसे 'कानून' पद से अभिहित किया गया है। इसके अन्तर्गत आजकल के फौजदारी और दीवानी के सभी कानून आते हैं। फौजदारी कानून के अन्तर्गत दण्ड और उसके प्रकार तथा साक्षी और उसके प्रकार एवं शपथ, अग्निशुद्धि, व्यवहार की प्रक्रिया, न्यायकर्ता के गुण और न्याय–निर्णय का ढंग आदि वर्णित है। इसके अतिरिक्त सीमा का निर्णय, सम्पत्ति का विभाजन, दाय (सम्पत्ति) के अधिकारी, दाय का अंश, स्त्रीधन, करग्रहण कानून भी वर्णित हैं। प्रायश्चित्त खण्ड में धार्मिक तथा सामाजिक कृत्यों के न करने अथवा उनकी अवहेलना करने से जो पाप होते हैं, उनके प्रायश्चित्त का विधान है।

समस्त वैदिक वाङ्मय में धर्म की ही चर्चा है। उपनिषदादि ग्रन्थ आत्मज्ञान–परमात्मज्ञान धर्म का निरुपण करते हैं। इतिहास–पुराण तथा रामायण आदि ग्रन्थ तो धर्म की सच्चर्चा से भरे ही पड़े हैं। पुराणों तथा महाभारत आदि के आख्यान–उपाख्यान, धर्म–महिमा में ही पर्यवसित होते दिखते हैं। इस प्रकार सर्वत्र धर्म की ही बातें हैं, क्योंकि धर्म ही सबका आधार है और इस धर्म का पालन ही परम कल्याणकारी है। कौटिल्य के अर्थशास्त्र में धर्मशास्त्र–विषयक चर्चा (राजा के कर्तव्य–उत्तरदायित्व आदि) परिलक्षित है।

वास्तव में अर्थशास्त्र भी धर्मशास्त्र की ही एक शाखा है। जिसका उद्देश्य है पृथ्वी के लालन–पालन के साधनों का उपाय करना।[53]

धर्मशास्त्र के निरुपण में रामायण तथा महाभारत–जैसी मूल्यवान् कृतियों का योगदान भी कम महत्त्वपूर्ण नहीं है। ये दोनों धर्म के उपादान माने जाते हैं। इन दोनों कृतियों में धर्मशास्त्र–विषयक सामग्री प्रभूत मात्रा में उपलब्ध है। महाभारत के तो अवान्तर पर्वों के नाम भी धर्मपरक हैं, जैसे – मोक्षधर्म पर्व, दानधर्म पर्व इत्यादि। महाभारत में आश्रमधर्म (शान्तिपर्व, 61, 243–246), आपद्धर्म (शान्ति0 131), उपवास (अनु0 106–107), तीर्थ (वनपर्व 82), दान (वन0 186), दायभाग (अनु0 45, 47), प्रायश्चित्त (शान्ति0 34, 35, 165), भक्ष्याभक्ष्य (शान्ति0 36, 78), राजनीति (सभा0 5, वन0 150, उद्योग0 33–34, शान्ति0 59–130), वर्णधर्म (शान्ति0 60), वर्णसंकर (शान्ति0 65, 297), विवाह (अनु0 44–46), श्राद्धकर्म (स्त्रीपर्व 26, 27) आदि विषयों की विवेचना से यह धर्मशास्त्र का कोश ही प्रतीत होता है। तथा आदिकाव्य वाल्मीकीय रामायण एवं श्रीरामचरितमानस में तो धर्मविग्रह भगवान् श्रीराम का ही वर्णन हुआ है, फिर उसकी धर्ममयता में क्या संदेह! वह तो पद–पद पर धर्म से अनुस्यूत है।

पुराणों में विशेषकर श्रीमद्भागवत्, विष्णुपुराण, पद्मपुराण, स्कन्द, विष्णुधर्मोत्तर तथा मत्स्यपुराण आदि में धर्म–सम्बन्धी अनेक विषयों का उल्लेख हुआ है, जिनमें आचार, आह्निक, आशौच, आश्रमधर्म, भक्ष्याभक्ष्य, वर्णधर्म, दान, कर्मविपाक, पातक, प्रायश्चित्त, राजधर्म, संस्कार, शान्ति, श्राद्ध, स्त्रीधर्म, तीर्थ, उत्सर्ग तथा व्रत और सर्वोपरि धर्म– भगवद्धर्म का निरुपण हुआ है।

स्मृतियाँ तो मुख्यरुप से 'धर्मशास्त्र' पद की ही परिचायिकाएँ हैं। मनु, याज्ञवल्क्य, गौतम, नारद, हारीत, वसिष्ठ, शंख, लिखित, आपस्तम्ब, पराशर, दक्ष, संवर्त, अत्रि, पुलस्त्य, दाल्भ्य, देवल, अंगिरा तथा वाधूल आदि ऋषि–महर्षियों द्वारा प्रणीत स्मृति–ग्रन्थ उनके नाम से ही प्रसिद्ध हैं। इनमें वर्णधर्म (ब्राह्मण, क्षत्रिय, वैश्य तथा शूद्र), आश्रमधर्म (ब्रह्मचर्य, गृहस्थ, वानप्रस्थ तथा संन्यास), सामान्यधर्म, विशेषधर्म, गर्भाधान से अन्त्येष्टि तक के संस्कार, दिनचर्या, पंचमहायज्ञ, बलिवैश्वदेव, भोजनविधि, शयनविधि, स्वाध्याय, यज्ञ–याज्ञादि, इष्टापूर्त धर्म, प्रायश्चित्त, कर्मविपाक, शुद्धितत्त्व, पाप–पुण्य, तीर्थ–व्रत, दान, प्रतिष्ठा, श्राद्ध, सदाचार, शौचाचार, आशौच (जननाशौच, मरणाशौच), भक्ष्याभक्ष्य–विचार, आपद्धर्म, दाय–विभाग (सम्पत्ति का बँटवारा), स्त्रीधन, पुत्रों के भेद, दत्तकपुत्र–मीमांसा और राजधर्म तथा मोक्ष–धर्म एवं आध्यात्मज्ञान इत्यादि का विस्तार से वर्णन हुआ है।

स्मृतिग्रन्थों पर अनेक आचार्यों की टीकाएँ– भाष्य हुए हैं तथा इन विविध विषयों पर एक–एक विषय को लेकर स्वतन्त्र निबन्ध ग्रन्थों की रचना भी हुई है। और विविध विषयों का एकत्र संग्रह भी हुआ है। जैसे हेमाद्रि के पुरुषार्थ चिन्तामणि तथा कमलाकर भट्ट के निर्णयसिन्धुः में स्मृतिग्रन्थों तथा पुराणादि के अनेक विषयों का संग्रह भी हुआ है।

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[53]. अर्थशास्त्र, कौटिल्य 15.1

अनेक भाष्यकारों एवं निबन्धकारों ने अपनी रचनाओं के माध्यम से धर्मशास्त्र को विकसित एवं प्रकाशित कर एक अहम भूमिका का निर्वाह किया है, इनमें से प्रमुख हैं – मेधातिथि, विज्ञानेश्वर, हलायुध, पारिजात, गोविन्दराज, जीमूतवाहन, अपरार्क, हेमाद्रि, नृसिंहप्रसाद तथा नागोजिभट्ट आदि। इनकी रचनाओं का आधार प्रमुख रुप से विभिन्न स्मृतिग्रन्थ तथा व्यवहारशास्त्र (कानून) है। व्याख्याओं एवं निबन्धों में आचार्य विज्ञानेश्वर की याज्ञवल्क्यस्मृति पर 'मिताक्षरा' नाम की टीका, जीमूतवाहन का दायभाग, शूलपाणिका स्मृतिविवेक, रघुनन्दन का स्मृतितत्त्व, चण्डेश्वर का विवाद–रत्नाकर, वाचस्पति का विवादचिन्तामणि, देवण्ण भट्ट की स्मृतिचन्द्रिका, नन्दपण्डित की 'दत्तक–मीमांसा' तथा नीलकण्ठ भट्ट का 'व्यवहारमयूख' कानून–सम्बन्धी ग्रन्थों में विशेष महत्त्वपूर्ण हैं। शूलपाणिका श्राद्धविवेक, श्रीदत्त उपाध्याय का श्राद्धकल्प और समय–प्रदीप, चण्डेश्वर का राजनीति–रत्नाकर, हेमाद्रि का चतुर्वर्गचिन्तामणि, माधवाचार्य का पराशर माधव, नारायण भट्ट का अन्त्येष्टिपद्धति, त्रिस्थलीसेतु और प्रयोगरत्न, नन्दपण्डित की शुद्धिचन्द्रिका, कमलाकर भट्ट का निर्णयसिन्धुः, मित्रमिश्र का वीरमित्रोदय और जगन्नाथ तर्कपंचानन का विवादार्णव भारत के विभिन्न भागों में विख्यात है। इसमें चण्डेश्वर का राजनीतिरत्नाकर मध्य युग की राजनीति जानने के लिए परम महत्त्वपूर्ण ग्रन्थ हैं। हेमाद्रि का चतुर्वर्गचिन्तामणि प्राचीन धार्मिक व्रतों, उपासनाओं तथा आचारों का विश्वकोश है। इस प्रकार भारतीय संस्कृति, सभ्यता, परम्परा तथा रीति–रिवाज आदि का विवेचन इन धर्मशास्त्रों में व्यापक रुप से व्यंजित है।

धर्मशास्त्रों में धर्म तथा सत्य की रक्षा के लिए एवं समाज का कार्य सुचारु रुप से चले इस दृष्टि से अर्थात् समाज को एक अभिन्न सूत्र में बाँधने के लिए सामाजिक व्यवस्था अर्थात् वर्णाश्रम आदि की धर्म–व्यवस्था एवं मर्यादा निरुपित है, जिसके माध्यम से संकेत दिया है कि प्रत्येक व्यक्ति इन निर्धारित नियमों के आधार पर यदि जीवन जीता है, स्व–धर्म का सम्यक् प्रकार से पालन करता है तो वह सुखी और समृद्ध बन सकता है तथा अपने परम निर्दिष्ट कर्तव्यों को करते हुए लक्ष्य तक पहुँच सकता है। परस्पर सौहार्द, प्रेम एवं 'वसुधैव कुटुम्बकम्' आदि उदात्त एवं पवित्र भावनाओं अंगीकार करते हुए वह स्वयं अपना तथा समाज, राष्ट्र एवं समूचे विश्व का कल्याण कर सकता है। धर्मशास्त्र मनुष्य को सुव्यवस्थित ढंग से जीने के लिये प्रेरित करते हैं। पुरुषार्थ–चतुष्टय–धर्म, अर्थ, काम और मोक्ष से समन्वित जीवन ही उसके लिये श्रेयस्कर माना गया है। इस हेतु मानव का सम्पूर्ण जीवन चार अध्यायों – ब्रह्मचर्य से गृहस्थ, वानप्रस्थ एवं संन्यास में विभक्त है। ब्रह्मचर्य से संन्यास तक यात्रा मानव–जीवन के सम्पूर्ण विकास को अभिदर्शित करती है। सम्पूर्ण जीवन का एक भाग यदि ब्रह्मचर्य–साधना एवं सम्यक् विद्याभ्यास तथा शिक्षार्जन में व्यतीत किया जाए तो निश्चित रुप से व्यक्ति में सम्यक् व्यक्तित्व का उद्घाटन होता है। इसी प्रकार जब वह गृहस्थ जीवन में पदार्पण करता है तो उसके कुछ कर्तव्य (अतिथि सत्कार, पंचमहायज्ञ, दान तथा श्राद्ध आदि) होते हैं, जिनका उसे पालन करना होता है। धर्माचरणरुप कर्तव्यमय जीवन से व्यक्ति की वृत्ति उन्नत तथा उदारमयी बनती है। गृहस्थ जीवन के उपरान्त अधिकारी व्यक्ति को वानप्रस्थ या संन्यास ग्रहण करने की आज्ञा है। इसमें व्यक्ति अपने अन्तिम पुरुषार्थ सार्थक करने का उपक्रम करता है, अर्थात् मोक्ष की ओर

प्रवृत्त रहता है। वह ईश्वर का पवित्र सानिध्य पाने की जिजीविषा में तल्लीन रहता है। इस प्रकार धर्मशास्त्रों में व्यवहृत आश्रमव्यवस्था–सम्बन्धी तथ्यों एवं उसकी उपयोगिता के विषय में जो बोध होता है, वह निश्चय ही मानव–जीवन के लिये वरेण्य है, उपादेय है।

जन्म से लेकर मृत्युपर्यन्त हिन्दू संस्कृति से अनुप्राणित मानव–जीवन संस्कारों में आबद्ध है। धर्मसम्मत संस्कारों के माध्यम से मानव–जीवन को जहाँ समानता तथा धर्मपरायणता आदि के सूत्र में पिरोया जा सकता है, वहीं उसे सुसंस्कृत भी बनाया जा सकता है। ऐसी सुसंस्कृत संस्कृति भारतीय सनातन संस्कृति है, जिससे सारे विश्व ने ज्ञान प्राप्त किया है –

एतद्देशप्रसूतस्य सकाशादजन्मनः।

स्वं स्वं चरित्रं शिक्षेरन् पृथिव्यां सर्वमानवाः।।[54]

पंचमहायज्ञ एवं शौचाशौच नामक धार्मिक क्रियाएँ जीवन को बाह्य एवं अन्तरंग दोनों रुपों में परिशुद्ध करती हैं, अर्थात् इनके माध्यम से जीवन पाप से निष्पाप की ओर प्रवृत्त होता है, साथ ही उसका शरीर तथा अन्तःकरण परम पवित्र हो जाता है। वास्तव में काम–क्रोधादिजन्य विकार व्यक्ति को अशुचिता प्रदान करते हैं। बिना शुचिता–निर्मलता के यज्ञ, धर्म, ध्यान, उपासना आदि सभी कर्म व्यर्थ हैं, निस्सार हैं। सांसारिक विषय जिनमें चित्त की मलिनता समायी रहती है, ब्रह्म तक पहुँचने में सर्वथा बाधक सिद्ध हुए हैं, अतः उनका त्याग–परित्याग जीवन की सर्वोत्तम साधना है।

संग्रहात्मक प्रवृत्ति में विकार–दूषण अर्थात् मोह–माया का जब समावेश होता है, तो संग्रह द्वन्द्व–संघर्ष का रुप धारण करने में सहायक बनता है। इस प्रवृत्ति से बचने के लिये तथा अर्जन–उपार्जन–वृत्ति को उत्पन्न करने के लिए दान एक आवश्यक साधन है, जिसे निःस्वार्थ–भाव से सम्पन्न करना–कराना चाहिए। धर्मशास्त्रों में दान–विषयक चर्चा निश्चित रुप से समाज को दान की ओर प्रेरित करके उसके अभ्युदय–निःश्रेयस का मार्ग प्रशस्त करती है। दोनों में भी सात्विक दान की विशेष महिमा है, तामसदान को निन्दित बतलाया गया है। परोपकार, सेवा की दृष्टि से किया गया सत्कर्म भी दान का ही एक अंग माना गया है।

भजन और भोजन – ये दो वृत्तियाँ व्यक्तित्व–निर्माण में अहम भूमिका का निर्वाह करती हैं। यह लोकोक्ति भी है कि ''जैसा खाये अन्न वैसा बने मन'' इसी को ध्यान में रखकर धर्मशास्त्रों में भक्ष्याभक्ष्य पर गहन चिन्तन हुआ है। भक्ष्याभक्ष्य का सीधा सम्बन्ध भोजन से है। क्या खाना चाहिए और क्या नहीं खाना चाहिए तथा किसका खाना चाहिए और किसका नहीं ? इस विषय में धर्मशास्त्रों में विस्तृत नियम निर्धारित हैं। स्मृतियों में भोजन के विधि–निषेध के विषय में व्यवस्थाएँ दी गयी हैं, आपस्तम्ब धर्मसूत्र, वसिष्ठधर्मसूत्र, मनुस्मृति (6। 207–223) तथा याज्ञवल्क्यस्मृति (1। 167–181) में इसकी विस्तारपूर्वक चर्चा हुई है।

[54] मनुस्मृति 2/20

सांसारिक विषय–वासनाओं को उद्दीप्त करने वाले पदार्थ अभक्ष्य तथा धर्म साधना में प्रवृत्ति एवं कर्तव्य–दायित्वों के प्रति सतत जागरुकता लाने वाले पदार्थ वस्तुतः भक्ष्य कहलाते हैं। धर्मशास्त्रों में अभिव्यक्त भक्ष्याभक्ष्य–सम्बन्धी तथ्य निश्चितरुप से समाज के लिये उपादेय है। इससे व्यक्ति अपने आहार अर्थात् भोज्य–सामग्री के संदर्भ में सदा सचेष्ट रहता है।

इस प्रकार धर्मशास्त्र के सांस्कृतिक पक्ष के अध्ययन से जहाँ एक ओर समाज को एक व्यवस्थित रुप मिलता है, वहीं दूसरी ओर सूत्रात्मक शैली में जीवन जीने का मार्ग प्रशस्त होता है।

धर्मशास्त्रों में राजविधि और व्यवहार–विषयक तथ्यों का प्रभूत मात्रा में वर्णन हुआ है, जिससे लोगों में तत्कालीन राज्यों की, राजा–प्रजा तथा उनकी सम्पत्ति आदि के बारे में अनेक जानकारियाँ प्राप्त होती हैं। न्याय और दण्डनीति धर्मशास्त्र के अभिन्न अंग हैं। जीवन से सत्य और धर्म जब पलायन कर जाते हैं, तब न्याय और दण्ड को आवश्यकता प्रतीत होती है। पवित्र आचरण और व्यवहार–हेतु दण्ड ही एक ऐसा साधन है, जिसके भय से व्यक्ति का अन्तःकरण पाप या अनीति–कर्म न करने को उद्यत रहता है। वास्तव में न्याय और दण्ड के माध्यम से व्यक्ति असत् से सत् की ओर प्रवृत्त होता है। उसके जीवन में अनुशासनात्मक प्रवृत्ति उद्‌भूत होती है। मनु आदि के शासन–विधान सभी कालों में सभी के लिये मान्य रहे हैं। इस प्रकार धर्मशास्त्रों में अभिव्यक्त न्याय और दण्डनीति के माध्यम से हमें न्याय, न्यायनिर्धारण की नीति, अपराध और दण्डनीति तथा प्रयोग पद्धति आदि का परिज्ञान होता है।

धर्मशास्त्रों में दुष्कर्मों या पापों का फलवान् होना 'कर्मविपाक' शब्द से अभिव्यंजित है। कर्मविपाक की मूलभित्ति है जीव और कर्म। जीव जब दुष्कर्म या पापकर्म करता है और वह इन कृत्यों का प्रायश्चित्त भी नहीं करता, तो धर्मशास्त्र ऐसे जीवों को नारकीय यातनाएँ भोगने के उपरान्त पापकृत्यों के अवशिष्ट चिह्न–स्वरुप कीट–पतंगों या निम्न कोटि के जीव या वृक्ष के रुप में पुनः जन्म एवं मनुष्य–रुप में जन्म लेने पर रोगों एवं कुलक्षणों से युक्त होने की बात बताते हैं। कर्मविपाक से यह प्रकट होता है कि किसी प्रकार पाप से सम्पृक्त जीव अपने पापों (दुष्कृत्यों) को समाप्त कर मानव–रुप धारण करता है और प्रायश्चित्त न करने के कारण रोगों एवं शारीरिक दोषों से ग्रसित होता है। कर्मविपाक वस्तुतः प्राणी को नैराश्यपूर्ण जीवन जीने की अपेक्षा अन्तस् में प्रतिष्ठित आत्मा के वास्तविक स्वरुप को पहचानने का अवसर प्रदान करता है। वास्तव में समस्त जीवन कर्मविपाक पर आधृत है। कर्मविपाक की रहस्यमयी गुत्थियों के अनावृत्त होने पर ही संसारी जीव जन्म–मरण के दारुण दुःखों से मुक्त होकर अनन्त आनन्द में विलीन हो जाता है। अर्थात् परमात्मपद का सामीप्य प्राप्त करता है। सम्भवतः उसके जीवन का यही अभीष्ट लक्ष्य है। व्यक्ति कर्म करता है, पुरुषार्थ करता है। उसका यह कर्म–पुरुषार्थ दो प्रकार का होता है– एक प्रवृत्ति परक तथा द्वितीय निवृत्तिपरक। प्रवृत्तिपरक में पारलौकिक आनन्द की अनुभूति अर्थात् ब्रह्म की अनुभूति अर्थात् निःश्रेयण की प्राप्ति गर्भित है। प्रवृत्तिपरक कर्मों में नैरन्तर्य कार्यशीलता पायी जाती है। जबकि निवृत्ति में लौकिक क्रियाओं एवं अभिकांक्षाओं या मनः कामनाओं का सर्वदा अभाव रहता है। निष्कर्षतः यह कहा जा सकता है कि

कर्मविपाक व्यक्ति के अन्तस् में सुप्त–प्रसुप्त चेतना को झंकृत कर धर्ममय जीवन जीने की ओर अर्थात् अशुभ से शुभ और शुभ सत्–कर्म करने की ओर अभिप्रेरित करता है। व्यक्ति किस प्रकार आत्मकल्याण एवं लोक–कल्याण के कार्य कर सकता है और उसका उसे क्या फल मिलता है? इस विषय को धर्मशास्त्रों में इष्टापूर्त धर्म, प्रतिष्ठा तथा उत्सर्ग धर्म नाम से विवेचित किया गया है। इष्ट धर्मों में अधिकारी व्यक्तियों द्वारा मुख्य रुप से यज्ञ–याज्ञादि वैदिक श्रौतकर्मों का सम्पादन होता है और पूर्तधर्म में विशुद्ध परोपकार एवं जनकल्याण की भावना से तालाब, कुआँ, बाग–बगीचा, मन्दिर, धर्मशाला, पौसला आदि बनवाना, उनकी व्यवस्था करवाना तथा जीर्णोद्धार आदि तथा गोचरभूमि की व्यवस्था करना एवं फलदार तथा छायादार वृक्ष लगाना आदि है।

धर्मशास्त्रों में अभिव्यक्त है कि इष्ट और पूर्त इन दोनों प्रकार के कल्याणपरक साधन का निर्माण करने–कराने से निर्मापक को जहाँ एक ओर शान्ति तथा प्रसन्नता मिलती है, वहीं दूसरी ओर इनके माध्यम से वह अपने पापों का शमन कर संसार से अपनी मुक्ति का मार्ग भी प्रशस्त कर लेता है। धर्मशास्त्रों में पूर्त–धर्म के माहात्म्य को प्रदर्शित करते हुए यहाँ तक कहा गया है कि यज्ञादि से व्यक्ति मात्र स्वर्ग का अधिकारी होता है, किंतु पूर्त कर्मों से वह मुक्ति का भी अधिकारी बन जाता है –

इष्टेन लभते स्वर्गं पूर्तं मोक्षमवाप्नुयात्।।[55]

इस प्रकार धर्मशास्त्रों में व्यक्ति के ऐहलौकिक तथा पारलौकिक सभी पक्षों का विस्तार से विवेचन हुआ है। धर्मशास्त्र हमें अच्छे आचारवान् बनने की शिक्षा देते हैं, सद्व्यवहार सिखाते हैं, सबसे मैत्री, करुणा, प्रेम करना सिखलाते हैं, सच्चा मानव बनने की प्रेरणा देते हैं और अपने कर्तव्य का अवबोध कराते हुए ऊँची स्थिति में पहुँचने का संदेश देते हैं। इस दृष्टि से धर्मशास्त्रीय नियम सभी के लिये सब समयों में परम कल्याणकारी हैं।

समस्त पुरातन वाङ्मय में धर्म के महत्त्व पर विस्तार से विचार किया गया है। वेदों, पुराणों और धर्मशास्त्रीय ग्रन्थों में धर्म को मानव के हित और कल्याण का साधन बताया गया है। उसका आदि, मध्य और अन्त सभी कुछ कल्याणमय एवं श्रेयस्कर है। संसार में जितने भी सुख–दुःख, उत्थान–पतन और राग–द्वेष हैं, सभी क्षणिक एवं अस्थिर हैं। यहाँ तक कि यह शरीर भी, जिसके लिए मनुष्य को सभी कुछ करना पड़ता है, वास्तव में विनाशशील है। यदि मनुष्य के साथ सतत् स्थिर रहने वाली कोई वस्तु है, तो वह धर्म ही है। इसलिए शास्त्रकारों ने मानव–मंगलकारी धर्म को परिपालन और उसका संरक्षण आवश्यक बताया गया है। धर्म ही मानव जगत् का रक्षक एवं पोषक है। उसके बिना प्रत्येक व्यक्ति असुरक्षित और असहाय है। मनु ने कहा है – 'यदि हम धर्म को ही मार डालेंगे, तो धर्म भी हमें मार डालेगा और यदि हम धर्म की रक्षा करेंगे, तो वह भी हमारी रक्षा करेगा। अतः धर्म की अपने प्राणों से बढ़ कर रक्षा करनी चाहिए –

[55] लिखितस्मृति 1

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः।

तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतोऽवधीत्[56]।।

कौरव–पाण्डवों के संग्राम को शास्त्रों में धर्मयुद्ध कहा गया है, और धर्म–समन्वित होने के कारण 'महाभारत' को वीर या रौद्र रस का ग्रन्थ न मानकर शान्तिरस का ग्रन्थ माना गया है। 'महाभारत' को 'धर्मसंहिता' की मान्यता प्राप्त है। 'भगवद्गीता' (3।35) में कहा गया है कि 'अपने धर्म पर अडिग बने रहकर उसके परिपालन एवं आचरण में यदि निधन भी हो जाये, तो वह श्रेयस्कर है – **'स्वधर्मे निधनं श्रेयः'।**

सभी युगों और समस्त देशों के जन–जीवन में धर्म का महत्त्व इसलिए भी है कि वह नियम और अनुशासन है। इस अनुशासन से ही सृष्टि का संचालन हो रहा है। सूर्य–चन्द्र और दिन–रात की अखण्डता एवं नित्यता का आधार वही है। प्रत्येक व्यक्ति, समाज और राष्ट्र की सुरक्षा–व्यवस्था नियमों के परिपालन से ही बनी रह सकती है। धर्म ही एक ऐसी सर्वहितकारी व्यवस्था है, जिसके आदर्शों पर चलकर मनुष्य अपने अधिकारों एवं कर्तव्यों का परिपालन करता हुआ अपना तथा मानवता का कल्याण करता है। धर्मानुष्ठान से ही जीवन में सदाचार का उदय होता है, और तब मनुष्य अपने से बड़ों का सम्मान तथा अपने से छोटों को स्नेह करना सीखता है। धर्म ही हमें निर्देश करता है कि परोपकार, ईश्वरभक्ति, राष्ट्रभक्ति, गुरुभक्ति और आतिथ्य क्या है? और उसके शुभंकर परिणाम क्या हैं?

धर्म की हमारे जीवन में व्यावहारिक उपादेयता है। वह शारीरिक उन्नति और उत्तम स्वास्थ्य का भी कारण है। उसकी आश्रय–व्यवस्था का एक प्रयोजन यह भी है। धर्म ही हमें संयम और आत्म–निग्रह की ओर प्रवृत्त करता है। वही हमारे मन, बुद्धि का परिष्कारक तथा आत्मतत्त्व का बोध कराने वाला है।

इस प्रकार धर्म मनुष्य की भौतिक तथा आध्यात्मिक, दोनों प्रकार की उन्नतियों का कारण है।

भारतीय धर्म–संहिता में आचारों की श्रेष्ठता को बड़ा महत्त्व दिया गया है। पुराणकारों और धर्मशास्त्रकारों ने विशेष प्रयोजनवश आचारशास्त्र की स्वतंत्र रुप से व्याख्या की है। आर्यावर्त्त में प्रविष्ट आर्येत्तर जातियों को आर्य–संस्कृति में विलय करने के उद्देश्य से पुराणकारों ने 'युगधर्म' की नयी प्रस्थापना की। 'नारदपुराण' (24।11) में स्पष्ट निर्देश किया गया है कि 'समस्त वर्णों को विचारपूर्वक युगधर्म को ग्रहण करना चाहिए और जिनका स्मृति धर्म से विरोध न हो, उन देशाचारों को भी अपनाना चाहिए' –

युगधर्म परिग्राह्यो वर्णैरेतैर्यथोचितम्।

देशाचारस्तथा ग्राह्यः स्मृतिधर्माविरोधः।।

देशाचाररहित लोकविद्दिष्ट युगधर्म का आचरण करना निंद्य है। जो अपने आचार से हीन है, वह सांगवेद और वेदांग में पारंगत होने पर भी पतित है, क्योंकि वह कर्म से हीन है –

[56] मनु0 8/15

यः स्वाचारपरिभ्रष्टः साङ्गवेदाङ्गोऽपि वा।

स एव पतितो ज्ञेयो यतः कर्मबहिश्कृतः[57]।।

आचारहीन व्यक्ति को हरि या हरिभक्ति अथवा वेद भी पवित्र नहीं कर सकते हैं। जो अपने आश्रम तथा आचार से हीन है, वह निंद्य एवं पतित है। इस दृष्टि से आचारशास्त्र अपने–आप में एक स्वतन्त्र शास्त्र है और स्मृतिकारों ने इसी रुप में उसकी श्रेष्ठता को प्रतिपादित किया है। उसे व्यवहारदर्शन, नीतिदर्शन (एथिक्स) आदि नामों से भी कहा गया है। इस शास्त्र में मानव जीवन के परम श्रेय पर विचार किया गया है, जिसकी प्राप्ति के लिए शुभ कर्मों का सम्पादन और अशुभ कर्मों का परित्याग बताया गया है। आचारशास्त्र यह भी बताता है कि अनुष्ठानयोग्य शुभ कर्मों के सम्पादन का विधान क्या है। उसमें नैतिक आचरण की अनिवार्यता पर भी बल दिया गया है। नैतिकता का नियामक धर्म रहा है। नैतिक नियमों का पालन इसलिए किया जाता है कि वह धर्म को या ईश्वर को अभीष्ट है। कर्तव्यपालन की इष्ट तथा साध्य वस्तु की प्राप्ति का उपाय है। इस दृष्टि से उसका सम्बन्ध आत्मोन्नति से है।

'आचार' लोक–संग्राहक धर्म का एक अंग है। प्राचीन धर्मविज्ञ आचार्यों द्वारा लोक–संग्राहक धर्म को तीन भागों में विभक्त किया गया है – आचार, व्यवहार और प्रायश्चित्त। इसी रुप में स्मृतियों का विषय–विभाजन किया गया है। धर्म–ग्रन्थों में इसलिए आचार को बड़ा महत्त्व दिया गया है। श्रुति तथा स्मृति के अनन्तर आचार को तीसरा स्थान दिया गया है। 'मनुस्मृति' (1।109) में कहा गया है कि 'आत्मानुभूतिजन्य विधि 'आचार' का द्विजों द्वारा अवश्य पालन किया जाना चाहिए।

स्मृतिकारों ने आचार के तीन विभाग किये हैं – देशाचार, जात्याचार और कुलाचार। देश–विशेष को दृष्टि में रखकर जो आचार परम्परा से प्रचलित हैं, उन्हें 'देशाचार' कहा जाता है। उदाहरण के लिए दक्षिण भारत में 'मातुल' कन्या से विवाह का प्रचलन है। जाति विशेष में जो आचार प्रचलित है, उन्हें 'जात्याचार' कहा जाता है। उदाहरण के लिए कुछ जातियों में सगोत्र विवाह विहित होते आ रहे हैं, इसी प्रकार कुलविशेष में प्रचलित आचार 'कुलाचार' के नाम से कहा जाता है। उदाहरण के लिए कुछ आदिवासी कबीलों में कतिपय धार्मिक क्रियाओं की विशेष प्रथाएँ प्रचलित हैं।

'याज्ञवल्क्यस्मृति' में आचार के अन्तर्गत लगभग 12 विषयों का समावेश किया गया है – 1. संस्कार, 2. वेदपाठी ब्रह्मचारियों के चारित्रिक नियम, 3. विवाह एवं पत्नी के नियम, 4. चार वर्ण एवं वर्णसंकर, 5. ब्राह्मण गृहपति के कर्त्तव्य, 6. ब्रह्मचारी जीवन के उपरान्त करणीय कर्त्तव्य, 7. विधिसम्मत भोजन एवं निषिद्ध भोजन, 8. धार्मिक पवित्रता, 9. श्राद्ध. 10. गणपति पूजा, 11. ग्रहशान्ति 12. राजा के कर्त्तव्य।

स्मृति–ग्रन्थों में प्रचलित आचार के तीन विभागों के तंत्र ग्रन्थों में सात विभाग किये हैं, ये सात आचार हैं – 1. वेद, 2. वैष्णव, 3. शैव, 4. दक्षिण, 5. वाम, 6. सिद्धान्त, 7. कुल। महाराष्ट्र में वैदिकों के

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वेदाचार, रामानुज तथा अन्यान्य वैष्णवाचार, शंकराचार्य के अनुयायी दाक्षिणात्य शैवों में दक्षिणाचार, वीरशैवों में शैवाचार एवं वीराचार और केरल के शाक्तों में वीराचार, गौड़ देश के शाक्तों में कौलाचार प्रचलित हैं। इन सात आचारों में से अन्तिम चार आचारों को निन्दनीय कहा गया है। ये सप्तविध आचार दैवयान, पितृयान और महायान के तीन कुलों के अन्तर्गत माने जाते हैं। शिष्ट या आप्त अथवा बहुमान्य व्यक्तियों द्वारा अनुमोदित विचारों को ही 'आचार' कहा गया है।

इस प्रकार परम धर्म आचार (आचारः परमो धर्म) की विशेष रुप से व्यवस्था कर उदारवृत्ति धर्माचारियों ने आर्येत्तर जातियों को आर्यसंघ में सम्मिलित करके और उसके लिए युगानरुप धर्म की संस्थापना करके सार्वभौम भावना का परिचय दिया है। धर्म को वर्ग विशेष एवं जाति विशेष की परिधि तथा सीमा से उन्मुक्त कर परम धर्म आचार को सर्व सामान्य के लिए वरणीय बनाया है।

पाण्डवों के वनवास काल की 'महाभारत' (वन0 312–314) में एक कथा आयी है। एक बार द्वैतवन में पाण्डवों को बड़ी प्यास लगी, बहुत भटकने पर भी उन्हें कहीं पानी नहीं मिला। अन्त में धर्मराज युधिष्ठिर ने एक स्थान पर हरियाली देखकर नकुल को वहाँ पानी लाने के लिए भेजा। नकुल वहाँ गये और उन्होंने पानी से भरा हुए एक तालाब देखा। उस तालाब में ज्यों ही वे पानी पीने के लिए उद्यत हुए, कि उन्हें यह आकाशवाणी सुनायी दी – इस तालाब के पानी पर मेरा अधिकार है। पहले मेरे प्रश्नों का उत्तर दो, तब पानी पीओ, किन्तु प्यास के कारण नकुल इतने व्याकुल थे कि आकाशवाणी पर ध्यान न देकर वे पानी पीने लगे। पानी का स्पर्श करते ही वे मूर्च्छित होकर धरती पर गिर पड़े। जब नकुल को गये बहुत विलम्ब हो गया, तो धर्मराज ने सहदेव को वहाँ भेजा, वे भी नकुल की भाँति मूर्च्छित होकर धरती पर गिरे। यही दशा क्रमशः अर्जुन और भीम की हुई। अन्त में धर्मराज स्वयं वहाँ गये। चारों भाइयों को मृत पाया देखकर उन्होंने बड़ा विलाप किया। परीक्षा हेतु जब वे पानी पीने के लिए तालाब में गये, तो उन्हें भी वही वाणी सुनायी दी। उनके सम्मुख एक यक्ष खड़ा था।

धर्मराज ने यक्ष से प्रश्न करने के लिए कहा। यक्ष ने अनेक प्रश्न किये और धर्मराज ने उनका उत्तर दिया। जिज्ञासा की पूर्ति होने पर सन्तुष्ट होकर यक्ष ने कहा – हे राजन्, आपने मेरे प्रश्नों का सही और सन्तोषजनक उत्तर दिया है। इसलिए अपने मृत भाइयों में जिस एक को आप चाहें, उसे मैं जीवित कर सकता हूँ। इस पर युधिष्ठिर ने कहा – 'कृपया मेंरे कनिष्ठ भाई नकुल को जीवित कर दें।' यह सुनकर यक्ष ने आश्चर्य मिश्रित वाणी में कहा – 'राजन्, आप राज्यहीन होकर वन में भटक रहे हैं। आपको शत्रुओं के साथ संग्राम करना है। अतः आप अपने पराक्रमी भाई भीम या अर्जुन को जीवित करने की इच्छा प्रकट करें।'

इस पर धर्मराज युधिष्ठिर ने कहा – हे यक्ष ! वनवास का कष्ट और शत्रुओं के साथ संग्राम का विधान तो लगा ही हुआ है। किन्तु मनुष्य को धर्म से च्युत नहीं होना चाहिए। 'जो धर्म की रक्षा करता है,

धर्म स्वयं उसकी रक्षा करता है' (धर्मो रक्षति रक्षितः), कुन्ती और माद्री, दोनों मेरी माताएँ हैं, कुन्ती का पुत्र मैं जीवित हूँ। मेरी दूसरी माता माद्री का पुत्र भी जीवित रहे, इसलिए आप नकुल को ही जीवन–दान दीजिए।' यक्ष ने कहा – 'धर्मराज, आप बड़े उदार है। अतः आपके चारों भाई जीवित हो जायें। मैं तुम्हारा पिता धर्म हूँ। तुम्हें देखने तथा तुम्हारे धर्म की परीक्षा लेने के लिए ही आया था'।

आधुनिक विश्व ने प्रत्येक व्यक्ति को धार्मिक स्वतन्त्रता का अधिकार प्रदान किया है। धर्म के इस सुरक्षित अधिकार का सदुपयोग हम मानव चेतना के विकास के लिए कर सकते हैं। डॉक्टर राधाकृष्णन् ने लिखा है – 'धर्म चरम सत्ता की प्रत्यक्ष समझ (बुद्धि) है। यह प्रकाशोद्भव की अवस्था की प्राप्ति है।' प्रकाशोद्भव की यह अवस्था ही 'भगवद्गीता' की 'समदृष्टि' है और इस प्रकार का समदृष्टि–सम्पन्न मानव ही व्यष्टि तथा समष्टि को नया आलोक दे सकता है। मानवता को नया आलोक देने वाले अनेक महापुरुष समय–समय पर इस पृथ्वी पर अवतरित हुए हैं और उन्होंने द्वन्द्वों तथा विषमताओं का निवारण कर इतिहास के पृष्ठों पर धर्म को उजागर किया है।

इतिहास के परिप्रेक्ष्य में धार्मिक परम्परा का अनुशीलन करने पर प्रतीत होता है कि संसार के हर हिस्से में धार्मिक संघर्षों ने मनुष्यों के आपसी द्वन्द्वों को बढ़ाया और असद्भाव के वातावरण को फैलाया। किन्तु आधुनिक विश्व पुरानी धार्मिक संकीर्णताओं की पुनरावृत्ति के पक्ष में नहीं है। विश्व की सर्वोच्च संस्था संयुक्त राष्ट्रसंघ ने 1948 में मानवाधिकारों के अपने घोषणा–पत्र में प्रत्येक व्यक्ति को विचार, विवेक तथा धर्म की स्वतंत्रता का अधिकार दिया है। वह अपनी आस्था तथा धर्म को बदलने का अधिकारी है और उसके इस मौलिक अधिकार में कोई भी हस्तक्षेप नहीं कर सकता। उसकी यह धार्मिक स्वतन्त्रता संविधान तथा कानून की दृष्टि में सुरक्षित है। इस घोषणा–पत्र का यह सुप्रभाव अब अधिक दृढ़तर होता जा रहा है कि अलगाव की भावना शिथिल पड़ती जा रही है और आपसी आदर–भाव तथा सामंजस्य का मार्ग प्रशस्त होता जा रहा है। इस आपसी मिलन से धर्मों की जीवनी शक्ति को अधिक बल मिला है। इस धार्मिक एकता ने विश्व में प्रेम, करुणा तथा सहानुभूति के सम्बन्धों को बढ़ाया है।

प्रत्येक मनुष्य में आज इस समझ की आवश्यकता तथा अपेक्षा है कि वह यह अवधारण करे कि धर्म आस्था की एक लीक मात्र नहीं है, एक ऐसी उद्देश्य रहित, अनपेक्ष्य, प्रक्रिया नहीं है, जिसको हम आँख मूँद कर, मन–मस्तिष्क के कपाट बन्द कर, निर्वाह मात्र के लिए अपना कर चलें। बल्कि वह एक ऐसा अनुशासन है, जिसके सुनहरे तन्तुओं से विश्व समुदाय आबद्ध है। सेवा, त्याग, परोपकार, सहानुभूति और प्रेम – धर्मानुशासन के ये ऐसे आदर्श हैं, जो धर्म की उपज हैं तथा जिनको अपनाने से, चरितार्थ करने से, फैलाने से समस्त मानवता को एक सूत्र में पिरोया जा सकता है। मानव–मंगल के लिए, विश्व–कल्याण के लिए धर्म ही एकमात्र ऐसी अनन्य शक्ति है, जिसके द्वारा आशंकाओं, द्वन्द्वों, भयों, अविश्वासों तथा संकटों से मानवता को सुरक्षा प्रदान की जा सकती है।

भारत में धर्म और न्याय का मूल स्रोत 'ऋत्' माना गया है। वही समस्त चराचर का नियामक है। उसी से धर्म का उदय हुआ। जिसके आदेशों पर राजा और प्रजा दोनों प्रतिबद्ध हैं। समस्त वैदिक युगीन धर्मव्यवस्था ऋत् पर आधारित थी और वही धर्मसूत्रों तथा स्मृतियों के विधि–विधानों का आधार बना।

वैदिक ऋषियों ने जिस जगत्पावनी धर्मगंगा को बहाया है, वह मानव मात्र के लिए समान रुप से सेव्य है। धर्म की इस व्यापक भारतीय दृष्टि में विरोध, वैमनस्य तथा द्वेष की भावना नहीं है। उसकी वर्गगत तथा जातिगत सीमाएँ नहीं है। इसके लिए वह समान रुप से ग्राह्य एवं उपादेय है। धर्म की इसी व्यापक लोकदृष्टि को 'महाभारत' (वन0 131।111) में कहा गया है – 'जो धर्म दूसरे धर्म के लिए बाधक हो, वह धर्म नहीं, अपितु कुधर्म है। धर्म तो वास्तव में वह है, जो किसी अन्य धर्म का विरोध नहीं करता। ऐसे धर्म का आचरण एवं प्रतिपालन करना श्रेयस्कर है –

धर्मं यो बाधते धर्मो न स धर्मः कुधर्म तत्।
अविरोधात्तु यो धर्मः स धर्मः सत्यविक्रमम्।।
विरोधिषु महीपाल निश्चित्य कुरु लाघवम्।
न बाधा विधते तत्र तं धर्मं समुपाचरेत्।।

धर्म भारत की प्राणशक्ति है। यह एक ऐसी आत्मज्योति है, जो प्रत्येक भारतीय के अन्तरस् में, आत्मा में व्याप्त है। यही कारण है कि धर्म के प्रति इतनी उदात्त एवं उदार धारणा विश्व के किसी भी राष्ट्र की धर्म–परम्परा में देखने को नहीं मिलती। दुःख से संतप्त प्राणि–जगत् का दुःख दूर करने के उद्देश्य, स्वयं दुःख को वरण करने की ऐसी दिव्य धारणा संसार के किसी भी धर्मानुयायी समाज में देखने को नहीं मिलती है – ''मुझे राज्योपभोग की कामना नहीं है। मैं तो दुःखों से संतप्त प्राणियों को दुःख से छुटकारा दिलाना चाहता हूँ। इसका उपाय क्या है? कि जिससे मैं दुःखितों के अन्तःकरण में प्रवेश कर आजीवन दुःख का उपयोग कर सकूँ –

न त्वहं कामये राज्यं न स्वर्गं न पुनर्भवम्।
कामये दुःखतप्तानां प्राणिनामर्तिनाशनम्।।
कश्चास्य स्यादुपायोऽत्र येनाऽहं दुःखितात्मनाम्।
अन्तः प्रविश्य भूतानां भवेयं दुःखभाक् सदा।।

धर्म की सनातनता और उसके परम्परागत इतिहास की ओर जब हम दृष्टिपात करते हैं, तो लगता है कि वर्गों, शाखाओं, सम्प्रदायों तथा पन्थों के रुप में उसका जो विभाजन का रुपान्तरण तथा नामान्तरण किया गया है, उससे उसके मूल उपादानों पर कोई प्रभाव नहीं पड़ता है। आर्य, सनातन, वैदिक,

हिन्दू, शैव, वैष्णव, जैन और बौद्ध आदि उसके रुपान्तर है। वे उसके इतिहास के विभिन्न अध्याय हैं, किन्तु उनसे उसकी अखण्डता में कोई अन्तर नहीं आने पाता। इस दृष्टि से यदि भारत के धार्मिक विकास का अध्ययन किया जाये, तो सभी धर्मों का मूल स्रोत एक ही दिखायी देता है। बहुधा यह कहा जाता है कि वैदिक धर्म से जैन–बौद्ध–धर्मों का विरोध है, किन्तु वास्तविकता यह है कि जैन स्वयं को 'हिन्दू' कहते हैं। हिन्दुत्व अथवा हिन्दू धर्म वैदिक धर्म का ही रुपान्तर है। जैनमत में 'हिन्दू' शब्द की व्युत्पत्ति की गई है। वहाँ 'हि' से 'हिंसा' और 'दू' से 'दूरीकरण' का अर्थ किया गया है। अर्थात् जैनमत में हिन्दू उसे कहा गया है, जो हिंसा से दूर है। अतः अहिंसा जिसका मुख्य लक्ष्य है, ऐसा जैन धर्म ही वास्तव में यथार्थ हिन्दू धर्म अथवा वैदिक धर्म है।

इसके अतिरिक्त वेदों तथा स्मृतियों में धर्म का जो स्वरुप प्रतिपादित है, जैनधर्म में भी उसी को स्वीकार किया गया है। स्मृति–प्रतिपादित वैदिक तथा हिन्दू धर्म में धैर्य, क्षमा तथा तप आदि धर्म के जो दस उपादान बताये गये हैं, आंशिक परिवर्तन के साथ जैन धर्म में भी उसी को स्वीकार किया गया है। जैन धर्म के शान्ति, मार्दव तथा आर्जव आदि दस उपादानों में ठीक यही बात कही गई है।

वर्तमान भारतीय संविधान में भारत को 'धर्मनिरपेक्ष राज्य' (सेक्यूलर स्टेट) घोषित किया गया है। यही धर्मनिरपेक्षता ही वस्तुतः आज के समाजवाद की आधारशिला है। 'सेक्यूलर' के लिए विद्वानों ने 'लौकिक' पर्याय दिया है। इस दृष्टि से धर्मनिरपेक्ष उसे कहा गया है, जिसमें समस्त धर्मों तथा सम्प्रदायों का समान आदर हैं, और सबको अपनी उन्नति करने का समान अधिकार है। वहाँ किसी धर्म–विशेष या सम्प्रदाय विशेष के प्रति कोई पक्षपात नहीं है। 'धर्मनिरपेक्षता' से धर्महीनता या धर्म की उपेक्षा नहीं है। प्रायः प्रत्येक देश या राज्य में किसी धर्म विशेष को मानने वालों की संख्या अधिक होती है। उदाहरण के लिए भारत में हिन्दू, पाकिस्तान में मुसलमान, इजराइल में यहूदी, यूरोप–अमरीका–आस्ट्रेलिया में ईसाई और श्रीलंका, बर्मा आदि में बौद्ध बहुसंख्यक हैं। इन देशों में बहुसंख्यक धर्मानुयायियों के कारण किसी धर्मविशेष का अधिक प्रभाव होना स्वाभाविक है। भारत को छोड़कर प्रायः सभी देशों के संविधान में किसी धर्मविशेष का सम्बन्ध है। किन्तु भारत में संविधान किसी धर्मविशेष को कोई महत्त्व नहीं दिया गया है। भारतीय संविधान के द्वितीय भाग के अनुच्छेद 5 और तृतीय भाग के अनुच्छेद 15, 16, 21, 25, 28 और 30 में धर्मनिरपेक्ष सिद्धान्तों की विस्तृत व्याख्या की गई है और भारत के लोकतंत्र पर आधारित यहाँ के विभिन्न धर्मानुयायी निवासियों के धर्मों को समान मान्यता एवं स्वतन्त्रता दी गयी है।

धर्मनिरपेक्षता का आधार सहिष्णुता है। अर्थात् जितने भी धर्म तथा धर्मानुयायी यहाँ निवास करते हैं और उनके प्रति सहनशीलता, उदारता और समानभाव के व्यवहार की व्यवस्था की गई है।

यह धर्मनिरपेक्षता ही यहाँ की राष्ट्रीयता है। इसी राष्ट्रीयता के आधार पर अन्तर्राष्ट्रीय सम्बन्धों की स्थापना हुई है। वास्तव में राष्ट्रीयता की स्थिरता ही अन्तर्राष्ट्रीयता का मार्ग प्रशस्त कर सकती है।

धर्मनिरपेक्षता का आशय धर्महीनता, धर्म के प्रति उदासीनता या अधार्मिकता नहीं है। यहाँ के लोकजीवन के सामाजिक, राजनीतिक तथा शासकीय जितने भी कार्यकलाप हैं, उनसे किसी धर्म विशेष को योजित या सम्बन्धित न करना ही धर्मनिरपेक्षता है। धर्मनिरपेक्षता का आशय धर्मशास्त्र की उपेक्षा करना भी नहीं है। उसका सम्बन्ध ईश्वर या परमेश्वर का विरोध करना भी नहीं है। 19वीं शती के प्रसिद्ध विद्वान् 'होलीओक' ने लिखा है कि 'मानव की भलाई के लिए मानव प्रयोग द्वारा, मानव बुद्धि द्वारा जो भी बाते संभव हों, जिन्हें इस जीवन में किया जा सकता है, जिनका सम्बन्ध इस जीवन से है, वही लौकिकता या धर्मनिरपेक्षता है। उसके विचार स्वातंत्र्य तथा धर्मानुचरण के लिए प्रत्येक व्यक्ति स्वतंत्र है। समस्त नागरिकों को धार्मिक प्रचार की स्वतन्त्रता है।

राष्ट्रपिता महात्मा गाँधी ने धर्म तथा राजनीति को सर्वथा पृथक् रखकर भारत की धर्मनीति को स्थिर किया, जब कि पाकिस्तान ने जाति, धर्म, संस्कृति और राजनीति को एक साथ मिलाकर धर्मराज्य घोषित किया। पं0 नेहरु ने 1945 ई0 में घोषणा की थी कि आजाद हिन्दुस्तान की भावी सरकार धर्मनिरपेक्ष होनी चाहिए। अर्थात् वह किसी धर्म विशेष से सम्बन्धित नहीं रहेगी, अपितु सभी धर्मों के अनुयायियों के प्रति समान सहिष्णुता बरती जायेगी। नेहरु जी ने उसे धार्मिक स्वतन्त्रता तथा अपनी अन्तरात्मा के अनुसार कार्य करने को स्वतंत्रता कहा है। इसमें उन लोगों की स्वतंत्रता भी सन्निहित है, जो किसी भी धर्म को नहीं मानते। उससे धर्मपालन को निरुत्साहित किया जाता है। किन्तु किसी के धर्मपालन पर कोई प्रतिबन्ध नहीं है, यदि वह किसी दूसरे धर्म को क्षति नहीं पहुँचाता।

भारतीय संविधान की तत्सम्बन्धी धारणा की व्याख्या करते हुए लोकसभा के अध्यक्ष श्री अनन्तशयनम् आंयगर ने अपने भाषण में कहा था – 'हम वचनबद्ध है कि हमारा राज्य धर्मनिरपेक्ष होगा। 'धर्मनिरपेक्ष' शब्द से हमारा यह अभिप्राय नहीं है कि हम किसी धर्म में विश्वास नहीं रखते और हमारे दैनिक जीवन से उसका कोई सम्बन्ध नहीं है। इसका अर्थ केवल यह है कि राज्य सरकार किसी मजहब को दूसरे की तुलना में न तो सहायता दे सकती है और न ही प्राथमिकता। इसलिए राज्य अपनी पूर्ण निरपेक्ष स्थिति रखने को विवश है' ।

आज के भारत में हिन्दू तथा हिन्दुत्व का प्रचलन जिस रुप में देखने को मिलता है, अपने पुरातन स्वरुप में वह सर्वथा भिन्न प्रतीत होता है। अत्यन्त पुरातन काल में ही 'हिन्दु' शब्द का अस्तित्व प्रकाश में आ गया था। ऋग्वेद (8।24।27 आदि) में सात नदियों के अर्थ में 'सप्तसिन्धु' का अनेक बार उल्लेख हुआ है, जिसे फारसियों के धर्म ग्रन्थ 'जेंद अवेस्ता' में 'हप्तहिन्द' कहा गया है। न केवल इस धर्मग्रन्थ में, अपितु वैदिक वाङ्मय में भी 'स' के स्थान पर 'ह' का प्रयोग देखने को मिलता है। उदाहरणस्वरुप अथर्ववेद (20।30।4) में 'हरिता न रंहया' का निर्वचन करते हुए निरुक्तकार यास्क (700 ई0 पूर्व) ने लिखा है – 'सरितो हरितो भवन्ति, सरस्वत्यो हरस्वत्यः'। अर्थात् नदीवाचक 'हरित्' शब्द को उच्चारण–भेद के कारण 'सरित्' शब्द समझना चाहिए।

सकार और हकार ने इस परिवर्तन या ध्वनि–भेद अथवा उच्चारण भेद की चर्चाएँ भारतीय साहित्य में, अपितु पार्शियनों के पुरातन धर्मग्रन्थ 'अवेस्ता' में भी देखने को मिलती है। वहाँ 'सिन्धु' के स्थान पर 'हिन्दु' का प्रयोग हुआ है। वहाँ 'ह' तथा 'स' का इसी रुप में उल्लेख हुआ है और उसे देशवाची अर्थ में प्रयुक्त किया गया है। कालान्तर में जिस प्रकार 'सिन्धु' को 'सिन्ध' और 'हिन्दु' को 'हिन्द' कहा जाने लगा, उसी प्रकार उनके अर्थ प्रचलन में भी भिन्नता आती गई। कालान्तर में 'हिन्दु' शब्द को धर्म का पर्याय माना जाने लगा और उसे भारतीय समाज के लिए प्रयुक्त किया जाने लगा, जिसके आचार–विचार ब्राह्मण कर्मकाण्ड से सम्बन्धित थे। इस संकुचित अर्थ में भारत के मूल निवासी जैन–बौद्ध भी उससे स्वयं को अलग निर्धारित करने लगे। 'हिन्दु' तथा 'हिन्दुत्व' को 'मुसलमान' तथा 'इस्लाम' का प्रतियोगी मानकर पारस्परिक विरोध–भावना का, धार्मिक अलगाव का भी उसके द्वारा प्रचलन हुआ। धार्मिक अलगाव की इस भावना के ऐतिहासिक प्रमाण हैं और उसके लिए स्वयं को 'हिन्दु' कहने वाले समाज को एक मात्र दोषी समझना न्यायोचित नहीं है।

अपने प्राचीन स्वरुप एवं अर्थाशय में 'हिन्दु' शब्द का प्रयोग न तो किसी जाति विशेष के लिए हुआ है और न वह किसी धार्मिक पन्थ या मत का बोधक रहा है। हिन्दू भारत की संज्ञा थी, उसका अभिधान था और उस देश के निवासियों को, चाहे वह किसी भी जाति, वर्ग या सम्प्रदाय का रहा हो, 'हिन्दू' कहा जाता था। आज जिसको 'हिन्द महासागर' कहा जाता है, और उसका सम्बन्ध भारत से स्थापित किया जाता है, वस्तुतः वह हिन्दू और हिन्दुत्व की व्यापकता का ही ऐतिहासिक साक्षी है। 'हिन्द महासागर' के रुप में भारत के परम्परागत हितों की रक्षा हिन्दू या हिन्दुत्व की उपेक्षा कर देने से सुरक्षित नहीं है। आज का भारत राष्ट्र ही हिन्दू राष्ट्र है और हिन्दुत्व की परम्पराओं तथा गरिमाओं के आधार पर ही उसका अपना अस्तित्व एवं महत्त्व बना हुआ है।

DUTIES AND RIGHTS OF CITIZENS IN THE *DHARMASUTRA*

Pratibha Shastri[*]

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 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

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

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 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

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

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

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 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).[8] 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.[9]

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

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[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 तद्दुःखे यश्च दुखितः ।
स कीर्तियुक्तो लोकेस्मिन्प्रेत्य स्वर्गे महीयते ॥ *विष्णु धर्मसूत्र,* ३.९८

[7] राज्ञोऽधिकं रक्षणं सर्वभूतानाम् । न्यायदण्डत्वम् । *गौ. धर्म.* २.१.७-८
तथा वर्णाश्रमांश्च न्यायतोऽभिरक्षेत् । चलतश्चैतान्स्वधर्मे स्थापयेत् । *गौ. धर्म.* २.२.९-१०

[8] चतुर्वर्णाश्रमस्यायं लोकस्याचाररक्षणात् ।
नश्यतां सर्वधर्माणां राजधर्मप्रवर्तकः ॥ *अर्थशास्त्र,* ३.१

[9] प्रव्रज्यासु वृथाचारान् राजा दण्डेन वारयेत् । वही, ३.१६

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॥[10]

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.[11] 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.[12] 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.[13] 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 ।[14]

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.[15] Baudhāyana has mentioned that one should not strike the enemy with barbed weapons or poisoned weapons.[16] 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,

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[10] *गौत्तम धर्मसूत्र*, १.८.२
[11] द्वौ लोके धृतव्रतौ राजा ब्राह्मणश्च बहुश्रुतः । *गौ. धर्म.* १.८.१
[12] प्रसूती रक्षणमसंकरो धर्मः । *गौ. धर्म.* १.८.३
[13] भये विशेषेण । *गौ. धर्म.* २.१.१४
[14] *बौ. धर्म.* १.१०.१८.११
[15] न्यस्तायुधप्रकीर्णकेशप्राञ्जलिपराङावृत्तानामार्या वधं परिचक्षते । *आप. धर्म.* २.५.१०.१२
[16] न कर्णिभिर्न दिग्धैः प्रहरेत् । *बौ. धर्म.* १.१०.१८.१०

internal security remains unreal."[17] It is the king's duty to administer punishment justly.[18] Justice prevents the criminal from committing further crimes, and punishment absolves the sinner of their sins.[19] Along with this, an impartial assessment of the offense is also essential for the redress of the victim.[20] If the king does not impartially dispense justice, he himself becomes a participant in sin.[21] 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.[22] 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 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.[23] 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.[24] 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.[25] 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,

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[17] *धर्मसूत्रों में राजधर्म एवं न्याय व्यवस्था,* सुधा शर्मा, पृ. ८१

[18] न्याय्दण्डत्वम् । *गौ. धर्म.* २.१.८
स्वराष्ट्रे न्यायदण्डः स्यात् । *वि. धर्म.* ३.९६

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

[20] वैरनिर्यातनाम् । *बौधा. धर्म.* १.१०.१९.१

[21] प्राप्तनिमित्ते दण्डाकर्मणि राजानमेनः स्पृशति । *हि. धर्म.* २७.६.१३

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

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

[24] पञ्चैव महायज्ञाः । तान्येव महासत्राणि भूतयज्ञो मनुष्ययज्ञः पितृयज्ञो ब्रह्मयज्ञ इति । *शतपथ ब्राह्मण,* ११.५.६.७

[25] अरण्ये च स्त्रियम् । *आप. धर्म.* १.४.१४.२८

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 ।[26]

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.[27] Āpastamba shared a similar view.[28] The significance of purity was such that one was advised not even to stretch their feet toward these elements.[29] 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*.[30] 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.[31] Cleaning the body, washing clothes by rubbing them by hand, or performing *achaman* while in the water was prohibited.[32] These rules were for all citizens but were particularly emphasized for students. Spitting or defecating in water was strictly prohibited.[33] Vasiṣṭha further stated that humans should not pollute rivers, public roads, sown fields, pastures, etc.[34]

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

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[26] *आप. धर्म.* १.४.१४.२८ पर टीका ।
[27] न वाय्वग्निविप्रादित्यापो देवता गाश्च प्रति पश्यन्वा मूत्रपुरीषामेध्यान्व्युदस्येत् । *गौ. धर्म.* १.९.१३
[28] अग्निमादित्यमपो ब्राह्मणं गां देवताश्चाऽभिमुखो मूत्रपुरीषोः कर्म वर्जयेत् । *आप. धर्म.* १.११.३०.२३
[29] अग्निमादित्यमपो ब्राह्मणं गां देवताद्वारं प्रति पादं च शक्तिविषये नाऽभिप्रसारयीत । *आप. धर्म.* १.११.३०.२५
[30] नाप्सु सतः प्रयमणं विद्यते । *आप. धर्म.* १.५.१५.१०
[31] अथ हैके ब्रुवते- श्मशानमापो देवगृहं गोष्ठं यत्र च ब्राह्मणा अप्रक्षाल्य पादौ तन्न प्रवेष्टव्यमिति । *बौ. धर्म.* २.५.८.२
[32] नाप्सु सतः प्रयमणं विद्यते न वासः पल्पूलनं नोपस्पर्शनम् । *बौ. धर्म.* २.५.८.८
[33] अप्सु च । तथाष्ठेवनमैथुनयोः कर्माऽप्सु वर्जयेत् । *आप. धर्म.* १.११.३०.२१-२२
[34] न नद्यां मेहनं कुर्यान् न पथि न च भस्मनि ।
न गोमये न वा कृष्टे नोप्ते क्षेत्रे न शाद्वले ॥ *वसि. धर्म.* ६.१२

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.[35] 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.

Artisan classes, primarily from the *shudra* class, contributed the most to the economy.[36] 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.[37] Āpastamba mentioned the term "*vinimay*"[38] and prescribed that grains should be exchanged with grains, slaves with slaves, juices with juices, scents with scents, and knowledge with knowledge.[39]

The king also had economic duties toward the country. He was instructed to avoid unnecessary luxury,[40] 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.[41] 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.[42] In the absence of a king, moneylenders or economic officers could charge arbitrary interest, leading to anarchy.

2. CITIZENS' RIGHTS

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

[36] शिल्पवृत्तिश्च । *गौ. धर्म.* २.१.६२

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

[38] अविहितश्चैतेषां मिथो विनिमयः । *आप. धर्म.* १.७.२०.१४

[39] अन्नेन चाऽन्नस्य मनुष्याणां च मनुष्यै रसानां च रसैर्गन्धानां च गन्धैर्विद्यया च विद्यानाम् । *आप. धर्म.* १.७.२०.१५

[40] गुरूनमात्याँश्च नातिजीवेत् । *आप. धर्म.* २.१०.२५.१०

[41] नापात्रवर्षी स्यात् । *वि. धर्म.* ३.५४

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

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, responsibility, authority, sovereignty, and position, among other meanings.[43]

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.[44] 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.[45] 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'*).[46]

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.[47]

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[43] वामन शिवराम आप्टे, *संस्कृत-हिन्दी शब्दकोश,* पृष्ठ-३०

[44] षड्भागभृतो राजा रक्षेत्प्रजाम्॥ *बौधायन धर्मसूत्र,* १.१०.१८.१

[45] तद्रक्षणधर्मित्वात् । अधिकेन वृत्तिः । *गौ. धर्म.* २.१.२८, ३०

[46] अन्येषामपि सारानुरूप्येणाऽनुपहत्य धर्मं प्रकल्पयेत् । *बौ. धर्म.* १.१०.१८.१५

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

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 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.[48] Gautama declared the king's right over hidden treasures (buried wealth whose owner is unknown).[49] 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.[50] All mines within the state's jurisdiction were naturally considered to belong to the state.[51]

The king also had the inherent right to punish individuals to protect the social order, ensure citizens performed their duties, and uphold social justice.[52] 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.[53] 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.[54] 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.[55] 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.[56] In addition to these social representatives, it was necessary for the king to seek knowledge from elderly experts in Dharmashastra when making decisions.[57]

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

[49] निध्यधिगमो राजधनम् । वही, २.१.४३

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

[51] आकरेभ्यः सर्वमादद्यात् । *वि. धर्म.* ३.५५

[52] राज्ञोऽधिकं रक्षणं सर्वभूतानाम् । न्याय्यदण्डत्वम् । *गौ. धर्म.* २.१.७-८

[53] स्वधर्ममपालयन्नादण्ड्यो नामास्ति राज्ञः । *वि. धर्म.* ३.९४

[54] अपराधानुरूपं च दण्डं दण्डेषु दापयेत् । सम्यग्दण्डप्रणयनं कुर्यात् । *वि. धर्म.* ३.९१-९२

[55] यथा हि कुरुते राजा प्रजां तमनुवर्तते । *वाल्मीकि रामायण,* ७.४२,१९

[56] तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणम् । देशजातिकुलधर्माश्चाऽऽम्नायैरविरुद्धाः प्रमाणम् । कर्षकवणिक्पशुपालकुसीदिकारवः स्वे स्वे वर्गे । *गौ. धर्म.* २.२.१९-२१

[57] 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.[58] 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.[59] 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.[60]

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.[61] Apastamba and Baudhayana also echoed this view.[62] 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.[63] 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.[64] 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, without any discrimination based on caste or economic status.[65]

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[58] पत्युर्नो यज्ञसंयोगे । *अष्टाध्यायी*, ४.१.३३
[59] जायापत्योर्न विभागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु । तथा पुण्यफलेषु । द्रव्यपरिग्रहेषु च । *आपस्तम्ब धर्म.* २.६.१४.१६-१८
[60] न हि भर्तुविप्रवासे नैमित्तिके दाने स्तेयमुपदिशन्ति । *आप. धर्म.* २.६.१४.२०
[61] गां धयन्तीं परस्मै नाऽऽचक्षीत । न चैनां वारयेत् । *गौ. धर्म.* १.९.२४-२५
[62] संसृष्टां च वत्सेनाऽनिमित्ते । *आप. धर्म.* १.११.३१.१० । गां धयन्तीं न परस्मै प्रब्रूयात् । *बौ. धर्म.* २.३.६.१७
[63] अध्ययनार्थेन यं चोदयेन्न चैनं प्रत्याचक्षीत । *आप. धर्म.* १.४.१४.२
[64] अन्तेवास्यनन्तेवासी भवति विनिहितात्मा गुरावनैपुणमापद्यमानः । *आप. धर्म.* १.२.८.२७
[65] पुत्रमिवैनमनुकाङ्क्षन् सर्वधर्मेष्वनपच्छादयमानः सुयुक्तो विद्यां ग्राहयेत् । आप. धर्म. १.२.८.२५

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.[66]

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.[67]

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.[68] 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.[69] 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.[70] According to Vasistha, there was no sin in killing a tyrant.[71] 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.[72]

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.[73] Society initially gave an individual the opportunity to reform themselves through penance. By performing penance, one could be freed from punishment.[74] It was a personal act in which an individual, guided by their moral conscience, recognized their misconduct and corrected it through prayer and austerities.[75] 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

[66] सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र,* २.११.२९.११
[67] योगक्षेमार्थमीश्वरमधिगच्छेत्॥ *गौत्तम धर्मसूत्र,* १.९.६३
[68] प्राणसंशये ब्राह्मणोऽपि शस्त्रमाददीत । *गौ. धर्म. १.*७.२५
[69] यो हिंसार्थमभिक्रान्तं हन्ति मन्युरेव मन्युं स्पृशति न तस्मिन् दोष इति पुराणे । *आप. धर्म.* १.१०.२९.७
[70] अध्यापकं कुले जातं यो हन्यादाततायिनम् ।
न तेन भ्रूणहा भवति मन्युस्तं मन्युमृच्छतीति ॥ *बौ. धर्म.* १.१०.१८.१२
[71] आततायिनं हत्वा नात्र प्राणच्छेत्तुः किंचित्किल्विषमाहुः । *वसि. धर्म.* ३.१६
[72] दुर्बलहिंसायां च विमोचने शक्तश्चेत् । *गौ. धर्म.* ३.३.१९, उत्क्रोशन्तमनभिधावतां तत्समीपवर्तिनां संसरतां च । *वि. धर्म.* ५.७४
[73] चरितनिर्वेशं सवनीयं कुर्युः । *बौ. धर्म.* २.१.१.३७
[74] द्वादशवर्षाणि चरित्वा सिद्धः सद्भिस्समप्रयोगः । *आप. धर्म.* १.९.२४.२०
[75] अथ कर्मभिरात्मकृतैर्गुरुमिवाऽऽत्मानं मन्येताऽऽत्मार्थे प्रसृतयावकं श्रपयेदुदितेषु नक्षत्रेषु । *बौ. धर्म.* ३.६.६.१

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.[76] 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.[77]

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.[78] 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.[79] 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.[80]

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 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.[81] He even stated that all other knowledge should be obtained from women, as they represent the ultimate limit of knowledge.[82] Maharishi Patanjali, using the terms *Upadhyayi* or *Upadhyaya*, indicated the presence of female teachers.[83] However, Manu granted them the right to initiation (upanayana) but diminished its significance by prohibiting them from reciting Vedic mantras.[84]

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

[77] अजाश्वा मुखतो मेध्याः गावो मेध्यास्तु पृष्टतः ।
ब्राह्मणाः पादतो मेध्याः स्त्रियो मेध्यास्तु सर्वत्रः ॥ वही, २८.९

[78] सर्वेषामेव वर्णानां दारा रक्ष्यतमा धनात् । *बौ. धर्म.* २.२.४.२

[79] देवदत्तां पतिर्भार्यां विन्दते नेच्छयात्मनः ।
तां साध्वीं बिभृयान्नित्यं देवानां प्रियमाचरन् ॥ *मनु.* ९.९५

[80] अरक्षिता गृहे रुद्धाः पुरुषैराप्तकारिभिः ।
आत्मानमात्मना यास्तु रक्षेयुस्ताः सुरक्षिताः ॥ *मनु.* ९.१२

[81] आर्थवणस्य वेदस्य शेष इत्युपदिशन्ति। स्त्रीभ्यस्सर्ववर्णेभ्यश्च धर्मशेषान्प्रतीयादित्येक इत्येके। *आप. धर्म.*२.११.२९.१२,१६

[82] सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र,* २.११.२९.११

[83] उपेत्याधीयते तस्या उपाध्यायी उपाध्याया। *पतञ्जलिमहाभाष्य,* ३.३.२१

[84] अमन्त्रिका तु कार्येयं स्त्रीणामावृदशेषतः।
संस्कारार्थे शरीरस्य यथाकालं यथाक्रमम्॥ *मनु.* २.६६

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.[85] According to Baudhayana, a girl should wait for three years, after which she could choose a suitable groom for herself.[86] 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.[87]

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.[88] 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.[89]

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.[90] No religious ceremonies could be completed without a wife. Husband and wife participated 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. [91]

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.[92]

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[85] त्रीन्कुमार्यृतूनतीत्य स्वयं युज्येतानिन्दितेनोत्सृज्य पित्र्यानलंकारान्। *गौ. धर्म.* २.९.२०

[86] त्रीणि वर्षाण्यृतुमती कांक्षेत पितृशासनम्।
ततश्चतुर्थे वर्षे तु विन्देत सदृशं पतिम्। *बौ. धर्म.* ४.१.१०.१५

[87] अविद्यमाने सदृशे गुणहीनमपि श्रयेत्। *बौ. धर्म.*४.१.१०.१६

[88] कानीनसहोढपौनर्भवपुत्रिकापुत्रस्वयंदत्तक्रीता गोत्रभाजः। *गौ. धर्म.*३.१०.३१

[89] कुटुम्बर्द्धिलोपे वा सुखावस्थैर्विमुक्ता यथेष्टं विन्देत जीवितार्थमापद्गता वा। *अर्थशास्त्र.* ३.४

[90] पत्युर्नो यज्ञसंयोगे। *अष्टाध्यायी,* ४.१.३३

[91] जायापत्योर्न विभागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु । तथा पुण्यफलेषु । द्रव्यपरिग्रहेषु च ।
आपस्तम्ब धर्म. २.६.१४.१६-१८

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

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.[93] 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*).[94]

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*.[95]

Gautama recognized a widow's right to her husband's property,[96] whereas Apastamba[97] and Vasistha[98] did not acknowledge this right. Most Dharmasutrakaras, including Gautama and Baudhayana,[99] denied a daughter the right to inherit family property. However, Apastamba granted daughters this right, though they were listed as the last heirs.[100] Kautilya explicitly supported daughters' property rights. He stated that if a childless man died, his property should go to his cohabiting brothers and daughters.[101] 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.[102] 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

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[93] कुटुम्बिनौ धनस्येशाते । तयोरनुमतेऽन्येऽपितद्धितेषु वर्तेरन् । *आप. धर्म.* २.११.२९.३-४
[94] अलंकारो भार्यायाः ज्ञातिधनं चेत्येके । *आप. धर्म.* २.६.१४.९
[95] यदि कुर्यात्समानंशान् पत्न्यः कार्याः समांशिकाः ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा ॥ *याज्ञ.*२.१५
[96] पिण्डगोत्रर्षिसम्बन्धा रिक्थं भजेरन्स्त्री वाऽनपत्यस्य । *गौ. धर्म.* ३.१०.१९
[97] पुत्राभावे यः प्रत्यासन्नः सपिण्डः। *आप. धर्म.*२.६.१४.२
[98] यस्य पूर्वेषां षण्णां न कश्चिद्दायादः स्यात्सपिण्डाः पुत्रस्थानीया वा तस्य धनं विभजेरन्। तेषामलाभ आचार्यान्तेवासिनौ हरेयाताम्।... *वसि. धर्म.*१७.८१-८२
[99] असत्स्वन्येषु तद्वामी ह्यर्थो भवति। सपिण्डाभावे सकुल्यः। तदभावे पिताऽऽचार्योऽन्तेवास्यृत्विग्वा हरेत्। *बौ. धर्म.*१.५.११.९-११
[100] पुत्राभावे यः प्रत्यासन्नः सपिण्डः। दुहिता वा। *आप. धर्म.* २.६.१४.२,४
[101] द्रव्ययपुत्रस्य सोदर्या भ्रातरः सहजीविनो वा हरेयुः कन्याश्च ।
रिक्थं पुत्रवतः पुत्रा दुहितरो वा धर्मिष्ठेषु विवाहेषु जायाः तद्भावे पिता धरमाणः ॥ *अर्थ.* ३.१५
[102] भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः। *गौ. धर्म.* ३.१०.२३

by her father, wealth given by a husband upon marrying another wife, and gifts received from relatives and the groom's family.[103]

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*.[104] 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.[105]

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*.[106] According to Apastamba, a woman's clothes, jewellery, and other property received from relatives, father, or husband were her rightful possessions.[107] 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.[108] In times of crisis, a husband had the right to use *Stridhana* for necessities such as famine, illness, imprisonment, or religious duties.[109] According to Yajnavalkya, if a husband used this wealth in emergencies, he was not required to return it.[110] 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*.[111] 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.[112] According to Baudhayana and Vasistha, daughters inherit the gifts received by their mother through tradition.[113] Vishnu also considered the first right to belong to the daughter.[114] According to Kane, by this time, Stridhan had expanded

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[103] पितृमातृसुतभ्रातृदत्तमध्यग्न्युपागतमाधिवेदनिकं बन्धुदत्तं शुल्कमन्वाधेयकमिति स्त्रीधनम्। *वि. धर्म.* १७.१८

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

[105] अध्यग्न्यध्यावाहनिकंदत्तंचप्रीति-कर्मणि।
भ्रातृमातृपितृ प्राप्तं षड्विधं स्त्रीधनं स्मृतम्॥ *मनु.* ९.१९४

[106] *धर्मशास्त्रकाइतिहास,* पी.वी. काणे, भाग-२, पृ. ९४०

[107] अलङ्कारो भार्यायाः ज्ञातिधनं चेत्येके। *आप. धर्म.*२.६.१४.९

[108] *धर्मशास्त्र का इतिहास,* पी.वी. काणे, भाग-२, पृ. ९४२

[109] प्रतिरोधकव्याधिदुर्भिक्षभयप्रतीकारे धर्मकार्ये व पत्युः। *अर्थ.* ३.२

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

[111] राजद्विष्टातिचाराभ्यामात्मापक्रमणेन च।
स्त्रीधनानीतशुल्कानामस्वान्यं जायते स्त्रियः॥ *अर्थ.*३.३

[112] स्त्रीधनं दुहितृणाम प्रत्तानामप्रतिष्ठितानां च। *गौ. धर्म.* ३.१०.२२

[113] मातुरलङ्कारं दुहितरस्साम्प्रदायिकं लभेरन्नन्यद्वा। *बौ. धर्म.*२.२.३.४४
मातुः पारिणेयं स्त्रियो विभजेरन्। *वसि. धर्म.* १७.४६

[114] सर्वेष्वेव प्रसूतायां यद्धनं तद्दुहितृगामि। *वि. धर्म.* १७.२१

significantly, and people did not like the idea of women receiving more property.[115] 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.[116] If a woman died childless, her wealth passed to her paternal family if the marriage was performed by the Asura rite.[117] 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.[118]

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.

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.[119] 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.[120]

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.[121] If the entire produce was destroyed due to an animal, the king would ensure that the landowner was compensated fully by the offender.[122] However, animals were not to be subjected to excessive suffering.[123]

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[115] *धर्मशास्त्र का इतिहास*, पी.वी. काणे, भाग-२, पृ. ९४३
[116] जनन्यां संस्थितायां तु समं सर्वे सहोदराः।
भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः॥ *मनु.* ९.१९२
[117] भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः। *गौ. धर्म.* ३.१०.२३
[118] ब्राह्मादिषु चतुर्षु विवाहेष्वप्रजायामतीतायां तद्भर्तुः। शेषेषु च पिता हरेत्। *वि. धर्म.*१७.१९-२०
[119] क्षेत्रं परिगृह्योत्थानाभावात्फलाभावे यस्समृद्धस्स भावि तदपहार्यः । *आप. धर्म.* २.११.२८.१
[120] अवाशिनः कीनाशस्य कर्मन्यासो दण्डताडनम् । *आप. धर्म.* २.११.२८.२
[121] पशुपीडिते स्वामिदोषः । *गौ. धर्म.* २.३.१६
[122] सर्वविनाशे शदः । *गौ. धर्म.* २.३.२३
[123] नाऽतिपातयेत् । *आप. धर्म.* २.११.२८.६

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.[124] Luxury goods were considered detrimental to the country's economy. Citizens did not have the right to divide essential resources such as water.[125] 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 displayed for sale in the market are also always pure.[126] 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.[127] 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.[128] 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."* [129] 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

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[124] राष्ट्रपीडाकरं भाण्डमुच्छिन्द्यादफलं च यत् ।
महोपकारमुच्छुल्कं कुर्याद्बीजं तु दुर्लभम् ॥ *अर्थशास्त्र,* २.२१

[125] उदकयोगक्षेमकृतान्नेश्वविभागः । *गौ. धर्म.* ३.१०.४

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

[127] प्रतिग्रहीताऽप्यधर्मसंयुक्ते । *गौ. धर्म.* २.३.४७

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

[129] अधर्माहृतान् भोगाननुज्ञाय न वयं चाऽधर्मश्चेत्यभिव्याहृत्याऽधो.....। *आप. धर्म.* १.१०.२८.११

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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धर्मसूत्रों में नागरिकों के कर्तव्य और अधिकार

*प्रतिभा शास्त्री**

यह अध्याय वैदिक युग से प्रारंभ होकर धर्मसूत्रों में नागरिकों के कर्तव्यों और अधिकारों पर केंद्रित है। इसमें बताया गया है कि कैसे वैदिक संस्कृति में कर्तव्यों को अधिकारों से अधिक महत्व दिया गया। धर्मसूत्रों ने सामाजिक आचरण, राज्य व्यवस्था, न्याय, और नागरिक कर्तव्यों को विस्तृत रूप से परिभाषित किया। नागरिक कर्तव्यों को राजनैतिक, सामाजिक, और आर्थिक रूप में वर्गीकृत किया गया है। राजनैतिक कर्तव्यों में राजा और नागरिकों की परस्पर जिम्मेदारियां शामिल हैं। राजा का मुख्य कर्तव्य न्याय और सुरक्षा सुनिश्चित करना था, जबकि नागरिकों का कर्तव्य कर अदा करना और सामाजिक नियमों का पालन करना था। सामाजिक कर्तव्यों में समाज के विभिन्न वर्गों के लिए आचार संहिता निर्धारित की गई थी। इसमें स्त्रियों, विद्यार्थियों, और पशुओं के अधिकारों पर विशेष ध्यान दिया गया। स्त्रियों को सुरक्षा, शिक्षा, और धार्मिक कृत्यों में भाग लेने का अधिकार दिया गया। विद्यार्थियों को शिक्षा प्राप्त करने और गुरु से ज्ञान अर्जित करने का अधिकार था। आर्थिक कर्तव्यों में कर प्रणाली, व्यापार, और संपत्ति के अधिकारों का उल्लेख है। राजा को कर संग्रह करने का अधिकार था, लेकिन इसे प्रजा के कल्याण के लिए उपयोग करना अनिवार्य था। अध्याय में यह भी बताया गया है कि धर्मसूत्रों ने प्रकृति संरक्षण और नैतिकता पर विशेष जोर दिया। वृक्षों, नदियों, और वायु जैसे प्राकृतिक तत्वों की शुद्धता बनाए रखने के लिए नागरिकों पर जिम्मेदारी डाली गई। इस प्रकार, यह अध्याय धर्मसूत्रों के माध्यम से भारतीय संस्कृति में अधिकारों और कर्तव्यों के संतुलन को समझाने का प्रयास करता है।

परिचय

वैदिक युग से ही धर्मशास्त्रों के बीज मिलने प्रारम्भ हो जाते हैं। वैदिक मन्त्रों का अर्थ समझने के लिए ही वेदाङ्गों का विकास हुआ। वेदों के उपकारक वेदाङ्गों में कल्प साहित्य का महत्त्वपूर्ण स्थान है । यह साहित्य सूत्र रूप में उपस्थित था एवं इसी कारण बोधगम्य भी था, इससे भी अधिक इसकी विषय महत्ता के कारण आज भी इसका शाश्वत महत्त्व है। ये हमारी सांस्कृतिक परम्परा का भाग रहे हैं।

सूत्र साहित्य में धर्मसूत्र धर्मशास्त्र का ही प्रतिनिधित्व करते हैं । ये जीवन के समग्र सामाजिक व्यवहार में वेद के स्थानापन्न बने रहे, जिनमें वैदिक आधार के साथ उस काल की परम्पराओं, व्यवहार, आचार एवं सदाचार का आवेश हुआ। इनमें कोई विषय छूटा नही था । धर्मशास्त्रों में व्यवहार (Practice) और आदर्श का समन्वय हुआ है । मनुष्य ने समाज के संचालन के लिए प्रबुद्ध नागरिकों की सहमति से एक दैनिक आचार की व्यवस्था स्थापित की है जिसे पौरुषेयी व्यवस्था या समय (सामयाचारिक धर्म) कहते है । इन्हीं की व्याख्या करना धर्मसूत्रों का प्रमुख विषय रहा है।[1] टीकाकार हरदत्त ने समय के तीन भेद माने हैं – विधि, नियम और प्रतिषेध । इनमें सभी प्रकार के कर्मों का समावेश हो जाता है ।

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* उपनिबंधक, सहकारिता विभाग, राजस्थान सरकार। लेखिका ने संस्कृत में पीएचडी जवाहरलाल नेहरू विश्वविद्यालय, नई दिल्ली से की है।

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

इस सामाजिक व्यवस्था तथा इसके विकास से राज्य की अवधारणा उद्‌भूत हुई तथा न्याय और सुरक्षा की भावना आयी । इनके उत्तरोत्तर विकास से प्रत्येक के कर्त्तव्य निश्चित कर दिये गये । समाज में प्रत्येक व्यक्ति परस्पर कैसा आचरण करे तथा इस आचरण का समाज की प्रगति में क्या योगदान हो? इसी आधार पर महर्षियों ने विभिन्न धर्मों (नियमों) को संकलित किया । इसे आचार संहिता (Code of Conduct) कहा जाता है। यद्यपि इस व्यवस्था में धर्मज्ञ (प्रबुद्ध नागरिक) प्रमाण हैं परन्तु सामान्य मनुष्य को कर्त्तव्य के संदर्भ में अंधानुकरण नहीं करना चाहिए क्योंकि मनुष्य में स्वाभाविक दुर्बलता होती है । कर्मों के सम्बन्ध में उसे स्वविवेक का आश्रय लेना चाहिए । यह नियम सूत्रकार आपस्तम्ब ने दिया है।[2]

यह प्रबुद्ध नागरिकों (धर्मज्ञों) द्वारा निर्मित समाज का संविधान था, समाज-संचालन की वैधानिक व्यवस्था थी जिसका आधार राज्य न होकर समकालीन सामाजिक आचार-विचार और परम्पराएँ थी । राज्य इनका निर्माण नहीं करता था, अपितु इस व्यवस्था को संचालित एवं नियंत्रित करता था । देश, जाति, कुल, वर्ग, स्थानीय संघ आदि अनेक तत्त्वों के नियम विशाल काल खण्ड के पश्चात् आचार के रूप में प्रतिष्ठित हो गये । समाज के निर्माण में अनेक तत्त्व समाहित रहते हैं; ये समयानुसार परिवर्तनशील रहते हैं; विभिन्न आधारों पर वैविध्य रहता है, अतः उनके लिए वैविध्यपूर्ण संहिता की आवश्यकता थी । यदि एक वर्ग को ध्यान में रखकर नियम बनाये जाते तो दूसरे के सम्मान और अधिकारों का उल्लंघन होने की संभावना रहती है तथा सामाजिक न्याय नहीं हो पाता है । इसी कारण धर्मसूत्रकारों ने जीवन के प्रत्येक पक्ष का समावेश करते हुए विधि-विधानों का संकलन किया है । इसी का परिपक्व रूप धर्मशास्त्रीय परम्परा के आगे के ग्रन्थों में मिलता है ।

विभिन्न कालखण्डानुसार प्राप्त धर्मसूत्रों को देखकर यह अनुमान लगाया जा सकता है कि धर्मसूत्रों का काल एक हजार वर्षों का (८०० ई. पू. से ईसा की प्रथम सदी तक) रहा होगा। प्रमुख धर्मसूत्र गौतम, आपस्तम्ब, बौधायन, वशिष्ठ, विष्णु, हारीत आदि रहें हैं ।

भारतीय संस्कृति में अधिकारों की अपेक्षा कर्त्तव्य पर अधिक बल दिया गया है । कर्त्तव्य का विवेचन वैदिक काल से ही मिलता है । वैदिक काल में कर्त्तव्यों के संदर्भ में ऋत की अवधारणा विशिष्ट है जिसमें सृष्टि के सभी प्राणियों के लिए कर्त्तव्य निश्चित थे । यह व्यवस्था शाश्वत और अपरिवर्तनीय थी । इसका संरक्षक वरूण देवता को माना गया है जो सभी को अपने-अपने कर्मों में संलग्न रखते है । इसका पालन न करने पर दण्ड का विधान था । ऋग्वेद में उल्लिखित है कि जिस शक्ति से सभी स्व-कर्त्तव्य में रत रहते हैं वह 'ऋत' की शक्ति है, जो समग्र विश्व, समाज, व्यक्ति, जीव-जन्तु एवं दैवी शक्तियों का आधार है।[3] ऋत सत्य और धर्म का रूप धारण करने में कर्त्तव्य का पर्याय हो गया । वस्तुतः यह नियमों की संहिता थी जो किसी सर्वोच्च शक्ति के द्वारा निर्मित न होकर स्वयं सर्वोच्च शक्ति थी । उसी के द्वारा आकाश, दिव और अन्तरिक्ष का संचालन एवं नियंत्रण रहता था ।[4] इसी के कारण निर्बल-सबल में सुरक्षा की स्थिति बनी

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

[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

रहती है और किसी के अधिकारों का उल्लंघन नहीं होता है ।[5] यह एक नैतिक नियम संहिता थी जो राजा के अभाव में भी सार्वकालिक सक्रिय थी ।

1. नागरिक-कर्त्तव्य

धर्मसूत्रों में नागरिकों के कर्त्तव्यों का विभाजन विभिन्न रूपों में मिलता हैं । इन्हें हम राजनैतिक, सामाजिक और आर्थिक में विभाजित कर सकते हैं ।

i. राजनैतिक कर्त्तव्य

राजनीतिक कर्त्तव्यों का सम्बन्ध शासन व्यवस्था से है । शासन से ही व्यक्तियों, जीवों, सामाजिक संस्थाओं तथा उनके कर्त्तव्यों और अधिकारों की रक्षा सम्भव होती है । प्रत्येक शासन पद्धति में धर्म का ही समावेश रहता है जो कर्त्तव्य का ही पर्याय है । व्यक्ति के राजनीतिक कर्त्तव्यों में राजा के कर्त्तव्य और नागरिकों के शासन के प्रति कर्त्तव्य सम्मिलित हैं । राजा के कर्त्तव्यों में ही नागरिकों के अधिकार समावेशित रहते हैं ।

समाज का संचालन, समाज में सुख, शान्ति एवं अभय की स्थापना, नागरिकों के अधिकारों की रक्षा तथा न्याय-व्यवस्था को सुनिश्चित करना राजा के प्रमुख कर्त्तव्य थे । प्रजा रक्षण का कर्त्तव्य इतना महत्त्वपूर्ण माना जाता था कि राजा प्रजा के सुख में सुखी और दुःख में दुःखी होने का अनुभव करता था ।[6] गौतम के अनुसार समस्त प्राणियों की रक्षा करना, वर्णाश्रम व्यवस्था की रक्षा और पतित जनों को श्रेष्ठ मार्ग पर चलने की प्रेरणा देना राजा के कर्त्तव्य हैं ।[7] वह न केवल मनुष्यों की रक्षा करता था अपितु समस्त जीव तथा प्रकृति (सर्वभूतानाम्) की भी रक्षा करता था । कौटिल्य का भी विचार है कि राजा चारों वर्णों और आश्रमों के आचार की रक्षा करें और नष्ट होते हुए धर्म की स्थापना करे (कर्त्तव्य विमुख जनों को स्वकर्त्तव्य में रत करे) ।[8] इन्होनें तो यहाँ तक लिखा है कि यदि प्रव्रज्या लिए हुए संन्यासी भी मिथ्याचारी हो तो राजा उन्हें दण्ड देकर कर्त्तव्य-पथ पर ले आये । एक कल्याणकारी राज्य की स्थापना के लिए वर्णाश्रम धर्म की स्थापना आवश्यक थी ।[9]

वस्तुतः समाज का प्रमुख होने के कारण राजा नागरिकों द्वारा अनुकरणीय था । समस्त राज्य उसी के द्वारा पालित था । गौतम के अनुसार चारों वर्णों के लोगों, वृक्षादि बढ़ने एवं घटने वाले, लुप्त चेतना वाले स्थावर पदार्थों, पशु आदि चलने वाले जीवों, उड़ने वाले पक्षियों और सरकने वाले सर्पों का जीवन राजा पर आश्रित होता है -

तयोश्चतुर्विधस्य मनुष्यजातस्यान्तःसंज्ञानां चलनपतनसर्पणानामायत्तं जीवनम्॥[10]

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[5] अथोऽबलीयान् बलीयासमाशंसन्ते धर्मेण यथा राज्ञैव । *बृह. उप.* १.४.१४

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

[7] राज्ञोऽधिकं रक्षणं सर्वभूतानाम् । न्यायदण्डत्वम् । *गौ. धर्म.* २.१.७-८
तथा वर्णाश्रमांश्च न्यायतोऽभिरक्षेत् । चलतश्चैतान्स्वधर्मे स्थापयेत् । *गौ. धर्म.* २.२.९-१०

[8] चतुर्वर्णाश्रमस्यायं लोकस्याचाररक्षणात् ।
नश्यतां सर्वधर्माणां राजधर्मप्रवर्तकः ॥ *अर्थशास्त्र,* ३.१

[9] प्रव्रज्यासु वृथाचारान् राजा दण्डेन वारयेत् । वही, ३.१६

[10] *गौत्तम धर्मसूत्र,* १.८.२

इनकी रक्षा करना राजा का दायित्व होता है । समाज की रक्षा का दायित्व दो प्रकार के नागरिकों के ऊपर निर्भर था -१. राजा और २. बहुश्रुत ब्राह्मण ।[11] ये ही अन्य नागरिकों को स्वकर्म में नियुक्त करते थे । यहाँ ब्राह्मण से तात्पर्य प्रबुद्ध नागरिकों से हैं क्योंकि सूत्रकार ने बहुश्रुत विशेषण प्रयुक्त किया है । इससे यह सूचित होता है कि रक्षा जैसा महान् कार्य किसी शिक्षित, प्रबुद्ध और जिम्मेदार व्यक्तियों को ही दिया जाता था । सूत्रकाल में इनकी योग्यता निर्धारित थी । गौतम ने इन दोनों के तीन कार्य परिगणित किये हैं – प्रसूति, रक्षा, कर्मों के अतिक्रमण से रक्षा ।[12] प्रसूति से अभिप्राय अभिवृद्धि से है, सभी बाधाओं को दूर कर राज्य की उन्नति करना है ।

राजा शत्रुओं के भय से भी प्रजा की रक्षा करे ।[13] युद्ध में विजय प्राप्त करना तथा अपने राज्य की सुरक्षा करना महत्त्वपूर्ण कार्य है । परन्तु युद्ध में अनाचार नही करना चाहिए । मानवीय भावनाओं तथा नैतिक मूल्यों को ध्यान में रखते हुए बौधायन ने निर्देश किया है कि राजा को भयभीत, सुरापान से मत्त, पागल, चेतनाहीन, कवचादि आयुधों से रहित, स्त्री, बालक, वृद्ध और ब्राह्मण से युद्ध नहीं करना चाहिए –

भीतमत्तोन्मत्तप्रमत्तविसन्नाहस्त्रीबालवृद्धब्राह्मणैर्न युध्येताऽन्यत्राऽऽततायिनः ।[14]

ऐसे ही विचार आपस्तम्ब ने भी व्यक्त किये हैं कि जिन्होंने हथियार डाल दिये हों, जो अस्त-व्यस्त केशों के साथ दोनों हाथ जोड़कर दया की भीख माँग रहे हो अथवा रणक्षेत्र से पलायन कर रहें हों, उनका वध राजा को नही करना चाहिए ।[15] बौधायन ने कहा है कि शत्रु पर बर्छीदार अस्त्रों से या विषदिग्ध अस्त्रों से प्रहार न करे ।[16] वर्तमान में विश्व में नैतिकता को भूलकर परमाणु अस्त्रों तथा जैव रसायनिक अस्त्रों का अंधाधुंध प्रयोग हो रहा है । ऐसे में यह उपदेश व्यावहारिक है ।

राजा का अन्य महत्त्वपूर्ण कार्य था न्याय एवं दण्ड की व्यवस्था करना । यह व्यवस्था नागरिकों के अधिकारों की रक्षा करती थी । वस्तुतः अधिकारों का हनन होने की स्थिति में न्याय ही एकमात्र संरक्षक होता है । "जब तक देश अथवा राज्य में राजा यह सुनिश्चित नही करता कि छोटे-बडे, विद्वान्-अविद्वान्, धनी-निर्धन, प्रतिष्ठित-अप्रतिष्ठित का भेद किये बिना प्रत्येक व्यक्ति को, किसी सन्देह या विवाद की स्थिति में, धर्मसंहिता के अनुसार न्याय मिलेगा, तब तक आन्तरिक सुरक्षा अयथार्थ ही है ।"[17] न्यायपूर्वक दण्ड देना राजा का कर्त्तव्य है ।[18] न्याय से ही अपराधी की निवृत्ति होती है, दण्ड से ही उसके पाप दूर होते हैं ।[19] उसके साथ ही पीड़ित व्यक्ति के प्रतीकारार्थ भी दोष का निष्पक्ष आकलन आवश्यक होता है ।[20] यदि राजा निष्पक्ष रूप से न्याय नही करता है तो वह स्वयं भी पाप का भागी होता है ।[21] पाप के भय से इसे

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[11] द्वौ लोके धृतव्रतौ राजा ब्राह्मणश्च बहुश्रुतः । *गौ. धर्म.* १.८.१
[12] प्रसूती रक्षणमसंकरो धर्मः । *गौ. धर्म.* १.८.३
[13] भये विशेषेण । *गौ. धर्म.* २.१.१४
[14] *बौ. धर्म.* १.१०.१८.११
[15] न्यस्तायुधप्रकीर्णकिशप्राञ्जलिपराङावृत्तानामार्या वधं परिचक्षते । *आप. धर्म.* २.५.१०.१२
[16] न कर्णिभिर्न दिग्धैः प्रहरेत् । *बौ. धर्म.* १.१०.१८.१०
[17] *धर्मसूत्रों में राजधर्म एवं न्याय व्यवस्था,* सुधा शर्मा, पृ. ८१
[18] न्याय्दण्डत्वम् । *गौ. धर्म.* २.१.८
स्वराष्ट्रे न्यायदण्डः स्यात् । *वि. धर्म.* ३.९६
[19] राजभिर्धृतदण्डास्तु कृत्वा पापानि मानवाः ।
निर्मलाः स्वर्गमायान्ति सन्तः सुकृतिनो यथा ॥ *वसि. धर्म.* १९.३०
[20] वैरनिर्यातनाम् । *बौधा. धर्म.* १.१०.१९.१
[21] प्राप्तनिमित्ते दण्डाकर्मणि राजानमेनः स्पृशति । *हि. धर्म.* २७.६.१३

राजा का अनिवार्य कर्त्तव्य बना दिया गया है । महाभारत में वर्णित है कि जिस समय दण्डनीति निर्जीव हो जाती है, उस समय तीनों वेद डूब जाते हैं, सब धर्म अर्थात् संस्कृति के आधार चाहे वे कितने ही प्राचीन हो, पूर्ण रूप से नष्ट हो जाते हैं । जब प्राचीन राजधर्म का त्याग कर दिया जाता है, तब वैयक्तिक आश्रम-धर्म के समस्त आधार नष्ट हो जाते हैं ।[22] स्पष्ट है सामाजिक स्थिति राजधर्म के या राजनीतिक कर्त्तव्यों के पालन करने पर अस्तित्व में रह सकती है ।

ii. सामाजिक कर्त्तव्य

प्राचीन भारत में सम्पूर्ण सामाजिक ढांचा वर्णाश्रम-व्यवस्थाओं के आधार पर निर्मित और व्यवस्थित था । यद्यपि यह व्यवस्था राज्य के द्वारा निर्मित नही थी, परन्तु राज्य इसका नियामक और संचालक था । आपस्तम्ब धर्मसूत्र स्पष्ट शब्दों में कहता है कि जो भी व्यक्ति वर्णाश्रम धर्मों या नियमों का उल्लंघन करता है अथवा प्रतिषिद्ध आचरण करता है उसे राजा कारागार में डाले और तब तक रखे जब तक वह नियमों का पालन और निषिद्ध से निवर्तन स्वीकार न कर ले; इतने पर भी सुधार न आये तो राज्य से निर्वासित कर दे ।[23] समाज में गृहस्थ का सर्वाधिक महत्त्व था क्योंकि अन्य सभी प्रकार के नागरिक गृहस्थ का आश्रय लेकर ही रहते हैं । गृहस्थ पञ्च महायज्ञ, ऋण त्रय, अतिथि सत्कार, अन्याश्रमों के प्रति कर्म आदि के माध्यम से अपना सामाजिक कर्त्तव्य पूर्ण करता था । पाँच महायज्ञ हैं- भूतयज्ञ, मनुष्ययज्ञ, पितृयज्ञ, देवयज्ञ एवं ब्रह्मयज्ञ ।[24] तीन प्रकार के ऋण ऋषि ऋण, देव ऋण, पितृ ऋण हैं ।

सभी नागरिकों को स्त्री की रक्षा करने का प्रयत्न करना चाहिए । आपस्तम्ब के अनुसार जंगल में यदि स्त्री मिले तो उससे वार्तालाप अवश्य करे ।[25] वन की विकट परिस्थितियों में स्त्री को देखकर स्वयं आगे से बातचीत करनी चाहिए क्योंकि हो सकता है स्त्री-स्वभाव के कारण वह संकट की स्थिति बताने की पहल न करे । आज सम्पूर्ण विश्व में सुरक्षा की दृष्टि से महिलाओं की स्थिति सम्यक् नहीं है और इसी कारण इस संदर्भ में व्यापक स्तर पर प्रयत्न भी हो रहे हैं । प्राचीन काल में बनाया गया यह कर्त्तव्य आज भी व्यावहारिक है । टीकाकार ने भी स्पष्टीकरण करते हुए कहा है-

सम्भाषणं च मातृवद्भगिनीवाच्च– 'भगिनि किं ते करवाणि न भेतव्यम्' इति ।[26]

प्रकृति के प्रति कर्त्तव्य के विषय में धर्मसूत्रकार सजग थे । वृक्षों, पर्वतों, नदियों आदि को चेतन मानते हुए राज्य का नागरिक माना हैं । इनके प्रति मनुष्य के कर्त्तव्य इनका अधिकार होता है । अतः धर्मसूत्रों में कड़े शब्दों में इनके प्रति अकरणीय कार्यों को निषिद्ध घोषित किया है । प्रकृति तो सनातन काल से ही निरन्तन अपने कर्तव्य करती आ रही है । कर्त्तव्यों में शिथिलता तो मनुष्य ही करता है, इसीलिए प्रकृति के प्रति कर्त्तव्यों का विधान मनुष्य के लिए ही है ।

गौतम ने वायु और जल जैसे प्राकृतिक तत्त्वों को शुद्ध रखने को अनिवार्य कर्त्तव्य बताते हुए कहा है कि वायु, अग्नि, ब्राह्मण, सूर्य, जल, देवता, गौ की ओर मुख करके मल, मूत्र का त्याग न करें और न ही

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

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

[24] पञ्चैव महायज्ञाः । तान्येव महासत्राणि भूतयज्ञो मनुष्ययज्ञः पितृयज्ञो ब्रह्मयज्ञ इति । *शतपथ ब्राह्मण,* ११.५.६.७

[25] अरण्ये च स्त्रियम् । *आप. धर्म.* १.४.१४.२८

[26] *आप. धर्म.* १.४.१४.२८ पर टीका ।

थूकें और उच्छिष्ट फेकें ।[27] आपस्तम्ब का भी यही विचार है ।[28] इनकी शुद्धता के विचार का महत्त्व इतना था कि इन तत्त्वों की ओर पैर भी न फैलाए ।[29] इस नियम से व्यक्ति के लिए न केवल शारीरिक कर्त्तव्य अपितु मानसिक कर्त्तव्य भी निर्दिष्ट था । मन में भी वह इनको दूषित करने का विचार न लाए । आपस्तम्ब के अनुसार आचमन के लिए भी जल को प्रदूषित नहीं करना चाहिए । किसी नदी या जलाशय के जल में स्थित हो तो उसमें स्थित होते हुए आचमन न करे ।[30] जलाशय से पानी लेकर अलग जगह आचमन करना चाहिए। बौधायन ने भी उद्धृत किया है कि कुछ लोग कहते है कि श्मशान, जल, मन्दिर, गायों के गोष्ठ आदि में बिना पैर धोये प्रवेश नहीं करना चाहिए ।[31] जल में रहते हुए शरीर की सफाई, वस्त्रों को हाथ से रगड़ कर धोना और आचमन करना वर्जित है ।[32] यह सभी नागरिकों के लिए नियम था परन्तु विद्यार्थी के लिए विशेष था । जल में थूकना और मल-मूत्र त्यागना वर्जित था ।[33]वसिष्ठ ने भी कहा है कि मनुष्य को नदी, सार्वजनिक मार्ग, बीज बोया खेत, चरागाह आदि को दूषित नहीं करना चाहिए ।[34]

iii. आर्थिक कर्त्तव्य

धर्मसूत्रों में सभी वर्णों के आर्थिक कर्त्तव्य और अधिकार निश्चत कर दिये गये थे । इन्हीं आर्थिक कर्त्तव्यों से समाज का संचालन होता था । प्रत्येक का अर्थव्यवस्था में योगदान होता था । इस युग तक आर्थिक गतिविधियाँ पूर्ण विकसित हो चुकी थी जैसे- ऋण का आदान-प्रदान, क्रय-विक्रय सम्बन्धी नियम और इन पर राज्य का नियंत्रण, खेती के विभिन्न प्रकार, विभिन्न शिल्पी-शिल्प, आयात-निर्यात, विनिमय प्रणाली आदि ।

अर्थव्यवस्था में सर्वाधिक हानिकारक तत्त्व काला धन होता है । यह अवधारणा भी तब विकसित हो चुकी थी । विष्णु धर्मसूत्र में धन का त्रिविध विभाजन किया गया है –"शुक्ल, शबल और असित (काला) । प्रत्येक नागरिक नियमाधारित वृत्ति का पालन करते हुए जो धन कमाता है वह शुक्ल धन है । अनुलोम क्रम से अपने वर्ण से बाद वाले वर्ण की वृत्ति अपना कर जो धन अर्जित करता है, वह धन शबल कहलाता है । और उससे भी एक और बाद वाले वर्ण की वृत्ति अपनाता है; उससे प्राप्त धन असित या काला कहलाता है ।"[35] वस्तुतः कर्माधारित वर्ण-व्यवस्था से प्रत्येक क्षेत्र में कार्यकुशलता बनी रहती थी और एक-दूसरे के क्षेत्र में अतिक्रमण नहीं होता था । जो व्यक्ति नियमों का अतिक्रमण करके धन अर्जित करता था; वह धन काला धन होता था ।

अर्थव्यवस्था में शिल्पी वर्ग का योगदान सर्वाधिक होता था, जो मुख्यतः शूद्र वर्ग के होते थे ।[36] समाज में विनिमय व्यवस्था प्रचलित थी, परन्तु यह वस्तु से वस्तु का विनिमय ही था । मुद्रा प्रणाली सुदृढ़

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[27] न वाय्वग्निविप्रादित्यापो देवता गाश्च प्रति पश्यन्वा मूत्रपुरीषामेध्यान्व्युदस्येत् । *गौ. धर्म.* १.९.१३
[28] अग्निमादित्यमपो ब्राह्मणं गां देवताश्चाऽभिमुखो मूत्रपुरीषोः कर्म वर्जयेत् । *आप. धर्म.* १.११.३०.२३
[29] अग्निमादित्यमपो ब्राह्मणं गां देवताद्वारं प्रति पादं च शक्तिविषये नाऽभिप्रसारयीत । *आप. धर्म.* १.११.३०.२५
[30] नाप्सु सतः प्रयमणं विद्यते । *आप. धर्म.* १.५.१५.१०
[31] अथ हैके ब्रुवते- श्मशानमापो देवगृहं गोष्ठं यत्र च ब्राह्मणा अप्रक्षाल्य पादौ तत्र प्रवेष्टव्यमिति । *बौ. धर्म.* २.५.८.२
[32] नाप्सु सतः प्रयमणं विद्यते न वासः पल्पूलनं नोपस्पर्शनम् । *बौ. धर्म.* २.५.८.८
[33] अप्सु च । तथाष्ठेवनमैथुनयोः कर्माऽप्सु वर्जयेत् । *आप. धर्म.* १.११.३०.२१-२२
[34] न नद्यां मेहनं कुर्यान् न पथि न च भस्मनि ।
न गोमये न वा कृष्टे नोप्ते क्षेत्रे न शाद्वले ॥ *वसि. धर्म.* ६.१२
[35] अथ गृहाश्रमिणस्त्रिविधोऽर्थो भवति । शुक्लः शबलोऽसितश्च ।...स्ववृत्त्युपार्जितं सर्वेषां शुक्लम् । अनन्तरवृत्त्युपात्तं शबलम् । एकान्तरवृत्त्युपात्तं च कृष्णम् । *वि. धर्म.* ५८.१-२, ६-८
[36] शिल्पवृत्तिश्च । *गौ. धर्म.* २.१.६२

नहीं थी । धर्मसूत्रों में विक्रेताओं के लिए कर्त्तव्य थे कि वे वस्तु-विनिमय में समान मूल्य वाली और यथा सम्भव समान वस्तु का ही आदान-प्रदान करें ताकि किसी की हानि न हो और जनसाधारण के अधिकारों का शोषण न हो । गौतम के अनुसार रसों का रसों के साथ, पशुओं का पशुओं के साथ तथा आम, तिल-तण्डुल का उतनी ही मात्रा में पके भोजन के साथ विनिमय का नियम है ।[37] आपस्तम्ब ने विनिमय शब्द का प्रयोग किया है ।[38] तथा नियम दिया है कि अन्न का अन्न के साथ, दास का दास के साथ, रसों का रसों के साथ, गंधों का गंधों के साथ एवं विद्या का विद्या के साथ विनिमय हो सकता है।[39]

राजा का भी देश की अर्थव्यवस्था के प्रति कर्त्तव्य था कि वह अनावश्यक विलासिता का आचरण न करे ।[40] ऐसा करने से अनुपयोगी आर्थिक भार होगा। साथ ही विष्णु धर्मसूत्र राजा को सचेत करते हुए कहता है कि देश के आर्थिक कल्याण के लिए उसे राजकोश में से अपात्रों पर धन की वर्षा नहीं करनी चाहिए ।[41] राज्य ही आर्थिक व्यवस्था का संचालन करता था। राजा के बिना अव्यवस्था फैल सकती थी, इसलिए वसिष्ठ ने कहा है कि प्राचीन राजा की मृत्यु और नवीन राजा का राज्याभिषेक होने तक के मध्य के समय धन पर सूद या ब्याज नहीं जोड़ना चाहिए।[42] बिना राजा के देश में महाजन या आर्थिक अधिकारी मनमाना सूद वसूल सकते थे। यह अराजकता की स्थिति हो सकती थी।

2. नागरिक अधिकार

अधिकार मनुष्य के सामाजिक जीवन की अनिवार्य आवश्यकताएँ हैं जिनके बिना वह न तो अपना विकास कर सकता है और न ही समाज के लिये उपयोगी कार्य कर सकता है । अधिकारों के बिना मानव जीवन के अस्तित्व की कल्पना ही नहीं की जा सकती है । राष्ट्र का सर्वोच्च लक्ष्य व्यक्ति के व्यक्तित्व का पूर्ण विकास करना है, जिसके लिये राष्ट्र के द्वारा व्यक्ति को कतिपय सुविधाएँ प्रदान की जाती हैं और इन्हीं सुविधाओं तथा जीवन को अनुकूल बनाने के नियमों को ही अधिकार कहते हैं ।

अधिकारों से तात्पर्य एक दूसरे के जीवन का सम्मान करना है। इसके लिए स्वयं के लिए कर्त्तव्यों की अवधारणा निर्धारित है। अधिकार शब्द अधि उपसर्ग पूर्वक कृ धातु से घञ् प्रत्यय करके निष्पन्न हुआ है जिसका अर्थ देखभाल करना, कर्त्तव्य, कार्यभार, सत्ता का अधिकार, प्रभुत्व तथा पदादि अनेक अर्थो में है।[43]

अधिकार और कर्त्तव्य एक-दूसरे के पूरक हैं । अधिकारों का क्षेत्र समाज है और धर्मसूत्र इसी सामाजिक व्यवस्था का प्रतिनिधित्व करते हैं । यद्यपि इनमें कर्त्तव्यों पर विशेष बल है, परन्तु ये कर्त्तव्य निरंकुशता से आरोपित नहीं थे; किसी के अधिकारों की कीमत पर प्रवर्तित नहीं थे । धर्मसूत्रों में अधिकारों के संरक्षण की स्पष्ट भावना मिलती है । अधिकारों के हनन होने पर दण्ड की अवधारणा का पूर्ण विकास हो चुका था । ये अधिकार नागरिकों और राज्य से संयोजित थे ।

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[37] नियमस्तु । रसानां रसैः । पशुनां च । लवणकृतान्नयोः । तिलानां च । समेनाऽऽमेन तु पक्वस्य संप्रत्यर्थे । *गौ. धर्म.* १.७.१६-२१
[38] अविहितश्चैतेषां मिथो विनिमयः । *आप. धर्म.* १.७.२०.१४
[39] अन्नेन चाऽन्नस्य मनुष्याणां च मनुष्यै रसानां च रसैर्गन्धानां च गन्धैर्विद्यया च विद्यानाम् । *आप. धर्म.* १.७.२०.१५
[40] गुरूनमात्याँश्च नातिजीवेत् । *आप. धर्म.* २.१०.२५.१०
[41] नापात्रवर्षी स्यात् । *वि. धर्म.* ३.५४
[42] राजा तु मृतभावेन द्रव्यवृद्धिं विनाशयेत् ।
पुना राजाभिषेकेण द्रव्यमूलं च वर्धते ॥ *वसि. धर्म.* २.४९
[43] वामन शिवराम आप्टे, *संस्कृत-हिन्दी शब्दकोश,* पृष्ठ-३०

i. राजनैतिक अधिकार

राजा के अधिकार - शासक होने के कारण तथा शासन-संचालन करने के कारण उसे कुछ अधिकारों की आवश्यकता होती है । शासन संचालन में अर्थ की आवश्यकता के कारण एवं नागरिकों की रक्षा रूपी सेवा के बदले राजा नागरिकों से कर लेने का अधिकारी है । वस्तुतः रक्षा और कर कर्त्तव्य और अधिकार के समान परस्पर जुड़े हुए हैं । राजा की दृष्टि में नागरिकों की रक्षा करना उसका कर्त्तव्य है तो कराधान अधिकार था । नागरिकों की दृष्टि में भी रक्षा और न्याय प्राप्त करना अधिकार तथा कर देना सभी का मौलिक कर्त्तव्य था । बौधायन के अनुसार राजा चारों वर्णों की रक्षा करता है, अतः उसे प्रजा से उनकी आय का छठा भाग प्राप्त होता है ।[44] धर्मसूत्रकार गौतम के अनुसार भी प्रजा की रक्षा के बदले राजा कृषि, पण्य आदि में से भाग ग्रहण करने का अधिकारी है । इससे राजा को जो भी प्राप्त होता है वह उसकी वृत्ति है ।[45] बौधायन ने राजा को कर के नये नियम बनाने का अधिकार तो दिया है, परन्तु उसे उतना ही कर लगाने का अधिकार था, जिससे करदाता और उसका व्यवसाय पीड़ित न हो ('अनुपहत्य' शब्द) ।[46]

इस अधिकार के साथ एक कर्त्तव्य भी अनुस्यूत था । कर से प्राप्त सम्पत्ति राजा की व्यक्तिगत सम्पत्ति नहीं थी । *वसिष्ठ धर्मसूत्र* के अनुसार जिस प्रकार बच्चे माता को धन लाकर देते हैं और वह उसका उपयोग उन्हीं के हित के लिए करती है, उसी प्रकार राजा प्रजा से जो धन प्राप्त करता है उसे उनके कल्याण के लिए नियोजित करना आवश्यक था ।[47]

राज्य की लावारिस या अस्वामिक सम्पत्ति और गुप्तनिधि पर भी राजा का अधिकार होता था । राजा इसका अधिग्रहण कर इसका उपयोग राज्य की कल्याणकारी योजनाओं के लिए ही करता था । यदि राज्य के द्वारा अस्वामिक सम्पत्ति पर अधिकार न किया जाय तो प्रजाजनों में परस्पर कलह एवं लूटमार होने की संभावना अधिक होती है । धर्मसूत्रों में वर्णित है कि जिसके स्वामी का पता न हो ऐसी खोई वस्तु पाकर उसके विषय में राजा को बताना चाहिए । राजा के द्वारा भी वस्तु की एक वर्ष तक रक्षा करनी चाहिए, उसके बाद वस्तु का चतुर्थांश उसके पाने वाले को देकर शेष स्वयं ग्रहण करना चाहिए ।[48] गौतम ने गुप्तनिधि (गडा हुआ धन, जिसका स्वामी अज्ञात है) पर राजा का अधिकार घोषित किया है ।[49] विष्णु ने भी कहा है कि यदि राजा को गुप्त धन प्राप्त हो तो वह उसका आधा भाग ब्राह्मणों में वितरित कर दे और शेष भाग अपने कोश में जमा कर दे ।[50] राज्य के अधिकार क्षेत्र में आने वाले सभी खानों (आकर) पर भी राज्य का नैसर्गिक अधिकार स्वीकार किया जाता है ।[51]

सामाजिक व्यवस्था की रक्षा के लिए, नागरिकों को अपने-अपने कर्त्तव्यों में प्रवृत्त कराने के लिए तथा सामाजिक न्याय के लिए दण्ड देने का अधिकार राजा के साथ अभिन्न रूप से जुडा था । इसी कारण

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[44] षड्भागभृतो राजा रक्षेत्प्रजाम्॥ *बौधायन धर्मसूत्र,* १.१०.१८.१

[45] तद्रक्षणधर्मित्वात् । अधिकेन वृत्तिः । *गौ. धर्म.* २.१.२८, ३०

[46] अन्येषामपि सारानुरूप्येणाऽनुपहत्य धर्मं प्रकल्पयेत् । *बौ. धर्म.* १.१०.१८.१५

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

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

[49] निध्यधिगमो राजधनम् । वही, २.१.४३

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

[51] आकरेभ्यः सर्वमादद्यात् । *वि. धर्म.* ३.५५

उसकी उपाधि 'दण्डधर' थी । गौतम के अनुसार अपराधियों को दण्ड देने का अधिकार राजा को ही था ।[52] विष्णु के अनुसार स्वकर्त्तव्य में अप्रवृत्त कोई भी ऐसा व्यक्ति नहीं हैं जो राजा द्वारा अदण्ड्य हो अर्थात् यह अधिकार राजा का स्वभाविक था ।[53] परन्तु इस अधिकार का प्रयोग वह व्यक्तिगत राग-द्वेष से प्रेरित हुए बिना एवं अपराध के अनुसार शास्त्रानुसार दण्ड देगा ।[54] अतः उसे अधिकारों का दुरुपयोग करने का अधिकार नहीं था ।

शासन-संचालन के लिए राजा को व्यापक अधिकार दिये गये थे । वह इन अधिकारों का दुरुपयोग न करे, इसके लिए धर्मसूत्रों में व्यवस्था की है ।प्रथमतः तो राजा को धर्म की सीमा में बाँध दिया गया । इसके उल्लंघन पर पाप या नरक का भय घोषित कर दिया गया था । राजा के आचरण का अनुकरण सामान्य नागरिक करते थे ।[55] धर्म का निर्धारण राज्य-द्वारा न होकर वेदादि शास्त्रों से होता था । इस प्रकार 'धर्म की शक्ति' एक जीवन्त शक्ति थी जो राजशक्ति पर प्रभावी नियंत्रण स्थापित करती थी । वह वेद, धर्मशास्त्र, वेदांग, पुराण, रीति, परम्परा, देश, कुल, जाति के आचार और मर्यादा, कृषक, वणिक, व्यापारी आदि के संघों के नियमों के अनुसार ही अपना विचार निश्चित कर सकता था ।[56] इन सामाजिक प्रतिनिधियों के अलावा धर्मशास्त्रमर्मज्ञ वृद्धों से निर्णय में ज्ञान प्राप्त करना आवश्यक था ।[57]

ii. सामाजिक अधिकार

पति– पत्नी के अधिकार - पति – पत्नी परिवार नामक संस्था की इकाई होते हैं । पत्नी का यज्ञादि कार्यों में अधिकार था । पत्नी शब्द की व्युत्पत्ति के अनुसार जो यज्ञ कार्यों में पति के साथ भाग ले सके ।[58] पत्नी के बिना कोई धार्मिक कार्य सम्पन्न नहीं होते थे । पति-पत्नी सभी कार्यों में समान भागीदारी करते थे । आपस्तम्ब के अनुसार विवाहोपरान्त पति एवं पत्नी धार्मिक कृत्य साथ करते हैं, पुण्यफल में, धन-सम्पत्ति में समान भागीदारी रखते हैं ।[59] पत्नी पति की अनुपस्थिति में अवसर पड़ने पर भेंट आदि देने का अधिकार रखती थी ।आपस्तम्ब के अनुसार इसे चोरी नहीं कह सकते है क्योंकि यह पत्नी का अधिकार है ।[60]

पशुओं के अधिकार- धर्मसूत्र में पशुओं को नागरिक मानने के कारण तथा मानव द्वारा मानवत्व के कारण पशु-अधिकार दिये गये थे । मनुष्यों को पशुओं के अधिकारों का हनन करने का अधिकार नहीं था । उनके अधिकारों की रक्षा करना नागरिकों का दायित्व था । सभी धर्मसूत्रकारों ने यह निर्देश किया है कि बछड़े को दूध पिलाती हुई गाय की चर्चा उसके स्वामी से न करें और न ही स्वयं गाय को बछड़े से अलग करें ।[61] आपस्तम्ब और बौधायन ने भी यही कहा है ।[62] क्योंकि स्वामी को कहने पर वह दोनों को

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[52] राज्ञोऽधिकं रक्षणं सर्वभूतानाम् । न्याय्यदण्डत्वम् । *गौ. धर्म.* २.१.७-८
[53] स्वधर्ममपालयन्नादण्ड्यो नामास्ति राज्ञः । *वि. धर्म.* ३.९४
[54] अपराधानुरूपं च दण्डं दण्डेषु दापयेत् । सम्यग्दण्डप्रणयनं कुर्यात् । *वि. धर्म.* ३.९१-९२
[55] यथा हि कुरुते राजा प्रजां तमनुवर्तते । *वाल्मीकि रामायण,* ७.४२,१९
[56] तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणम् । देशजातिकुलधर्माश्चाऽऽम्नायैरविरुद्धाः प्रमाणम् । कर्षकवणिक्पशुपालकुसीदिकारवः स्वे स्वे वर्गे । *गौ. धर्म.* २.२.१९-२१
[57] विप्रतिपत्तौ त्रैविद्यवृद्धेभ्यः प्रत्यवहृत्य निष्ठां गमयेत् । *गौ. धर्म.* २.२.२५
[58] पत्युर्नो यज्ञसंयोगे । *अष्टाध्यायी,* ४.१.३३
[59] जायापत्योर्न विभागो विद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु । तथा पुण्यफलेषु । द्रव्यपरिग्रहेषु च । *आपस्तम्ब धर्म.* २.६.१४.१६-१८
[60] न हि भर्तुर्विप्रवासे नैमित्तिके दाने स्तेयमुपदिशन्ति । *आप. धर्म.* २.६.१४.२०
[61] गां धयन्तीं परस्मै नाऽऽचक्षीत । न चैनां वारयेत् । *गौ. धर्म.* १.९.२४-२५
[62] संसृष्टां च वत्सेनाऽनिमित्ते । *आप. धर्म.* १.११.३१.१० । गां धयन्तीं न परस्मै प्रब्रूयात् । *बौ. धर्म.* २.३.६.१७

अलग कर देगा, जिससे गाय और बछड़े को कष्ट होगा । गाय का अपने बच्चे को दूध पिलाना अधिकार था । इसका महत्त्व अर्थव्यवस्था में भी था, क्योंकि इसे पूरा करने पर ही पशुधन की वृद्धि संभव थी और पशुपालन के व्यवसाय का अर्थव्यवस्था में योगदान आज भी प्रासंगिक है ।

विद्यार्थी के अधिकार – विद्यार्थी समाज की नींव था । विद्यार्थी को शिक्षा प्राप्ति का अधिकार (Right to Education) था । तत्कालीन व्यवस्था में गुरुकुल पद्धति प्रचलित थी, जिसमें गुरु के सानिध्य में शिक्षा प्राप्त की जाती थी । इसमें भी विकल्प के रूप में विद्यार्थी जिस गुरू से विद्या प्राप्त करना चाहे उससे अध्ययन कराने के लिए आग्रह कर सकता था और शिक्षक उसे अस्वीकार नहीं कर सकता था ।[63] उसे मनोवाञ्छित शिक्षा पाने का अधिकार था । आपस्तम्ब के अनुसार विद्यार्थी एक गुरु से मनोवाञ्छित शिक्षा पाने में अपर्याप्तता अनुभव करता था तो वह अन्य गुरु के पास जा सकता था ।[64] शिक्षा के क्षेत्र में वह नियमों में बँधा नहीं था । उसे रुचिकर और पर्याप्त काल तक शिक्षा पाने का अधिकार था । गुरु भी सभी विद्यार्थियों को समान रूप से अपने पुत्र के समान शिक्षा देते थे, उनमें ऊँच-नीच और अमीर-गरीब का भेदभाव नहीं किया जाता था ।[65]

आपस्तम्ब ने स्त्रियों एवं शूद्रों को भी विद्या का अधिकार दिया है। उनके अनुसार जो विद्या स्त्रियों एवं शूद्रों में होती है वही विद्या की अन्तिम सीमा होती है। उसका ज्ञान प्राप्त करने पर ही सभी विद्याओं का ज्ञान पूरा होता है।[66]

स्नातक का राजा से योगक्षेम (रोजगार का अधिकार) करने का उल्लेख है। स्नातक को शिक्षा पूर्ण कर लेने के बाद रोजगार माँगने राजा के पास जाना चाहिए । विद्या प्राप्ति के बाद स्नातक को रोजगार का अधिकार प्रदान करना राजा का कर्त्तव्य है।[67]

आत्मरक्षा का अधिकार - समाज में रहते हुए व्यक्ति को अपनी रक्षा करने का पूर्णाधिकार था । इसके लिए सम्भव उपाय करने चाहिए । गौतम ने कहा है कि प्राणसंशय होने पर ब्राह्मण भी शस्त्र धारण कर सकता है ।[68] आपस्तम्ब ने पुराण का मत उद्धृत करते हुए कहा है कि हिंसा करने के निमित्त से आक्रमण करने वाले को जो मारता है तो उसका क्रोध दूसरे व्यक्ति के क्रोध को छूता है । इससे आत्मरक्षा करने वाले को दोष नहीं लगता ।[69] यही विचार बौधायन ने व्यक्त किये हैं । इन्होंने आत्मरक्षा के निमित्त अध्यापक और उच्चकुलोत्पन्न व्यक्ति को भी मारने का निर्देश दिया है ।[70] वसिष्ठ के अनुसार भी आततायी को मार डालने पर कोई पाप नहीं लगता है ।[71] गौतम और विष्णु व्यक्ति का यह कर्त्तव्य भी मानते है कि

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[63] अध्ययनार्थेन यं चोदयेन्न चैनं प्रत्याचक्षीत । *आप. धर्म.* १.४.१४.२
[64] अन्तेवास्यनन्तेवासी भवति विनिहितात्मा गुरावनैपुणमापद्यमानः । *आप. धर्म.* १.२.८.२७
[65] पुत्रमिवैनमनुकाङ्क्षन् सर्वधर्मेष्वनपच्छादयमानः सुयुक्तो विद्यां ग्राहयेत् । आप. धर्म. १.२.८.२५

[66] सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र,* २.११.२९.११
[67] योगक्षेमार्थमीश्वरमधिगच्छेत्॥ *गौत्तम धर्मसूत्र,* १.९.६३
[68] प्राणसंशये ब्राह्मणोऽपि शस्त्रमाददीत । *गौ. धर्म. १.*७.२५
[69] यो हिंसार्थमभिक्रान्तं हन्ति मन्युरेव मन्युं स्पृशति न तस्मिन् दोष इति पुराणे । *आप. धर्म.* १.१०.२९.७
[70] अध्यापकं कुले जातं यो हन्यादाततायिनम् ।
न तेन भ्रूणहा भवति मन्युस्तं मन्युमृच्छतीति ॥ *बौ. धर्म.* १.१०.१८.१२
[71] आततायिनं हत्वा नात्र प्राणच्छेत्तुः किंचित्किल्विषमाहुः । *वसि. धर्म.* ३.१६

बलवान् के द्वारा दुर्बल की हिंसा के अवसर पर, यदि बलवान् उपस्थित हो तो दुर्बल की रक्षा करे, अन्यथा वह भी उतना ही दोषी होता है जितना हिंसा करने वाला ।[72]

दण्ड से मुक्ति का अधिकार - दण्ड से मुक्ति का अधिकार भी था । धर्मसूत्रों में भी यह सुधारात्मक प्रवृत्ति प्रायश्चित्त के रूप में लक्षित होती है । इसमें व्यक्ति दण्ड से मुक्त होने का प्रयत्न करता था और स्वतः आत्मिक रूप से स्थायी सुधार लाता था । प्रायश्चित्त कर लेने पर व्यक्ति को उससे छीने अधिकार पुनः मिल जाते थे ।[73] प्रायश्चित्त के माध्यम से समाज द्वारा प्रथमतः व्यक्ति को स्वयं सुधार का अवसर दिया जाता था । प्रायश्चित्त के द्वारा वह दण्ड से मुक्ति पाता था ।[74] यह एक वैयक्तिक कर्म था, जिसमें व्यक्ति स्वयं अपने दोष को नैतिक चेतना द्वारा अपने अनाचरण को अनुभव करता था ।[75] और जप-तप के माध्यम से दूर करता था । परन्तु धीरे-धीरे प्रायश्चित्त की अवधारणा का विकास राजदण्ड ने ग्रहण कर लिया, क्योंकि सामाजिक और न्यायिक व्यवस्था केवल व्यक्ति की सद्भावना के आश्रित नहीं रह सकती ।

iii. स्त्री - अधिकार

स्त्री का स्थान विभिन्न कालों में परिवर्तित होता रहा है । धर्मसूत्रों में स्त्री के व्यापक अधिकारों की चर्चा तो नहीं है, परन्तु पदे-पदे उसकी महत्ता प्रतिपादित की गयी है। उसके कुछ कर्त्तव्य निर्धारित किये गये हैंएवंकुछ अधिकार प्रदान किये गये हैं । स्त्रयधिकारों के संदर्भ में धर्मसूत्रकारों में मतान्तर हैं । कुछ आचार्यों ने स्त्री तथा उसके कार्यों को पवित्र माना हैं । वसिष्ठ के अनुसार स्त्री और बालक के कार्य सर्वदा पवित्र रहते हैं ।[76] आगे भी कहा है कि बकरी और घोडे के मुख, गाय की पीठ और ब्राह्मण की पीठ पवित्र रहती है, परन्तु स्त्री तो सम्पूर्ण ही पवित्र होती है ।[77]

रक्षा का अधिकार- धर्मसूत्रों में कहा गयाहै कि स्त्री को रक्षा प्राप्त करने का अधिकार है । प्रत्येक परिस्थिति में समाज द्वारा उसकी रक्षा करने का विधान है । बौधायन के अनुसार सभी वर्णों के पुरुषों के लिए पत्नियाँ धन की अपेक्षा भी अधिक सावधानी से रक्षणीय होती हैं ।[78] मनु ने भी स्त्रीरक्षा को पति का कर्त्तव्य बताते हुए कहा है कि अपनी पत्नी की रक्षा करने से मनुष्य चरित्र, कुल, आत्मा और धर्म की रक्षा करता है ।[79] स्त्री संरक्षित रहने पर ही देश की प्रगति में योगदान कर सकती है । इसके अतिरिक्त भी कहा है कि स्त्री को रक्षा प्राप्त करने का अधिकार तो है ही, साथ ही उसका कर्त्तव्य भी है कि वह स्वयं की रक्षा करे, तभी वह देश की जिम्मेदार नागरिक बन पायेगी । मनु ने लिखा है कि आप्त और आज्ञाकारी पुरुषों

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

[73] चरितनिर्वेशं सवनीयं कुर्युः । *बौ. धर्म.* २.१.१.३७

[74] द्वादशवर्षाणि चरित्वा सिद्धः सन्द्विस्सम्प्रयोगः । *आप. धर्म.* १.९.२४.२०

[75] अथ कर्मभिरात्मकृतैर्गुरुमिवाऽऽत्मानं मन्येताऽऽत्मार्थे प्रसृतयावकं श्रपयेदुदितेषु नक्षत्रेषु । *बौ. धर्म.* ३.६.६.१

[76] श्वहताश्व मृगा वन्याः पातितं च खगैः फलम् ।
बालैरनुपरिक्रान्तं स्त्रीभिराचरितं च यत् ॥ *वसि. धर्म.* ३.४५

[77] अजाश्वा मुखतो मेध्याः गावो मेध्यास्तु पृष्टतः ।
ब्राह्मणाः पादतो मेध्याः स्त्रियो मेध्यास्तु सर्वत्रः ॥ वही, २८.९

[78] सर्वेषामेव वर्णानां दारा रक्ष्यतमा धनात् । *बौ. धर्म.* २.२.४.२

[79] देवदत्तां पतिर्भार्यां विन्दते नेच्छयात्मनः ।
तां साध्वीं बिभृयान्नित्यं देवानां प्रियमाचरन् ॥ *मनु.* ९.९५

के घर में भी वे स्त्रियाँ अरक्षित हैं जो संरक्षित धर्मविरुद्ध बुद्धि होने से अपनी रक्षा स्वयं नहीं करती हैं । इसके विपरीत वे ही स्त्रियाँ सुरक्षित हैं जो धर्मानुकूल बुद्धि से अपनी रक्षा स्वयं करती हैं ।[80]

शिक्षा का अधिकार- यद्यपि सूत्रकाल में इसके उद्धरण कम मिलते हैं परन्तु फिर भी ये शिक्षा की स्थिति स्पष्ट करने के लिए पर्याप्त हैं । वैदिक काल में स्त्रियों को शिक्षा प्राप्त करने के स्पष्ट उल्लेख मिलते हैं, परन्तु सूत्रकाल तक आते-आते स्त्रियों को सीमित अधिकार ही दिया गया । इसका कारण सम्भवतः असुरक्षा की भावना थी । वे घर पर ही पारिवारिक जनों से शिक्षा पाने लगी । आपस्तम्ब ने पण्डिता स्त्रियों के परिपक्व ज्ञान और विद्वत्ता की चर्चा की है ।[81] इन्होनें तो यहाँ तक कहा है कि सभी शेष विद्याएँ स्त्रियों से ग्रहण करनी चाहिए क्योंकि वही ज्ञान की अन्तिम सीमा है ।[82] महर्षि पतञ्जलि ने 'उपाध्यायी या उपाध्याया' शब्द से स्त्री शिक्षिकाओं की ओर संकेत किया है ।[83] परन्तु मनु ने उन्हें उपनयन का अधिकार तो दिया लेकिन वैदिक मन्त्रों के उच्चारण का निषेध करके इस अधिकार को महत्त्वहीन बना दिया ।[84]

अतः स्पष्ट है इस समय तक उपनयन या शिक्षा के विधिवत् अधिकार को औपचारिक बना दिया गया था ।

विवाह का अधिकार- यह अधिकार माता-पिता के द्वारा दिया गया था । माता-पिता का अनिवार्य कर्त्तव्य है कि यथासमय कन्या का विवाह कर दें । अन्यथा कन्या को यह अधिकार है कि वह स्वयं ही वर ढूँढ़कर विवाह कर सकती है । परन्तु इसमें उसे परिवार से प्राप्त वस्त्राभूषण लौटाने पड़ते थे ।[85] बौधायन के अनुसार कन्या को तीन वर्ष की प्रतीक्षा करनी चाहिए । इसके पश्चात् स्वयं योग्य वर का वरण कर सकती है ।[86] अन्तर्जातीय विवाह की अनुमति देते हुए आगे कहा है कि यदि जाति और गुण में समान पुरुष न मिले तो गुणहीन पुरुष को भी पति के रूप में वरण कर सकती है ।[87]

स्त्री को पुनर्विवाह की अनुमति थी । गौतम ने पौनर्भव (पुनर्भू (पुनः विवाह करने वाली) का पुत्र) का नामोल्लेख किया है ।[88] तात्पर्य है कि स्त्री को स्वेच्छा से एक पति को छोड़कर अन्य से विवाह का अधिकार था । यह विधवा के संदर्भ में भी था । कौटिल्य के अनुसार कुटुम्बक्षय या समृद्ध बंधु-बांधवों के छोड़े जाने के कारण या विपत्ति की मारी हुई कोई भी प्रोषितपतिका (जिसका पति विदेश गया हो) जीवन-निर्वाह के लिए, अपनी इच्छानुसार दूसरा विवाह कर सकती है ।[89]

यज्ञाधिकार – धार्मिक कार्यों में स्त्री पति के साथ यज्ञ की अधिकारिणी थी । पाणिनि ने पत्नी की व्युत्पत्ति करते हुए लिखा है कि जो यज्ञ की अधिकारिणी एवं यज्ञ के फल की भागी होती है वह पत्नी होती

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[80] अरक्षिता गृहे रुद्धाः पुरुषैराप्तकारिभिः ।
आत्मानमात्मना यास्तु रक्षेयुस्ताः सुरक्षिताः ॥ *मनु.* ९.१२

[81] आर्थवणस्य वेदस्य शेष इत्युपदिशन्ति। स्त्रीभ्यस्सर्ववर्णेभ्यश्च धर्मशेषान्प्रतीयादित्येक इत्येके। *आप. धर्म.*२.११.२९.१२,१६

[82] सा निष्ठा या विद्या स्त्रीषु शूद्रेषु च॥ *आपस्तम्ब धर्मसूत्र,* २.११.२९.११

[83] उपेत्याधीयते तस्या उपाध्यायी उपाध्याया। *पतञ्जलिमहाभाष्य,* ३.३.२१

[84] अमन्त्रिका तु कार्येयं स्त्रीणामावृदशेषतः।
संस्कारार्थे शरीरस्य यथाकालं यथाक्रमम्॥ *मनु.* २.६६

[85] त्रीन्कुमार्यृतूनतीत्य स्वयं युज्येतानिन्दितेनोत्सृज्य पित्र्यानलंकारान्। *गौ. धर्म.* २.९.२०

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

[87] अविद्यमाने सदृशे गुणहीनमपि श्रयेत्। *बौ. धर्म.*४.१.१०.१६

[88] कानीनसहोढपौनर्भवपुत्रिकापुत्रस्वयंदत्तक्रीता गोत्रभाजः। *गौ. धर्म.*३.१०.३१

[89] कुटुम्बर्द्धिलोपे वा सुखावस्थैर्विमुक्ता यथेष्टं विन्देत जीवितार्थमापद्गता वा। *अर्थशास्त्र.* ३.४

है ।[90] पत्नी के बिना कोई धार्मिक कार्य सम्पन्न नहीं होते थे । पति-पत्नी सभी कार्यों में समान भागीदारी करते थे । आपस्तम्ब के अनुसार विवाहोपरान्त पति एवं पत्नी धार्मिक कृत्य साथ करते हैं, पुण्यफल में, धन सम्पत्ति में समान भागीदारी रखते हैं ।[91]

समाज में अनुलोमादि विवाह का प्रचलन था । ऐसी स्थिति में पति के साथ यज्ञ में भाग लेने के लिए सजातीय पत्नी को ही अधिकार दिया गया क्योंकि पुरुष के अनेक पत्नियाँ होती थी । कहा गया है कि यदि सजातीय न हो तो हीन वर्ण की पत्नी को भी यज्ञाधिकार था, परन्तु शूद्रा पत्नी को इस अधिकार से वंचित रखा गया ।[92]

साम्पत्तिक अधिकार – भारतीय संस्कृति में स्त्री को सम्पत्ति का अधिकार प्राप्त रहा है । समकालीन सभ्यताओं में उसे क्रय-विक्रय की वस्तु बना दिया गया है, परन्तु धर्मशास्त्रीय व्यवस्था में किसी भी व्यक्ति पति, पिता, पुत्र, राजा को यह अधिकार नहीं कि वे उसे बेच सकते थे । यद्यपि कुछ उद्धरण अपवाद स्वरूप प्राप्त होते हैं, परन्तु इन कार्यों की भर्त्सना की गयी थी । आपस्तम्ब के अनुसार पति-पत्नी का परिवार की सम्पत्ति पर समान अधिकार होता है अतः उनकी आज्ञानुसार ही पारिवारिक सदस्यों को उन्हीं के कर्मों में संलग्न रहना चाहिये । [93] स्त्री पति की अनुपस्थिति में सम्पत्ति में से दान दे सकती थी । साथ ही यदि विभाजन की बात उठती है तो पत्नी का भाग, उसके जेवरादि स्त्रीधन को सम्मिलित करने पर बाकी बचा धन देकर पूरा किया जाता था ।[94]

याज्ञवल्क्य के अनुसार स्त्री को धन के विभाजन की माँग का अधिकार नहीं है, लेकिन यदि पिता अपने जीवनकाल में पुत्रों के बीच सम्पत्ति का बँटवारा करता है तो पत्नी को भी पुत्रों के बराबर भाग मिलता है । यह अधिकार स्त्रीधन नहीं मिलने पर ही था ।[95]

गौतम ने विधवा को पति की सम्पत्ति में अधिकारिणी माना है ।[96] अन्यत्र आपस्तम्ब[97] और वसिष्ठ [98] ने यह अधिकार स्वीकार नहीं किया हैं । स्त्री को पुत्री के रूप में परिवार की सम्पत्ति में अधिकार अधिकांश धर्मसूत्रकारों द्वारा स्वीकार नहीं किया गया । इनमें प्रमुख गौतम और बौधायन[99] हैं । परन्तु आपस्तम्ब ने पुत्री को यह अधिकार दिया है, यद्यपि उसका नाम अन्तिम दायादों में लिया है ।[100] कौटिल्य ने स्पष्ट रूप से कन्या के साम्पत्तिक अधिकार का समर्थन किया है । अपुत्र व्यक्ति की मृत्यु के बाद उसकी

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[90] पत्युर्नो यज्ञसंयोगे। *अष्टाध्यायी,* ४.१.३३

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

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

[93] कुटुम्बिनौ धनस्येशाते । तयोरनुमतेऽन्येऽपितद्धितेषु वर्तेरन् । *आप. धर्म.* २.११.२९.३-४

[94] अलंकारो भार्यायाः ज्ञातिधनं चेत्येके । *आप. धर्म.* २.६.१४.९

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

[96] पिण्डगोत्रर्षिसम्बन्धा रिक्थं भजेरन्स्त्री वाऽनपत्यस्य । *गौ. धर्म.* ३.१०.१९

[97] पुत्राभावे यः प्रत्यासन्नः सपिण्डः। *आप. धर्म.*२.६.१४.२

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

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

[100] पुत्राभावे यः प्रत्यासन्नः सपिण्डः। दुहिता वा। *आप. धर्म.* २.६.१४.२,४

सम्पत्ति को साथ रहने वाले भाई तथा कन्याएँ प्राप्त करें और पुत्रों वाले व्यक्ति की सम्पत्ति के अधिकारी धर्म विवाहों से उत्पन्न पुत्र तथा पुत्रियाँ बनें ।[101]

साम्पत्तिक अधिकार नहीं देने का दूसरा पक्ष स्त्रीधन की व्यवस्था करना था । इस धन को खर्च (विनियोग) करने में वह स्वतन्त्र थी ।

स्त्री- धन – इसकी चर्चा कुछ धर्मसूत्रकारों ने ही की है। स्त्रीधन वह धन था, जिस पर उसका पूर्ण स्वत्व होता था, यह वस्त्र, आभूषण और धन के रूप में विवाह के अवसर पर तथा अन्य विशिष्ट अवसरों पर माता-पिता, भाई, बन्धु-बान्धव और पति से प्राप्त करती थी।[102] विष्णु के अनुसार माता-पिता, पुत्रों और भाइयों के द्वारा विविध अवसरों पर दिया गया धन, वैवाहिक अग्नि के सम्मुख पिता द्वारा दिया गया धन, पति द्वारा दूसरा विवाह करने पर पहली पत्नी को दिया धन, सम्बन्धियों के द्वारा दिया धन, विवाह के अवसर पर वरपक्ष द्वारा कन्यापक्ष को दिया शुल्क और उपहार स्त्रीधन कहलाता था।[103] याज्ञवल्क्य के अनुसार पिता, माता, पति या भाई द्वारा दिया गया धन, विवाह के समय अग्नि के समीप प्राप्त धन तथा पति के द्वारा अन्य स्त्री से विवाह के समय प्राप्त धन – ये स्त्रीधन कहलाते हैं । स्त्री के माता-पिता के बन्धुओं द्वारा दिया धन, परिणय के शुल्क के रूप में दिया गया धन, विवाह के बाद पति तथा पितृकुल से प्राप्त धन भी स्त्रीधन कहलाता है ।[104] मनु ने छः प्रकार के स्त्रीधनों का उल्लेख किया है – वैवाहिक अग्नि के सम्मुख पिता द्वारा दिया धन, विदाई के समय दिया धन, प्रेम सम्बन्धी किसी अवसर पर पति के द्वारा दिया धन, भाई, माता-पिता आदि के द्वारा विविध अवसरों पर दिया धन स्त्रीधन कहलाता है।[105]

इस प्रकार स्पष्ट है कि स्त्री-धन के विषय में पर्याप्त अवधारणा विकसित हो चुकी थी । यह उसका अधिकार बन चुका था। डॉ. काणे ने लिखा है कि वह धन जिसे स्त्री विवाहोपरान्त स्वयं (अपने परिश्रम से) अर्जित करती थी या बाहरी लोगों से प्राप्त करती थी, स्त्रीधन नहीं कहलाता था।[106] स्त्री-धन के स्वामित्व के विषय में आपस्तम्ब कुछ आचार्यों के मत का उल्लेख करते हुए कहते है कि वस्त्राभूषणादि सम्पत्ति बन्धुओं, पिता, पति से मिलती हैं, उस पर स्त्री का स्वत्व होता है।[107] इस विषय पर धर्मसूत्रों में अधिक उल्लेख नहीं है। काणे के अनुसार स्त्रीधन पर स्वामित्व तीन बातों पर निर्भर करता है, प्रथम- सम्पत्ति प्राप्त करने का उद्गम, द्वितीय- प्राप्ति के समय उसकी स्थिति अर्थात् वह कुमारी है या विवाहित, सधवा है या विधवा, तृतीय- वह सम्प्रदाय जिसके अनुसार उस पर स्मृति-शासन होता था।[108] आपत्काल में स्त्रीधन पर पति का भी अधिकार था। कौटिल्य के अनुसार पति स्त्रीधन का उपयोग विपत्ति आने पर, बीमारी, दुर्भिक्ष और भय के प्रतिकार तथा धर्मकार्य के लिए कर सकता था।[109] याज्ञवल्क्यानुसार यदि पति दुर्भिक्ष,

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

[102] भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः। *गौ. धर्म.* ३.१०.२३

[103] पितृमातृसुतभ्रातृदत्तमध्यग्न्युपागतमाधिवेदनिकं बन्धुदत्तं शुल्कमन्वाधेयकमिति स्त्रीधनम्।*वि. धर्म.* १७.१८

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

[105] अध्यग्न्यध्यावाहनिकंदत्तंचप्रीति-कर्मणि।
भ्रातृमातृपितृ प्राप्तं षड्विधं स्त्रीधनं स्मृतम्॥ *मनु.* ९.१९४

[106] *धर्मशास्त्रकाइतिहास,* पी.वी. काणे, भाग-२, पृ. ९४०

[107] अलङ्कारो भार्यायाः ज्ञातिधनं चेत्येके। *आप. धर्म.*२.६.१४.९

[108] *धर्मशास्त्र का इतिहास,* पी.वी. काणे, भाग-२, पृ. ९४२

[109] प्रतिरोधकव्याधिदुर्भिक्षभयप्रतीकारे धर्मकार्ये व पत्युः। *अर्थ.* ३.२

धर्मकार्य, व्याधि, जेल जाने की स्थिति में इस धन का उपयोग करता है तो उसे यह धन वापस लौटाने के लिए बाध्य नहीं किया जा सकता।[110] शास्त्रकारों ने इस धन का दुरुपयोग रोकने की भी व्यवस्था की थी । यदि स्त्री राजविरोधी बातें कहती हो, शराब एवं जुएँ आदि व्यसन करती हो तथा व्यभिचारिणी हो तो उसका स्त्रीधन से स्वत्व समाप्त हो जाता है।[111] स्त्रीधन पर उत्तराधिकार के संदर्भ में सामान्यतयाः पुत्र की अपेक्षा पुत्री को वरीयता दी जाती थी। सूत्रकारों में सर्वप्रथम गौतम ने समर्थन किया तथा स्त्रीधन का नामोल्लेख भी किया। उनके अनुसार स्त्रियों की ममता साधारणतः पुत्रियों के प्रति होती है, अतः धन की उत्तराधिकारिणी भी उसकी पुत्रियाँ होती हैं। पुत्रियों में भी सर्वप्रथम अविवाहित पुत्रियाँ ही अधिकारिणी होती हैं किन्तु उसके अभाव में निर्धन विवाहित पुत्रियों को यह धन मिलता है।[112] बौधायन और वसिष्ठ के अनुसार पुत्रियाँ माता को परम्परा में मिले उपहारों को ग्रहण करती हैं।[113] विष्णु ने भी पहला अधिकार पुत्री का माना है।[114] काणे के अनुसार इस समय तक स्त्रीधन का पर्याप्त विस्तार हो गया था और लोगों को यह बात पसन्द नहीं आयी कि स्त्रियों को ज्यादा सम्पत्ति मिले।[115] अतः समय के साथ इस पर पुत्रों का भी अधिकार होने लगा। मनु ने माता की मृत्यु पर धन को सभी भाई-बहनों में बाँट लेने का निर्देश किया।[116] यदि स्त्री निःसंतान मर जाती थी तो उसका धन पितृकुल में चला जाता था, यदि विवाह आसुरविधि से हुआ हो।[117] यहाँ स्त्रीधन को पति के द्वारा हड़पने का अधिकार नहीं था। पति का नैतिक दायित्व था कि स्त्री के साथ आये धन को पुनः लौटा दे। विष्णु ने कहा है कि स्त्री निःसन्तान मर जाये और उसका विवाह मान्यता प्राप्त कोटि से (ब्रह्म, आर्ष, दैव, प्राजापत्य) हुआ हो तो धन पति को मिलता है, शेष पितृकुल को।[118]

निष्कर्षतः स्त्रीधन के नियम, उत्तराधिकारादि का इतिहास और विकास स्त्रीजाति के प्रति भारतीय संस्कृति की उदारता एवं न्यायिकता का ज्वलन्त उदाहरण है।

iv. आर्थिक अधिकार

भूमि पर व्यक्तिगत स्वामित्व माना जाता था । यह निजी सम्पत्ति के अधिकार के अन्तर्गत आता था, जिसमें व्यक्ति को भूमि क्रय-विक्रय, दान देने या गिरवी रखने का अधिकार था । कृषक द्वारा जमीन को पट्टे पर देने का उल्लेख मिलता है । आपस्तम्ब के अनुसार यदि कोई व्यक्ति किसी का खेत पट्टे पर लेकर उसमें खेती नहीं करता तो राजा उस व्यक्ति से नुकसान की पूर्ति करवाये ।[119] क्योंकि उसके खेती नहीं करने से संभावित उपज की प्राप्ति नहीं होती एवं क्षेत्रस्वामी को तो नुकसान होता ही है, देश की अर्थव्यवस्था को भी अप्रत्यक्षतः हानि होती है । वस्तुतः प्राचीन काल में तथा आज भी कृषि का महत्त्व कम

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[110] दुर्भिक्षे धर्मकार्ये च व्याधौ संप्रतिरोधके।
गृहीतमस्त्रीधनं भर्ता न स्त्रयै दातुमर्हति॥ *याज्ञ.* २.१४७
[111] राजद्विष्टातिचाराभ्यामात्मापक्रमणेन च।
स्त्रीधनानीतशुल्कानामस्वान्यं जायते स्त्रियः॥ *अर्थ.*३.३
[112] स्त्रीधनं दुहितृणाम प्रत्तानामप्रतिष्ठितानां च। *गौ. धर्म.* ३.१०.२२
[113] मातुरलङ्कारं दुहितरस्साम्प्रदायिकं लभेरन्नन्यद्वा। *बौ. धर्म.*२.२.३.४४
मातुः पारिणेयं स्त्रियो विभजेरन्। *वसि. धर्म.* १७.४६
[114] सर्वेष्वेव प्रसूतायां यद्धनं तद्दुहितृगामि। *वि. धर्म.* १७.२१
[115] *धर्मशास्त्र का इतिहास,* पी.वी. काणे, भाग-२, पृ. ९४३
[116] जनन्यां संस्थितायां तु समं सर्वे सहोदराः।
भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः॥ *मनु.* ९.१९२
[117] भगिनीशुल्कः सोदर्याणामूर्ध्वं मातुः। *गौ. धर्म.* ३.१०.२३
[118] ब्राह्मादिषु चतुर्षु विवाहेष्वप्रजायामतीतायां तद्भर्तुः। शेषेषु च पिता हरेत्। *वि. धर्म.*१७.१९-२०
[119] क्षेत्रं परिगृह्योत्थानाभावात्फलाभावे यस्समृद्धस्स भावि तदपहार्यः । *आप. धर्म.* २.११.२८.१

नहीं है । कृषि ही प्राथमिक क्षेत्र है जिस पर देश की अर्थव्यवस्था निर्भर करती है । यहाँ भूमि को पट्टे पर देने का अधिकार भी द्योतित होता है । इसके अतिरिक्त कृषिकर्म को बीच में छोडने का अधिकार नहीं था, अन्यथा आपस्तम्बानुसार वह व्यक्ति पिटने योग्य होता था ।[120]

पशुपालन भी कृषि के साथ मुख्य व्यवसाय था । राज्य द्वारा पशुओं के हित के लिए व्यवस्थाएँ जैसे चरागाह आदि की जाती थी । परन्तु पशुपालक को दूसरों का नुकसान करने का अधिकार नहीं था । पशु के द्वारा उपज को नष्ट करने पर दोष पशुपालक का होता था ।[121] इस प्रकार यदि पूरी उपज नष्ट हो जाये तो राजा क्षेत्रस्वामी को पूरी उपज अपराधी से दिलाये ।[122] परन्तु पशु को अत्यधिक कष्ट देने का अधिकार नहीं था ।[123]

राजा का यह आर्थिक अधिकार था कि जो वस्तुएँ राष्ट्र के लिए दुःखदायक हो या निरर्थक एवं केवल शौक के लिए हों, उन पर अत्यधिक कर लगाकर उनका आयात कम कर देना चाहिए ।[124] विलासिता की वस्तुएँ देश की अर्थव्यवस्था के लिए घातक होती हैं। नागरिकों को जल जैसे महत्त्वपूर्ण संसाधन का विभाजन करने का अधिकार नहीं था ।[125] आज विभिन्न राष्ट्रों और राज्यों के बीच जल-विवाद होते रहते हैं, जल को स्वयं की सम्पत्ति मानकर व्यवहार किया जाता है । धर्मसूत्रों ने जल का विभाजन स्वीकार न कर उसका मिलकर समुचित उपयोग पर बल दिया है ।

श्रमिकों के अधिकार- अर्थव्यवस्था के लिए श्रमशक्ति की अतुलनीय भूमिका रहती है । कारीगरों को आजीविका का अधिकार प्रदान करने के लिए उन्हें पवित्रता-अपवित्रता के नियमों से परे घोषित किया गया है क्योंकि उनके व्यापक अधिकार-क्षेत्र और लोगों की आवश्यकता पूरी करने के लिए व्यावहारिक विचार अत्यावश्यक होते हैं । बौधायन के अनुसार कारू या कारीगर का हाथ सर्वदा शुद्ध रहता है, विक्रय के लिए फैलायी गयी वस्तु भी सदा शुद्ध रहती है ।[126] यदि बाजार की वस्तुओं में भी पवित्रता सम्बन्धी नियम लागू किया जाता तो यह जन-सामान्य के जीवन के लिए अप्रायोगिक रहता, अतः यह नियम देश-काल के अनुसार प्रासंगिक और जनसामान्य की आर्थिक उन्नति के लिए है ।

आर्थिक अपराध – समाज में चोरी के धन को प्राप्त करने का अधिकार किसी को नहीं था । गौतम के अनुसार जो व्यक्ति चोरी के धन को बुद्धिपूर्वक स्वीकार करता है वह भी चोर के समान दण्डनीय होता है ।[127] चोरी के धन से अनजान जो मनुष्य चोरी के द्रव्य को उचित मूल्य देकर खरीदता है वह निर्दोष होता है; किन्तु कालान्तर में उस द्रव्य का पता लगने पर उसे मूल स्वामी को देना होगा । और जो चोरी के धन को उचित मूल्य से कम मूल्य पर खरीदता है तो बेचने तथा खरीदने वाले दोनों ही राज्य द्वारा दण्डनीय

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[120] अवाशिनः कीनाशस्य कर्मन्यासो दण्डताडनम् । *आप. धर्म.* २.११.२८.२
[121] पशुपीडिते स्वामिदोषः । *गौ. धर्म.* २.३.१६
[122] सर्वविनाशे शदः । *गौ. धर्म.* २.३.२३
[123] नाऽतिपातयेत् । *आप. धर्म.* २.११.२८.६
[124] राष्ट्रपीडाकरं भाण्डमुच्छिन्द्यादफलं च यत् ।
महोपकारमुच्छुल्कं कुर्याद्बीजं तु दुर्लभम् ॥ *अर्थशास्त्र,* २.२१
[125] उदकयोगक्षेमकृतान्नेश्वविभागः । *गौ. धर्म.* ३.१०.४
[126] नित्यं शुद्धः कारुहस्तः पण्यं यच्च प्रसारितम् ।
ब्रह्मचारिगतं भैक्षं नित्यं मेध्यमिति श्रुतिः ॥ *बौ. धर्म.* १.६.९.१
[127] प्रतिग्रहीताऽप्यधर्मसंयुक्ते । *गौ. धर्म.* २.३.४७

होते हैं ।[128] आपस्तम्ब के अनुसार अधर्म से भौतिक सुख-सुविधाएँ ग्रहण करने का अधिकार नहीं है । यदि इस मार्ग से सुविधाएँ मिल भी रही हो तो उन्हें त्याग दे- 'मैं अधर्म के साथ नहीं रहूँगा' कहना चाहिए ।[129] वर्तमान काल में इस उपदेश की प्रासंगिकता है क्योंकि सभी के मन में अधिकाधिक सुख-सुविधाएँ जुटाने की अभिलाषा रहती है, चाहे वह अधर्म पूर्वक, निषिद्ध कर्म करके या अनाचार के माध्यम से हो । इसी कारण भ्रष्टाचार को बढावा मिलता है । इसका सबसे घातक प्रभाव अर्थव्यवस्था पर ही पड़ता है ।

निष्कर्ष

इस प्रकार धर्मसूत्रों में प्रचुरता से उपलब्ध कर्त्तव्य और अधिकार से सम्बन्धित उद्धरण यह सिद्ध करते हैं कि धर्मसूत्र साहित्य में सर्वप्रथम इस विषय पर मानवीय दृष्टि से विचार किया गया था । नागरिक का व्यापक अर्थ जैसा धर्मसूत्रों में मिलता है वह वर्तमान व्यवस्था में दुर्लभ है । नागरिकता जैसी आधुनिक संकल्पना का विकास भी हो चुका था । ये सब भारतीय संविधान को सुदृढ़ पृष्ठभूमि प्रदान करते हैं । इनमें वर्णित नियम और परम्पराएँ आज भी भारतीय समाज में प्रतिबिम्बित होती हैं ।

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- *शतपथ ब्राह्मण,*(सं.) चिन्नास्वामी शास्त्री, काशी संस्कृत ग्रन्थमाला-१२७, चौखम्बा संस्कृत संस्थान, वाराणसी, वि. सं. २०४०.
- *हिरण्यकेशी धर्मसूत्र*(हिरण्यकेशीश्रौतसूत्र का २६वां और २७वां प्रश्न), आनन्दाश्रम संस्कृत सीरीज, पूना, १९३२.

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

[129] अधर्माहृतान् भोगाननुज्ञाय न वयं चाऽधर्मश्चेत्यभिव्याहृत्याऽधो.....। *आप. धर्म.* १.१०.२८.११

- काणे, पाण्डुरङ्ग वामन, *धर्मशास्त्र का इतिहास,* उत्तरप्रदेश हिन्दी संस्थान (हिन्दी समिति प्रभाग), लखनऊ, १९९२.
- *याज्ञवल्क्यस्मृति,*याज्ञवल्क्य, मिताक्षरा की टीका सहित, (हि. व्या.) दुर्गाधर झा, भारतीय विद्या प्रकाशन, दिल्ली, २००२.

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

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

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

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.

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***

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

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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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

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

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[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:

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

(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.

CONCEPT OF RIGHT AND DUTIES: PHILOSOPHICAL ANALYSIS

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.

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.

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

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[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.

[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.

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

-Taniya Malik[1]

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.[2] 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.[3] 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

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[2] *Mohd. Salim* v. *State of Uttarakhand* UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.

[3] 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.

Andes believe that the "good way of living" or *Buen Vivir* is rooted in community and harmony with and nature.[4] 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 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.[5] 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.[6] Soon afterward, the Constitution Court of Columbia recognized that the river Atrato is a subject and holder of rights.[7] 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.[8] In February 2021, River Magpie in Canada's province of Quebec became the first Canadian river that the city council granted personhood.[9]

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

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[4] Caria, S.; Domínguez, R., 2016, Ecuador's Buen vivir: A New Ideology for Development, 206:43, *LAT. AMR. PERS*. pp 18–33,

[5] 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.

[6] *Mohd. Salim v State of Uttarakhand* UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.

[7] 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.

[8] 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).

[9] 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.

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'[10], 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,

> *"[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…*"[11]

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.*"[12]

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.[13]

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.[14]

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[10] Stone, C.D., 1972, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45, *S. CAL. L. REV*. 450 (

[11] *Id.* at p. 464.

[12] *Ibid.*

[13]. Gordon, G.J. ,2018 Environmental Personhood, 43 *COLUM. J. ENVTL. L*. 49

[14] *Id*. at p. 53.

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.[15]

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.[16] 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 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.[17] 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."[18] 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.[19]

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.*[20] 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,

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[15] 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

[16] Hutchison,A. 2014, The Whanganui River as a Legal Person, 39 *ALT. L.J.* 179,pp 180-81 .

[17] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

[18] *Id*. at s. 13.

[19] *Ibid.*

[20] UK HC WP(PIL) No. 126/2014 decided on 20-03-2017.

> "[*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."*[21]

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."*[22]

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).[23] 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.

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. [24]

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.[25]

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[21] *Id*. at para 17.

[22] *Id*. at para 19

[23] *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.

[24] *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.

[25] 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.

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*'.[26] 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.[27] 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[28] 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".*[29]

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.[30]

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 decision primarily on public trust doctrine.[31] However, it needs to be remembered that the normal perception is to treat the rivers as divine mothers amongst the indigenous population.[32]

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.[33] In fact, the resolutions recognized nine riverine rights of River Magpie, including the rights to evolve naturally and be protected, be free of

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[26] 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.

[27] Id. at p. 537

[28] WP No. 13989/2016 filed on 7/11/2016, Judgment dated 30/01/2019, order dated 03/02/2019.

[29] 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.

[30] Id. at para 3

[31] 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.

[32] *Supra* Note no. 8

[33] 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.

pollution, and sue.[34] 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.[35]

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. 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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[34] *Ibid.*

[35] 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.

Pramatha Nath Mullick vs Pradyumna Kumar Mullick on 28 April, 1925

Equivalent citations: (1925)27BOMLR1064

JUDGMENT

Shaw, J.

1. The questions raised by this appeal are of a wide and general importance. They have reference to the control and worship of a Hindu family idol. It may be explained that although one idol is referred to, called of course the Thakur, there were two others, the Thakurani, a female idol referred to in some of the papers as the consort of the Thakur, and there was also a third, a sacred or deified stone called the Salgram Sila. These three idols became the objects of the pious worship of the family of the founder, Mutty Lal Mullick, who originally installed them. But the points in the case can be more simply treated by referring to the one, namely the principal idol the Thakur.

2. The appeal is from a decree dated April 10, 1923, made by the High Court in Calcutta in its Civil Appellate Jurisdiction reversing a decree dated June 1, 1922, made by the same Court in its Original Civil Jurisdiction.

3. The case was argued at great length, and a large mass of authorities was cited.

4. Before entering upon the legal questions which were debated, their lordships think it not inadvisable to state the family history, in so far as it concerns the installation of this idol. It was established and consecrated many years ago by a wealthy Hindu inhabitant of Calcutta, Babu Mutty Lal Mullick, in his family dwelling house, in a Thakur Ghar, or room therein, set apart for worship.

5. Mutty Lal Mullick died in 1846 leaving a widow, Ranganmoui, and an adopted son, Jadulal, then two years of age. He left a will dated August 17, 1846, (shortly before his death). He had for some time prior to his death set up and established and consecrated the idol, and no doubt is thrown upon the fact that the idol so installed became unquestionably the object of worship by himself and the family. The will provided that his widow should be the malik or proprietor and attorney, for the protection and care of the whole of his estate until his adopted son Jadulal attained the age of twenty, and the enumeration included the Sri Iswar Thakurs, Thakuranis, etc., established by him and ancestorial.

6. Upon the adopted son attaining twenty, the property was to be made over to the son as his heir. There was a power to the widow in case the adopted son died without issue to adopt another. A gift was made to the widow of one lac of rupees, together with various jewels and silver with right of residence in the family residence. With regard to the maintenance and worship of the idol certain

funds, amounting to Rs. 600 a month, were to be drawn by the widow and therewith she was to defray the expenses of the idol's Sheba (or worship) and for religious festivals and ceremonies, "in the method that I have paid and defrayed the same hitherto." Upon the adopted son attaining twenty the widow was to "make over the whole of the property to him fully and he will in a like manner protect the whole of the property and effectuate the Kreah Karmas, or religious acts and ceremonies."

7. It seems accordingly clear that in Mutty Lal Mullick's lifetime the idol was, as already stated, established as a household god; and the pious founder, narrating his own upkeep and maintenance of the deity, gave funds in order that those should be continued; and he proscribed the duty of continuance to the widow during the adopted son's minority and upon the son thereafter during his life,

8. One of the questions emerging at this point is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir, It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.

9. A useful narrative of the concrete realities of the position is to be found in the judgment of Mukerji J. in Rambrahma v. Kedar (1922) 30 C.L.J. 478 (p 483):-

> We need not describe here in detail the normal type of continued worship of a consecrated image, the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of (lowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life indue succession, oven to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest.

10. The person founding a deity and becoming responsible for these duties is de facto and in Common parlance called Shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or-as in the case of Sudras, to which caste the parties belonged-by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death or his successor likewise, may confer the office of Shebait on another.

11. Under the will of Mutty Lal Mullick he did not adopt the latter course, but he acted as Shebait with the Brahmin assistance referred to. After his death his widow officiated similarly as the ministrant of the worship, and she used, as directed, the endowed funds specially destined for the

upkeed and worship of the deity. After the adopted son Jadulal reached the age of twenty he then became de facto the person, charged with the same duties, to be performed as fully as his adoptive father and mother had performed them.

12. It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolizing the Divinity, has in the eye of the law status as a separate persona. The position and rights of the deity must in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being Accordingly he is the Shebait custodian of the idol and manager of its estate. And HO, paying proper respect to the religious proprieties of the case, the father, mother and adopted son were successively and de facto ministrants and custodians of this idol.

13. The period during which this state of matters existed was in the narrative from anterior to 1846 till the year 1864. The widow's charge of the affairs of the idol had come to an end; and Jadulal the son's period of administration, he having reached the age of twenty, had begun. Jadulal died in the year 1894. What had happened during his period of administration was this: that in 1881 he enlarged the old family dwelling-house containing the Thakurbari in which the household gods had hitherto resided and were worshipped. He had erected a puja dalan for the worship of all the family Thakurs, including the three referred to; that is to say, instead of one house with its Thakurbari for the family, two houses were erected on adjoining plots of ground and between these the puja dalan was erected, having a private entrance from each of the private dwellings so that the family worship was conducted with due decorum and propriety in what was practically an annexe to either house,

14. Two other events occurred which are important during this period of Jadulal's regime, In 1888 he executed a deed of trust providing particular premises for the location and worship of the deities in the puja dalan aforesaid. The terms of this deed are the centre of the contentions raised by the parties in the appeal and will be more particularly hereinafter referred to The other fact affecting this period was that in the year 1891 Ranganmoni, the widow of Mutty Lal Mullick, died. She made a very large endowment in favour of the family idol, amounting to about one lac of rupees, By her will she appointed Jadulal her executor and trustee and she made a disposition of her property in these terms:-

> I give and devise my tenanted land, No. 129 Bowbazar Street in Calcutta, to my said trustee, his heirs and representatives to be held by him and them upon trust, to apply the rents and income thereof, after providing for the payment of taxes and other outgoings, in the performance of the daily and periodical worship of the idol, consecrated by my late husband, called RadhaShamsunder, such worship to be performed by my said son and his descendants.

15. Jadulal died in 1894, leaving issue three sons and four daughters. The estates were large, and a suit for partition among the three sons ensued. Questions of importance were raised as to :-

> (1) The provisions of Jadulal's will; and (2) The endowment by Banganraoni.

16. On the former head the disputes and differences were submitted to the arbitration of the late Mr. W. C. Bonnerjee, who delivered an award in 1899. That award was made a rule of Court. In the partition proceedings, Mr. Bonnerjee declared that the three sons, as Jadulal's heirs, were entitled to the residue of the father's estate in three equal shares. He allotted one of the two houses to the first son. another to the third son and, in regard to the second son, the present appellant, he was, so to speak, paid out in money in order that he might erect a desirable residence for himself, Among other trusts declared in Jadulal's will was the following, namely :-

> The trust for the worship of the said Jadulal Mullich's hereditary Goddess Sri dinghabahini Debi and other family deities during his turn or pala of worship.

17. It is to be observed that, although the turn or pala of worship as amongst the three sons was recognised in that part of the award the idols in question in this case were not named.

18. In a subsequent part of the award various turns of worship were given to the sons in order, As to the Thakurbari, or puja dalan, plans were referred to, and it was declared to be the joint property of the three sons. Prohibition was made against the two sons vested in the adjoining properties raising any structure or building of any kind which might interfere with the joint property. The situation created by this deed accordingly was that, while the deities were not named, the joint property of tin three sons in the house dedicated to the idol was declared and the system of worship by turn or pala was established.

19. With regard to Ranganmoni's estate and endowment, a suit was brought in 1904, and in June, 1905, it was decreed that a scheme should be framed for carrying on the varied trusts of the lady's will and, subject to provision being made therefor, her estate should be divided into three equal shares among the plaintiff' and defendants in this suit A commission was accordingly issued to Babu Bhupendra Nath Basu to frame a scheme of worship and to partition the residue This was done by return to the commission, which appointed the worship of Thakur Sri Sri Radha Shamsunderji, the idols in question in this suit, in the following terms :-

> I direct that the sheba and worship of the Thakur Sri Sri Radha-Shamsunderji and of the Thakur located at Mahesh and Brindaban and the Ekodistha sradh will be performed by the parties and their heira by turns of one year each, the first turn commencing from the 1st day of Baisakh in the Bengali year 1317, and such first turn shall devolve on the said Pradyumna Kumar Mullick and his heirs, the second turn commencing from first day of the month of Baisakh 1318 shall devolve on the said Pramatha Nath Mullick and his heirs, and the third turn commencing from the first day of the month of Baisakh 1319 shall devolve on the said Manmatha Nath Mullick and his heirs, and so on by rotation, On the demise of any one of the parties, his heirs will become entitled to his burn of worship, and the party having the turn of worship will perform such worship without any interference by any of the other parties.

20. The family very sensibly acted in accordance with the rules set down in these proceedings. The practical result was that the parties, now judicially separated, continued the worship of the idols The

idol was, of course, not removed by the parties during their period of worship or pala because in the building as constructed the idols wore located as mentioned in a building adjoining their respective houses.

21. In the year 1910-11 the second son's establishment was set up. The idol was removed to his house in connection with certain festivals considered suitable for the occasion and, after these were concluded in February, 1911, was brought back to the puja dalan. In May, 1911, the second son's year of pala, or turn of worship, came round and the family idol was removed to the Thakurbari of his house and family worship continued there for one year. In 1914 the same thing occurred, the first respondent being still an infant, It is not suggested in any part of the case that these temporary transfers of the location of the family idol (such temporary transfers on occasions of festivals are familial' in the community) were not conducted with complete reverence and propriety and without interruption of the ordinary daily services tendered to the idol or any of the rights connected with its worship. In short, the results of the partition suit, the interpretation of the wills of Jadulal and Ranganmoni, find the awards made therein, were so far worked out without defect or friction.

22. When the appellant's pala, however, again came round, namely in 1917, the transfer of the idol by him as before to his Thakurbari was objected to by the first respondent, who had now attained majority (with whose objection the third son concurs); and the broad question in this appeal is whether that objection is well founded in law.

23. In substance the objection is founded upon the deed executed in 1888 by Jadulal.

24. The argument in the appellate Court is thus recorded by Richardson J. :-

> The learned Standing Counsel, Mr. B.L. Mitter, founding on Matty Lal's Will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed, Mr. Mitter said that Jadulal might, if he had so pleased, have thrown them into the river.

25. The appellate Court rejected that proposition. And this Board can give no countenance to it. As is added in the judgment referred to:-

> The inclusion of the idols, however, among items of property, movable and immovable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the Will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

26. There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may no doubt also be a variety of other contracts of such a persona with mundane ideas But an argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the

authorities, nor with principle The Board does not find itself at variance with the views upon this subject taken in the appellate Court or with the analysis of the authorities there contained,

27. The appellate Court, it is true, felt itself constrained by the terms of the deed of 1888 to arrive at a conclusion adverse to the case of the appellant; but upon the main points in argument, both as to the contention that the household god was mere property, and as to Jadulal's right being absolute therein, this appeal was argued before the Board by the counsel for the respondents here on the footing that if the appellate Court's decree depended on the reasons given, it could not be defended. The Board is, on the contrary, of the opinion that, upon the two points they discussed, the reasoning and view of the High Court are sound,

28. Their lordships would only add, on the subject of property, that the argument is said to be supported by the judgment of Banerji J. in Khetter Chunder Ghose v. Han Das Bundopadhya (1890) I.L.R. 17 Cal. 557. In that case the facts were that the household idol was made over to relatives, owing to the family, whose idol it was, being unable to carry on the worship on account of the paucity of profits of the endowed lands, and it was held that the transfer was justified in the interests of the idol. It was a proper and a pious act. The Shebait, being charged fundamentally with the duty of seeing to the worship being carried on, and, having the concurrence of the entire family to the transaction, did have power to Carry through the transaction "for the purpose of performing its worship regularly through generation to generation " The members of the family were thereby deprived of no right of worship. The interest of worshippers and idol were conserved. Their lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognised

29. The argument as to property being thus displaced, their lordships have now to consider the position of Jadulal, the grantor of the deed of 1888.

30. Was the Shebait of this idol in the narrower sense as the appellant contends or did he succeed by virtue of Mutty Lal's will to the rights and privileges possessed by the testator ? In the deed of 1888, Jadulal declared as follows :-"whereas the said Babu Muttilal Mullick, the father of the said Jadulal Mullick, established and consecrated the Thakur called RadhaShamsunderji." As has been seen, during his life Mutty Lal Mullick had de fecto performed piously and regularly all the duties which the law would charge upon the custodians of the idol. It stands without question that Jadulal himself was fully performing similar duties and functions As was said by Lord Hobhouse in Gossamee Sree Greedharreejee v. Rumanlolljee Gonsamee (1889) L.R. 16 I.A. 137 (p. 144):-

> According to Hindu law, when the worship of a Thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he hag disposed of it otherwise, or there has boon some usage, course of dealing, or some circumstances to show a different mode of devolution.

31. A similar principle appears also to have been implied in the judgments of Jayannath Prasad Gupta v. Runjit Singh (1897) I.L.R. 25 Cal. 354 Shevratan Kunwari v. Ham Pargash (1890) I.L.R. 18 All. 227; and Mussamat Jai Bansi Kunwar v. Chattar Dhari Singh (1870) 5 Beng. L.R. 181.

32. To apply this law to the present case, Jadulal was the sole heir of his father and, by the general law of India, he thus stood vested with the right of custody of, and management of the trust for the family idol which his father had consecrated and set up. So far as the legal status and rights of Jadulal as grantor of the deed of 1888, the deed proceeds to narrate :-

> Whereas the said Jadulal Mullick is now desirous of dedicating the said premises to the said Thakur in the manner hereinafter expressed.

33. This is perfectly correct language in acknowledgment of the fact that the Thakur existed and was the capable recipient in law of the property dedicated to it, The deed then proceeds to declare that certain premises, described in the schedule.

shall be for ever held by the said Jadulal Mullick his heirs executors administrators and representatives to and for the use of the said Thakur Kadha shamsunder to the intent that the said Thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever Provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick his heirs executors administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable Thakur Bari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another Thakur Bari is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another Thakur Bari being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever.

This passage has been quoted in full so as to make clear the three propositions which seem to follow, namely, First, the recognition as mentioned of the idol as the dedicate : Second, the conveyance in no respect whatever appears to be a conveyance of the idol, but is a conveyance of the premises described in the schedule to and for the use of the idol and for no other use: Third, this use is not to be interfered with by Jadulal's heirs, executors, administrators or representatives ., except upon providing for the dedicatee another Thakurbari of the same or a larger value. When that is done Jadulal's heirs, etc., could revoke the trusts of the premises affecting the present puja dalan, and unless and until that is done the idol is not to be removed therefrom.

34. It is this last proposition which raises the real difficulty in the case and their lordships express no surprise that the High Court should have felt it. Upon a full consideration their lordships have come to the conclusion that this was not a dedication, in any flense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognised as a legal entity, to which such dedication might be made.

35. The true view of this is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the Shebait, it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must be given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject. In the case already referred to so far did the decision go that it was expressly said by Lord Hobhouse in Gossamee .Sree Greedharreejee v. Rumanlolljee Gossamee, " The Thakur Dowjee, or those who speak for him on earth, need not take advantage of this gift."

36. A fortiori it is open to an idol acting through his guardian the Shebait to conduct its worship in its own way at its own place always on the assumption that the acts of the Shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

37. A question was raised whether the right of worship of an idol can be made the subject of partition. Their lordships have already referred to this point when dealing with the arbitration proceedings.

38. In 1874 the point arose especially in the case of Mitta Kunth Audhicarry v. Neerunjun Audhicarry (1874) 14 Beng. L.R. 166. The headnote is as follows :-

> The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns.

39. And, in Sir Richard Couch's judgment, the following rule of law is referred to :-

> The suit is founded upon the light of the plaintiff, as one of several owners of this which may be described as property, to a partition. No doubt, the plaintiff is entitled be that; and the decree of the first Court was right in awarding it. But that decree has not made provision for the term which each of the three persons, the plaintiff and the two defendants, should have, and does not state whether the plaintiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lob in what order the plaintiff and the two defendants shall exercise the right to worship the idol. And having determined that, he should insert it in his decree, so that it will be settled in what order they are to exercise the right of worship.

40. The sole objection made in these proceedings to the removal by one of the Shebaits during his pala or turn of worship to his residence is founded upon the deed of 1888 already analysed, In paragraph 13 of the defence " this defendant admits that the plaintiff's turn of worship commenced on and from...April 14, 1917. On April 2, 1917, this defendant, who had attained majority on or about November 20, 1914...objected." In the evidence of the first respondent, he deposed as follows:-

> Babu Bhupendra Nath Basu divided the turn of worship of six Thakurs, and each of us have one year my only objection is based on the deed of dedication; apart from the deed there would be objection to the removal because the Thakur has its own house where arrangements are made for sheba. I have said that my only objection is on the deed of dedication.

41. While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting Shebaits. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience,

42. Their lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols.

43. Their lordships will therefore humbly advise His Majesty that the case should be remitted to the High Court to be dealt with in accordance with this report. It will be necessary in these circumstances to set aside the decrees of both the Courts below. The parties must bear their own costs in the Courts of India and before this Board; any costs paid under either of the decrees of the Courts below will be repaid.

Rama Reddy vs Ranga Dasan And Ors. on 28 October, 1925

Equivalent citations: (1926)50MLJ589, AIR 1926 MADRAS 769

JUDGMENT

Devadoss, J.

1. This is an appeal against the judgment of Madhavan Nair, J., giving a decree to the plaintiff. The 3rd defendant has preferred this Letters Patent Appeal. The question for determination is whether the suit is barred by Article 134 of the Limitation Act. The plaintiff is the trustee of a temple. The finding is that the property is the property of the temple. The contention of Mr. Ramachandra Aiyar is that the suit is barred under Article 134 inasmuch as the suit was brought more than 12 years after the date of the alienation. Article 134 gives a period of 12 years for the recovery of possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration. The argument advanced is that the suit is barred by Article 134 if the transferor is held to be a trustee and if he is not a trustee, then the suit is barred by reason of Article 144 of the Limitation Act. The finding that the transferor is a trustee cannot be challenged now. The simple question is therefore whether Article 134 applies to the case. It was decided in Vidya Varuthi v. Baluswami Aiyar (1921) ILR 44 M 831 : 41 MLJ 340 (PC) that a permanent lease of Mutt property granted by the head of the Mutt could not create any interest in the property to enure beyond the life of the grantor and consequently Article 134 of Schedule I of the Limitation Act of 1908 did not apply to a suit brought by the successor of the grantor for the recovery of the property. Mr. Ramachandra Aiyar tries to get over this decision by contending that the transferee was only a lessee and that he did not deny the title of the Mutt but only contended that he was entitled to be in perpetual possession of the property being a permanent lessee. Mr. Ameer Ali in delivering the judgment of their Lordships observed:

> It is also to be remembered that a 'trust' in the sense in which the expression is used in the English Law is unknown in the Hindu system, pure and simple.

2. With reference to the head of a Mutt or Shebait he observed:

> In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him he is answerable as a trustee, in the general sense, for maladministration.

3. In the case of a religious institution the property is vested in the idol and the trustee is only a manager for the time being. In the case of a Mutt the head of the Mutt for the time being is entitled to use the income of the Mutt property subject to the maintenance of the Thambirans and the ascetics attached to the Mutt. In the case of a trustee of a temple he is not entitled to use any portion of the income for himself. In the case of a wakf if the deed of trust makes provision for the

maintenance of the Muthavali or the trustee for the time being, he may use the income for himself as allowed by the deed of trust, but in the case of Hindu religious institutions no trustee of any institution is entitled to use any portion of the income for himself if the property is vested in the idol. The decision in Vidya Varuthi v. Baluswami Aiyar (1921) ILR 44 M 831 : 41 MLJ 340 (PC) cannot be said to apply only to cases of leases. The remarks of their Lordships apply to cases of all 'alienations of property. A permanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale. Has the trustee of a religious institution the right to alienate the kudivaram interest in the temple property? Can it be said if he lets into possession tenants so as to enable them to acquire occupancy rights, that he does not alienate the kudivaram interest? The mere fact that the tenants pay the mel-varam to the temple cannot convert the transfer of the kudivaram into anything less than an alienation of it. A trustee, therefore, cannot convey a valid title to the transferee and therefore Article 134 does not apply to a suit for the recovery of the temple property improperly alienated by the trustee. The case in Subbayya Pandaram v. Mahomed Mustapha Marcayer (1917) 32 M L J 85 : ILR 40 M 751 has no application to the present case. In that case the property was vested in the trustees and it was sold in execution of a decree. It was held that the suit was Barred by Article 144. In that case it was distinctly found that the property was vested in the person against whom the decree was obtained and the property being vested in him he could by transfer give a title to the vendee and if the transaction is not set aside within 12 years the vendee gets a good title. The case in Kuppuswami Mudaliar v. Samia Pillai (1921) 42 M L J 1(1921) 42 MLJ 1 does not touch the point under discussion. There the! holder of a religious office was dismissed from the office, but he continued to be in possession of the property for more than 12 years after his dismissal and a suit by the successor was held to be barred. The property was vested in the person and he held the office for the time being and when he was dismissed from the office his possession became adverse to his successor and the successor not having sued within 12 years his suit was barred.

4. There are a few cases which may be said to support the contention of Mr. Ramachandra Aiyar that an invalid alienation of trust property should be set aside within 12 years and if not so set aside, the vendee under the invalid sale gets a good title. The decision in Gnana Sambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 M. 271 : 10 MLJ 39 (PC) and Damodar Das v. Lakhan Das (1910) ILR 37 C. 885 : 30 MLJ 624 (PC) supports this view. In Gnana Sambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 M. 271 : 10 MLJ 39 (PC) the hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution. It was held that the possession delivered to the purchaser was adverse to the vendors, and after 12 years, the successor of the vendor could not recover possession of the property conveyed.

5. Their Lordships observed at page 279:

> There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them....

6. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is the office attached to the other, but if there is, Article 144 of the same schedule is applicable to the property. That bars the suit after 12 years' adverse possession.

7. In Damodar Das v. Lakhan Das (1910) ILR 37 C. 885 : 30 MLJ 624 (PC) the Privy Council held that where two chelas divided two institutions and the property among themselves one chela could not recover the property on the death of the other. Sir Arthur Wilson, who delivered the judgment of their Lordships observed at page 894:

> It follows from this that the learned Judges were further right in holding that from the date of the ekrarnama the possession of the junior chela. by virtue of the terms of that ekrarnama, was adverse to the right of the idol and of the senior chela, as representing that idol, and that therefore the previous suit was barred by limitation.

8. There is no discussion in Vidya Varuthi v. Baluswami Aiyar (1921) ILR 44 M. 831 : 41 MLJ 346 (P C) Gnana Sambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 M 271 : 10 MLJ 39 (PC) and Damodar Das v. Lakhan Das (1910) ILR 37 C. 885 : 30 MLJ 624 (PC). In view of their Lordships' decision in Vidya Varuthi v. Baluswami. Aiyar (1921) ILR 44 M. 831 : 41 MLJ 346 (P C), Gnana Sambanda Pandara Sannadhi v. Velu Pandaram (1899) ILR 23 M. 271 : 10 MLJ 39 (PC) and Damodar Das v. Lakhan Das (1910) ILR 37 C. 885 : 30 MLJ 624 (PC) cannot be considered to be good law. The principle underlying these decisions seems to be this: that where the trustee of a religious institution who is only a manager for the time being, alienates any property belonging to the trust, he cannot give a valid title to the alienee, for he himself has no interest in the property and the alienee can only get what the manager himself possesses, namely, of being in possession of the property. The principle of adverse possession would apply to cases where a person who could assert his title does not assert his, title within the period fixed by Article 144 of the Limitation Act. In the case of a minor whose property has been improperly alienated by the guardian he has the right of suit within three years after his attaining majority. The legal fiction is that an idol is a minor for all time and it has to be under perpetual tutelage and that being so, it cannot be said that the idol can ever acquire majority; and a person who acquires title from a trustee of a temple cannot acquire any title adverse to the idol, for the idol is an infant for all time and the succeeding trustee could recover the property for the idol at any time. Though the language has been loosely used as if the trustee occupies a position; similar to that of the karnavan of a Malabar tarwad, or the managing member of a joint Hindu family, or the guardian of a minor, yet his position is different from that of any of these. It is contended by Mr. Ramachandra Aiyar that a trustee can alienate the property for certain purposes. In order to preserve the trust or with the sanction of the Court he could alienate the property but such alienation is under exceptional circumstances. But where he purports to convey the title to the property which is vested in him the vendee cannot be said to derive title from a man who could never give a good title to him. If the vendee buys knowing that the trustee has no right to convey title to the property which is vested in the idol, he cannot set up Article 144 in answer to a suit by the trustee for the recovery of the property. His possession is that of the trustee and a trustee's possession can never be adverse to the idol. No doubt if a person takes possession of the immoveable property belonging to a temple and keeps the trustee and the persons connected with the temple out of possession and is able to assert such possession adversely to the trust for over 12

years, he could acquire a valid title under Section 28 of the Limitation Act. But where such a person acquires possession from the manager, his possession can only be with the consent of the trustee for the time being and therefore his possession can never become adverse to the temple. The observations of one of us in Jagga Row Bahadur Garu v. Gonhar Bibi (1917) 32 MLJ 85 : ILR 40 M. 751 apply to the present case:

> If the properties are trust properties any person claiming from a trustee cannot acquire a prescriptive title against the trust. Whether the document is valid or invalid, it would not give a right to anybody claiming under that document to prescribe for a title against the trust.
>
> Madhavan Nair, J.

9. Held similarly in Lakshminarayana Kulluriva v. Rajamma (1924) 21 LW 256. In a recent case Phillips, J held that a permanent lesseee could not set up the bar of limitation in a suit for recovery of possession of the property by the trustee. He held that Article 134 did not apply to that case. As regards the contention that Article 144 applied, the learned Judge observed:

> This contention was negatived by their Lordships on the ground that the idol had no power to bring a suit except through the trustee. Consequently there could be no question of the suit being barred inasmuch as it could not have been brought at an earlier date.

10. Reliance is placed upon Ramrup Gir v. Lakhand Marwari (1922) 67 IC 401. In that case the Patna High Court held that the alienation by the Mahant did not give a good title to the alienee unless it is proved that the alienation was one which could bind the institution. In the course of the judgment, Das, J. observed:

> In my opinion the true rule is this, where the property is vested in the juridical person as it was in Damodar Das's case (5) and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol, or the manager of the idol on behalf of the idol must bring the suit within twelve years from the date of the alienation. But where the title is in the Mahant or the Shebait, as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive; and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and, which has not approved of or acquiesced in the alienation.

11. With due respect to the learned Judge I am unable to follow his reasoning as regards the property vesting in an idol. Where the manager alienates property belonging to an idol his act cannot be said to be a challenge on the title of the idol. When the idol is incapable of asserting its

will except through its manager how can it be said that the manager's act is a challenge on its title? An idol as I have already observed being under perpetual tutelage can never assert its will and therefore the manager or the trustee, who alienated its property cannot by his act be said to challenge the title of the idol. He might as well set up his own title against the idol. Can any express trustee or manager of a temple set up his own title against the trust or the temple? If the manager cannot set up an adverse title to the property vested in the idol, can he by his act allow a person who derives title from him to assert a title which he himself could not assert against the idol. The case in Ramrup Gir v. Lalchand Marwari (1922) 67 IC 401 is against the principle of the decision in Vidyavaruthi v. Baluswami Aiyar (1921) ILR 44 M. 831 : 41 MLJ 346 (PC) and therefore it cannot be relied upon in support of the argument of 1st respondent.

12. In the result the appeal fails and is dismissed with costs of 1st respondent.

Waller, J.

13. I agree.

Mahant Ram Saroop Dasji vs S. P. Sahi, Special Officer-In-Charge ... on 15 April, 1959

Equivalent citations: 1959 AIR 942, 1959 SCR SUPL. (2) 503, AIR 1959 SUPREME COURT 951, ILR 38 PAT 661

Author: S.K. Das

Bench: S.K. Das, P.B. Gajendragadkar, K.N. Wanchoo, M. Hidayatullah

PETITIONER:
MAHANT RAM SAROOP DASJI

Vs.

RESPONDENT:
S. P. SAHI, SPECIAL OFFICER-IN-CHARGE OF THE HINDU

DATE OF JUDGMENT:
15/04/1959

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
DAS, SUDHI RANJAN (CJ)
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
HIDAYATULLAH, M.

CITATION:
1959 AIR 942 1959 SCR Supl. (2) 503
CITATOR INFO :
R 1959 SC 951 (4)
R 1959 SC1002 (6)
F 1959 SC1073 (9,14)
R 1960 SC 554 (8,9)
E 1980 SC 161 (12)
RF 1991 SC 672 (33)

ACT:
Hindu Religious Trusts Private Trusts-Applicability of Bihar Hindu Religious Trusts Act-Religious Endowments, public and private-Distinction between-Definition of " religious trust" -scope and Effect-Bihar Hindu Religious Trusts Act, 1950 (Bihar 1 of 1951), SS. 2(1), 4(5), 30(1), 32, 48.

HEADNOTE:
The appellant as the Mahant of the Salouna asthal made an application in the High Court under Art. 226 of the Constitution praying inter alia for the issue of a writ quashing the order of the Bihar State Board of Religious Trusts requiring the appellant to submit a return of income and expenditure under s. 59 Of the Bihar Hindu Religious Trusts Act, 1950, on the grounds, inter alia, that the Salouna as that was a private institution and not a religious trust within the meaning of the Act and that the Act did not apply to private trusts. The High Court took the view that the language of s. 2(1) of the Act, which defined a " religious trust ", was wide enough to cover within its ambit both private and public trusts recognised by Hindu law and that the Salouna asthal did not come within any of the two exceptions recognised by the section.
Held, that on a true and proper construction of the provi-sions of the Act, considered in the background of previous legislative history with regard to religious, charitable or pious trusts in India, the definition clause in s. 2(1) of the Act does not include within its ambit private trusts and that the provisions of the Act do not apply to such trusts.
The essential distinction in Hindu law between religious endowments which are public and those which are private is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description ; in a private trust the beneficiaries are definite and ascertained individuals or who within a time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following as particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a 'private trust.
584

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 343 of 1955. Appeal from the judgment and order dated September 13, 1954, of the Patna High Court in Misc. Judl. Case No. 39 of 1954.

L. K. Jha, B. K. P. Sinha and R. C. Prasad, for the appellant.

Mahabir Prasad, Advocate-General for the State of Bihar, Ishwari Nandan Prasad and S. P. Varma, for the respondents. 1959. April 1,5. The Judgment of the Court was delivered by S. K. DAS, J.-This appeal on a certificate granted by the High Court of Patna is from a judgment of the said High Court dated September 13, 1954, in a writ proceeding numbered as Miscellaneous Judicial Case No. 39 of

1954 in that court, which the appellant had instituted on an application made under Art. 226 of the Constitution in the circumstances stated below.

It was alleged that one Mahatma Mast Ram" Hindu saint, owned and possessed considerable properties in the district of Monghyr in the State of Bihar. About two hundred years ago, he built a small temple at Salouna in which he installed a deity called Sri Thakur Lakshmi Narainji. This temple came to be known as the Salouna asthal. Mast Ramji died near about the year 1802. He was succeeded in turn by some of his disciples, one of whom was Mahant Lakshmi Dasji. He built a new temple in 1916 into which he removed the deity from the old temple and installed two new deities, Sri Ram and Sita. in 1919 Mahant Lakshmi Dasji died. He left three disciples, Vishnu Das, Bhagwat Das and Rameshwar Das. A dispute arose among these disciples about succession to the gaddi, which was settled sometime in February 1919. By that settlement it was arranged that Vishnu Das would succeed Mahant Lakshmi Das as the shebait and would be succeeded by Bhagwat Das, and thereafter the ablest "bairagi " of the asthal, born of Brahmin parents, would be eligible for appointment as shebait. Bhagwat Das died sometime in 1935 and again a dispute arose between one Rameshwar Das, the youngest chela of Mahant Lakshmi Das, and Ram Saroop Das who is the present Mahant and appellant before us. Rameshwar Das, it appears, filed an application under the Charitable and Religious Trusts Act (XIV of 1920) for a direction upon Mahant Ram Saroop Das to render an account of the usufruct of the asthal. This application was contested by Mahant Ram Saroop Das, who said that the properties appertaining to the Salouna asthal did not constitute a public trust within the meaning of the provisions of the Charitable and Religious Trusts Act (XIV of 1920) and therefore he was not accountable to any person. Mahant Ram Saroop Das also applied for and obtained permission under s. 5 of the aforesaid Act to institute a suit for a declaration that the Salouna asthal and the properties thereof did not constitute a public trust. Such a suit was brought in the court of the Subordinate Judge of Monghyr who, however, dismissed the suit. Then, there was an appeal to the High Court of Patna and by the judgment and decree passed in First Appeal No. 10 of 1941 dated March 5, 1943, the High Court gave a declaration to the effect that the Salouna asthal and the properties appertaining thereto did not constitute a public trust within the meaning of the provisions of the Charitable and Religious Trusts Act, (XIV of 1920). Some eight years later, the Bihar Hindu Religious Trust Act, 1950 (Bihar I of 1951), hereinafter referred to as the Act, was passed by the Bihar Legislature and received the President's assent on February 21, 1951. It came into force on August 15, 1951. The Bihar State Board of Religious Trusts (one of the respondents before us) was constituted under this Act to discharge in regard to religious trusts other than Jain religious trusts the functions assigned to it under the several provisions of the Act. On November 14, 1952, this Board, in exercise of the powers conferred on it under s. 59 of the Act, asked the appellant to furnish to the Board a return of the income and expenditure of the asthol.

The appellant replied by a letter dated December 1, 1952, that the Salouna asthal was a private institution to which the Act did not apply, and also drew the attention of the Board to the judgment and decree of the High Court in First Appeal No. 10 of 1941. The Board, however, gave a reply to the effect that it was not bound by the declaration made by the High Court and asked the appellant to obtain a declaration in respect of his claim under the provisions of the Act or to submit a return. Thereafter' on January 22, 1954, the appellant made his application under Art. 226 of the Constitution in which he averred (a) that the Salouna asthal was not a religious trust within the

meaning of the Act; (b) that the properties appertaining thereto did not constitute a religious trust and the appellant was not a trustee within the meaning of the Act; (e) that the Act did not apply to private trusts; and (d) that the demand made by the respondent Board amounted to an interference with the appellant's fundamental right to hold the asthal properties. The appellant accordingly prayed for the issue of a writ quashing the order of the respondent Board requiring the appellant to submit a return of income and expenditure and also for an order directing the respondent Board and its officers to refrain from interfering with the appellant in his right of management of the Salouna asthal and the properties appertaining thereto.

The High Court of Patna by its judgment complained against dismissed the petition on the main ground that the language of s. 2(1) of the Act, which defined a I religious trust' for the purposes of the Act, was wide enough to cover within its ambit both private and public trusts recognised by Hindu law to be religious, pious or charitable and that the Salouna asthal did not come within any of the two exceptions recognised by the section, namely, (1) a trust created ac- cording to Sikh religion or purely for the benefit of the Sikh community; and (2) a private endowment created for the worship of a family idol in which the public are not interested. The High Court also held that the materials on the record were not sufficient to decide the question whether the Salouna asthal and the properties thereof constituted a religious trust of a public character; but proceeding on the footing that the Act applied to private trusts, it expressed the view that the restrictions imposed on the trustee by the several provisions of the Act were not violative of the fundamental right guaranteed under Art. 19(1)(f) of the Constitution, inasmuch as there was no legal reason why the State should not exercise superintend- ence and control over the administration of private trusts as in the case of public trusts. In a judgment dated October 5, 1953, dealing with the same question in some earlier cases, the High Court had, however, expressed a somewhat different view. It had then referred to the principle that when a legislature with limited power makes use of a word of wide and general import, the presumption must be that it is using the word with reference to what it is competent to legislate, and adopting that principle it said that s. 2(1) of the Act should be read in a restricted sense so as to include only Hindu religious or charitable trusts of a public character and the provisions of the Act would accordingly apply to such trusts only. The principal point urged before us on behalf of the appellant is one of construction-do the provisions of the Act apply to private religious trusts? The contention of the appellant is that they do not. It is necessary to refer at this stage to some of the relevant provisions of the Act. In connected Civil Appeals Nos. 225, 226, 228, 229 and 248 of 1955 (1) in which also we are delivering judgment today, we have referred to the provisions of the Act in somewhat greater detail. In this appeal we shall refer to such provisions only as have a bearing on the principal point. We start with the definition clause in s. 2 (1). It says-

> " religious trust' means any express 6r constructive trust created or existing for any purpose recognised by Hindu Law to be religious, pious or charitable, but shall not include a trust created according to the Sikh religion or purely for the benefit of the Sikh (1) Mahant Moti Das v. S.P. Sahi, see P. 563 ante.

community and a private endowment created for the worship of a family idol in which the public are not interested The expression 'trust property ' in a. 2 (p) means the property appertaining to a religious trust and the expression 'trustee' in s. 2 (n) is defined in the following terms-

> " I trustee' means any person, by whatever designation known, appointed to administer a religious trust either verbally or by or under any deed or instrument or in accordance with the usage of such trust or by the District Judge or any other competent authority, and includes any person appointed by a trustee to perform the duties of a trustee and any member of a Committee or any other person for the time being managing or administering any trust pro- perty as such; ".

The next important section for our purpose is s. 4 as amended by Bihar Act, XVI of 1954, which gives effect to certain amendments and repeals. Sub-section (5) of s. 4 is in these terms-

> "The Religious Endowments Act, 1863 (XX of 1863), and section 92 of the Code of Civil Procedure, 1908 (V of 1908), shall not apply to any religious trust in this State, as defined in this Act."

Chapter V of the Act contains a series of sections which delimit the powers and duties of the State Board of Religious Trusts. Section 28, the opening section of the chapter, states the general powers and duties of the Board. Section 29(1) has a bearing on the question at issue before us. It states inter alia that where the supervision of a religious trust is vested in any committee or association appointed by the founder or by a competent court or authority, such committee or association shall continue to function under the general superintendence and control of the Board unless superseded by the Board under sub-S. (2) of the section. If an order of supersensible is passed, the committee or association or any other person interested in the religious trust may within 30 days of the order of the Board under sub-s. (2) make an application to the District Judge for varying, modifying or setting aside the order of supersession. Section 30, so far as it is relevant for our purpose, states-

> " When any object of a religious trust has ceased to exist or has, in the opinion of the Board, become impossible of achievement, the Board may, of its own motion or on the application of any Hindu, after issuing notice in the prescribed manner, to the trustee of such trust and to such other person as may appear to the Board to be interested therein and after making such inquiry as it thinks fit, determine the object (which sfiall be similar or as nearly similar as practicable to the object which has ceased to exist or become impossible of achievement) to which the funds, property or income of the trust or so much of such fund, property or income as was previously expended on or applied to the object which has ceased to exist or become impossible of achievement, shall be a plied." Section 32 defines the power of the Board to settle schemes for proper administration of religious trusts. It states:
>
> " 32(1). The Board may, of its own motion or on application made to it in this behalf by two or more persons interested in any trust,-
>
> (a) settle a scheme for such religious trust after making such inquiry as it thinks fit and giving notice to the trustee of such trust and to such other person as may appear to the Board to be interested therein;

(b) in like manner and subject to the like conditions, modify any scheme settled under this section or under any other law or substitute another scheme in its stead:

Provided that any scheme so settled, modified or substituted shall be in accordance with the law governing the trust and shall not be contrary to the wishes of the founder so far as such wishes can be ascertained. (2) A scheme settled, modified or substituted instead of another scheme under this section shall, unless otherwise ordered by the District Judge on an application, if any, made under sub-section (3) come into force on a day to be appointed by the Board in this behalf and shall be published in the official gazette.

(3) The trustee of, or any other person interested in, such trust, may within three months from the date of the publication in the official gazette of the scheme so settled, modified or substituted instead of another scheme, as the case may be, make an application to the District Judge for varying, modifying or setting aside the scheme;

but, subject to the result of such application, the order of the Board under sub-sections (1) and (2) shall be final and binding upon the trustee of the religious trust and upon every other person interested in such religious trust. (4) An order passed by the District Judge on any application made under sub-section (3) shall be final." It may be here stated that the expression " person interested in religious trust " is defined in s. 2(g). The definition is in these terms-

" " person interested in a religious trust " means any person who is entitled to receive any pecuniary or other benefit from a religious trust and includes, (1) any person who has a right to worship or to perform any rite, or to attend at the performance of any worship or rite, in any religious institution connected with such trust or to participate in any religious or charitable ministration under such trust;

(ii) the founder and any descendant of the founder; and

(iii) the trustee;".

The only other section which need be quoted in full is s. 48 of the Act which is in these terms:-

" 48(1). The Board, or with the previous sanction of the Board, any person interested in a religious trust may make an application to the District Judge for an order-

(a) removing the trustee of such religious trust, if such trustee-

(1) acts in a manner prejudicial to the interest of the said trust; or

(ii) defaults on three or more occasions in the payment of any amount payable under any law for the time-being in force in respect of the property or income of the said

trust or any other statutory charge on such property or income; or

(iii) defaults on three or more occasions in the payment of any sum payable to any beneficiary under the said trust, or in discharging any other duty imposed upon him under it; or

(iv) is guilty of a breach of trust.

(b) appointing a new trustee;

(e) vesting any property in a trustee;

(d) directing accounts and inquiries; or

(e) granting such further or other relief as the nature of the case may require.

(2) The order of the District Judge under sub-. section (1) shall be final ".

Now, the argument on behalf of the appellant is that on a true and proper construction of the aforesaid provisions of the Act, considered in the background of previous legislative history with regard to religious, charitable or pious trusts in India, the definition clause in s. 2 (1) of the Act is confined to religious, pious or charitable trusts of a public nature recognised as such by Hindu law. In order to appreciate this argument it is necessary to state first the distinction in Hindu law between religious endowments which are public and those which are private. To put it briefly, the essential distinction is that in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private trust the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference in the matter and would not make the trust a private trust (see the observations in Nabi Shirazi v. Province of Bengal) (1). The distinction in this respect between English law and Hindu law has been thus stated by Dr. Mukherjea in his Tagore Law Lectures on the Hindu Law of Religious and Charitable Trusts (1952 Edition, pp. 392-396): ,,In English law charitable trusts are synonymous (1) (1942) I.L.R. I cal. 211, 228.

with public trusts and what is called religious trust is only a form of charitable trust. The beneficiaries in a charitable trust being the general public or a section of the same and not a determinate body of individuals, the remedies for enforcement of charitable trust are somewhat different from those which can be availed of by beneficiaries in a private trust. In English law the Crown as parens patriae is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern..... One fundamental distinction between English and Indian law lies in the fact that there can be religious trust of a private character under Hindu law which is not possible in English law ".

On behalf of the appellant it has been pointed out that so far as public religious and charitable trusts are concerned, there are a number of legislative enactments, both general and local, which aim at controlling the management and administration of such trusts and provide for remedies in cases of maladministration, So far as private religious trusts are concerned, there are no specific statutory enactments and such trusts are regulated by the general law of the land. The British Government, when it was first established in India, following the tradition of the former rulers, asserted by virtue of its sovereign authority the right to visit public religious and charitable endowments and to prevent and redress abuses in their management. A Regulation for that purpose was passed in Bengal in 1810 (Regulation XIX of 1810) and one for Madras in 1817 (Regulation VII of 1817). In Bombay also there was a Regulation (XVII of 1827) which related to endowments of the same character. In 1863 was passed the Religious Endowments Act (XX of 1863), which repealed the Bengal and Madras Regulations in so far as they related to purely religious institutions and their control was transferred from the Board of Revenue to-non-official committees constituted under the Act of 1863. It is worthy of note, however, that the Act of 1863 also applied to public religious endowments only. In course of time it was found that the Act of 1863 did not provide adequate protec.

tion to public religious trust against abuses which led to their control by the State and the remedies provided by that Act did not go far enough. Then came the Charitable Endowments Act, 1890 (VI of 1890), and the Charitable and Religious Trusts Act, 1920 (XVI of 1920), both of which related to public trusts ; the former related exclusively to public trusts for charitable purposes unconnected with religious teaching or worship while the latter related to trusts created for public purposes of a charitable or religious nature. In the Civil Procedure Code of 1877 a specific section was introduced, viz., s. 539, under which a suit could be instituted in case of any alleged breach of any express or constructive trust created for public religious or charitable purposes. This section was later amended, and in this amended form it became s. 92 of the present Civil Procedure Code, the first condition necessary to bring a case within its purview being the existence of a trust, whether express or constructive for public purposes of a religious or charitable nature. It is clear beyond doubt that a private trust is outside the operation of s. 92, Civil Procedure Code. Of the local Acts, the earliest was that of the Bombay Presidency of the year 1863. In more recent years were passed the Orissa Hindu Religious Endowments Act, 1939, the Bombay Public Trusts Act, 1950, and the Madras Hindu Religious and Charitable Endowments Act, 1951, all of which relate to public religious institutions and endowments. No local Act has been brought to our notice which clearly or unmistakenly sought to include within its ambit private religious trusts. On behalf of the appellant it has been submitted that though the definition clause in s. 2 (1) of the Act is expressed in wide language, other provisions of the Act make it clear that it is confined to public trusts only. Section 2 (1) of the Act, we have pointed out, recognises two exceptions:

> first, a trust created according to the Sikh religion or purely for the benefit of the Sikh community; and, second, a private endowment created for the worship of a family idol, in which the public are not interested. It is not disputed that the second exception is an instance of a private trust, in which the public are not interested. The High Court has taken the view that inasmuch as the definition clause mentions by way of an exception only one instance of a private endowment, all private

endowments created otherwise than for the worship of a family idol must be included within the definition Of the maxim of expression unius exclusio alterius. We do not think that this view is quite correct. First of all, let us examine some other provisions of the Act which specifically refer to the definition clause and see what the legislature has itself taken it to mean. Take, for example, s. 4 of the Act, as amended by Bihar Act, XVI of 1954. This section amends and repeals certain earlier Acts like the Charitable Endowments Act, 1890, and the Charitable and Religious Trusts Act, 1920, both of which we have already pointed out related exclusively to public trusts. Sub-s. (5) of s. 4 states that the Religious Endowments Act, 1863, and s. 92 of the Code of Civil Procedure, 1908, shall not apply to any religious trust in the State, as defined in this Act. The Religious Endowments Act, 1863, and s. 92, Civil Procedure Code,-both apply to public trusts; they have no application to private trusts. If the definition clause was intended to include within its ambit private trusts (other than those created for the wor- ship of a family idol), then it is difficult to understand why sub-s. (5) of s. 4 should be worded as it has been done. That sub-section in effect says that two earlier enactments which apply exclusively to public trusts shall not apply to any trust (we emphasise the word ' any ') as defined in the Act. If private trusts created otherwise than for the worship of a family idol were included in the definition of religious trust, then sub-s. (5) was entirely otiose or redundant so far as those private trusts were concerned for the earlier enactments never applied to them. The obvious indication is that all trusts defined in the Act are public trusts and, therefore, it became necessary to exclude the operation of earlier enactments which but for the exclusion would have applied to such trusts. If the intention of sub- s. (5) of s. 4 was to exclude some, trusts only out of many included within the definition clause from the operation of the earlier enactments, as is contended for by the learned Advocate-General of Bihar, then the use of the word 'any' appears to us to be particularly inapt. Sub- section (5) of s. 4 was amended by Bihar Act XVI of 1954. Before the amendment it read as follows:

" S. 4(5). The Religious Endowments Act, 1863, and section 92 of the Code of Civil Procedure, 1908, shall not apply to any Hindu Religious Trust in the State of Bihar."

Prior to the amendment, sub-s. (5) made no reference to the definition clause; it merely said that two of the earlier enactments shall not apply to any Hindu Religious Trust in the State of Bihar. The amended subsection, however, specifically refers to the definition clause and states that two of the earlier enactments, which apply only to public trusts, shall not apply to any trusts, as defined in the Act. In our opinion, by sub-s. (5) of s. 4 the Legislature itself has spoken and indicated the true scope and effect of the definition clause.

Secondly, it may be asked why the legislature having before it the earlier enactments which applied to public trusts only, failed to use the word 'public ' before the word 'purpose' in the definition clause ? This is a pertinent question which must be faced. The answer, we think, is this. Charitable trusts are public trusts, both under the English and Indian law; in England a religious trust being a form of charitable trust is also public, but in India, according to Hindu law, religious trust may be public or

private. But the most usual and commonest form of a private religious trust is one created for the worship of a family idol in which the public are not interested. Any other pri- vate religious trust must be very rare and difficult to think of.' Dealing with the distinction between public and private endowments in Hindu law, Sir Dinshah Mulla has said at p. 529 of his Principles of Hindu Law (11th edition)-

> " Religious endowments are either public or private. In a public endowment the dedication is for the use or benefit of the public. When property is set apart for the worship of a family god in which the public are not interested, the endowment is a private one ".

Obviously enough, the definition clause merely quotes the typical example of a private endowment mentioned above. It is also significant that the exclusion of an endowment created for the worship of a family idol is based on the adjectival clause which follows it, viz., " in which the public are not interested ". In other words, the exclusion is based on the essential distinction between a public and private trust in Hindu law. If the test is that the public or any section thereof are not interested in the trust, such a test is characteristic of all private trusts in Hindu law. It also shows that there may be a trust created for the worship of a family idol in which the public may be interested. Those are cases of trust which began as a private trust but which eventually came to be thrown open to the public. This also indicates that the definition was intended to cover only public trusts.

We now turn to some of the other provisions of the Act, which we have earlier quoted. Section 29(1) which talks of supervision of a religious trust being vested in any committee or association appointed by the founder or by a competent court or authority is ordinarily appropriate in the case of a public trust only. Section 30(1) which embodies the doctrine of cypress permits any Hindu to make an application for invoking the power of the Board to determine the object to which funds, property and income of a religious trust shall be applied where the original object of the trust has ceased to exist or has become impossible of achievement. This section is also inappropriate in the case of a private trust, the obvious reason being that any and every Hindu cannot be interested in a private trust so as to give him a locus stand to make the application. Further, it is difficult to visualise that a Hindu private rebutter will fail, for a deity is immortal. Even if the idol gets broken or is lost or stolen, another image may be consecrated and it cannot be said that the original object has ceased to exist. Sec-

tion 32 is an important section of the Act and confers power on the Board to settle schemes for proper administration of religious trusts. Now, the section says that the Board may exercise the power of its own motion or on application made to it in this behalf by two, or more persons interested in any trust. The language of the section follows closely the language of s. 92, Civil Procedure Code, so far as the phrase " two or more persons interested in any trust "

> is concerned. It is difficult to understand why in the case of a private trust, it should be necessary that two or more persons interested in the trust must make the application to settle a scheme for such a trust. In a private or family rebutter the beneficiaries are a limited and defined class of persons, as for example, the members

of a family. If the trustee or shebait is guilty of mismanagement, waste, wrongful alienation of debutter property or other neglect of duties, a suit can certainly be instituted for remedying these abuses of trust. Under the general law of the land the founder of the endowment, or any of his heirs is competent to institute a suit for proper administration of the debutter, for removal of the old trustee and for appointment of a new one. It is not necessary in such a case that two or more persons interested in the trust must join in order to institute the suit. The condition of " two or more persons " is appropriate only to a public trust, the reason being that a public trust is a matter of public concern. Section 48 of the Act is also analogous to s. 92 of the Code of Civil Procedure and one of the reasons for excluding the operation of s. 92 of the Code of Civil Procedure from trusts as defined by the Act is the existence of provisions in the Act which are analogous to s. 92 of the Code of Civil Procedure. This section is also more appropriate to public trusts than to private trusts. In fact, the Act contains provisions, as the preamble states, for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts and for that purpose certain earlier enactments like the Religious Endowments Act, 1863, the Charitable Endowments Act, 1890, the Charitable and Religious Trusts Act, 1920 and the Civil Procedure Code, 1908, have either been amended or excluded from operation. All those earlier enactments related only to public trusts and if the intention was that the Act would apply to private trusts as well, one would expect that intention would be made clear by the use of unambiguous lan- guage. We find, on the contrary, that though the definition clause in s. 2(1) is expressed in somewhat wide language, sub-s. (5) of s. 4 makes clear what the true scope and effect of the definition clause is.

For the reasons given above, we hold that the definition clause does not include within its ambit private trusts and the Act and its provisions do not apply to such trusts. Learned counsel for the appellant has in the alternative argued before us that if the Act applies to private trusts, several of its provisions will be violative of the fundamental right guaranteed to citizens under Art. 19(1)(f) of the Constitution inasmuch as the restrictions imposed thereby on trustees of private trusts, in which the public are not interested, cannot be justified as reasonable restrictions in the interests of the general public within the meaning of cl. (5) of Art. 19. The High Court negatived this argument by adopting the rule of English law that in the case of a charitable corporation where the founder is a private person, he and his heirs become visitors in law and where such heirs are extinct or incompetent, their powers devolve on the Crown or the State; therefore, it is in the interests of the general public that the State should exercise superintendence and control over the administration of private trusts as in the case of public trusts. This view of the High Court has been seriously contested before us, and learned counsel for the appellant has submitted that there is no war. rant for the adoption of the rule of English law in view of the fundamental distinction between English and Hindu law as to private religious trusts. He has also drawn our attention to the following observations of Dr. Mukherjea (Hindu Law of Religious and Charitable Trust, 1952 Edition, p. 393) on this point:

> ,,In English law there is a ' visitatorial ' power attached to all eleemosynary corporations. A visitor has the right to settle disputes between members of the corporation, to inspect and regulate their actions and generally to correct all abuses and irregularities in the administration of charity. The law allows to the founder of an eleemosynary institution full powers to make regulations for its creation and such powers include the right of nominating visitors. Under the law of England as it stood before 1926, if a private person was the founder of a charitable corporation, then he and his heirs became automatically the visitors. The descent of the rights of a visitor to heirs has now been abolished by the Administration of Estates Act, 1925, and it is not clear as to who would be visitor in default of appointment by the founder. Most probably such rights would devolve upon the Crown as they did when the founder's heirs became extinct or could not be found or the heir was a lunatic."

He has further submitted that whatever be the position in English law, the guarantee of a fundamental right must depend on the terms of Art. 19 of the Constitution and such guarantee cannot be whittled down by importing artificial rules of English law.

In view of our finding on the question of construction of the definition clause read with s. 4 (5) and other provisions of the Act, we consider it unnecessary to pronounce finally on the contentions referred to in the preceding paragraph, except merely to state that a serious question of the constitutional validity of several provisions of the Act would have undoubtedly arisen if the Act were held to apply to private trusts as well. On our finding that, the Act does not apply to private trusts, the appellant is entitled to succeed in his appeal. The High Court has said that the materials on the record of the case are not sufficient to decide the question whether the Salouna asthal and the properties of the mahant constitute a trust of a public character. This question, however, was the subject of a contested litigation and the appellant had obtained a declaration in First Appeal No. 10 of 1941 that the Salouna asthal and the properties appertaining there to did not constitute a public trust. The respondents were not parties to that litigation and may not be bound by that judgment; but on behalf of the respondents no affidavit was filed nor were any materials placed to show that the position is different from what was declared by the High Court. The High Court commented on the fact that the appellant did not produce before the court all the documents in his possession. A petition has been filed before us for taking in evidence the documents which were considered by the High Court in First Appeal No. 10 of 1941. We do not think that in the circumstances of this case it is necessary to consider that evidence afresh. As long as the declaration made by the High Court in First Appeal No. 10 of 1941 stands and in the absence of some evidence to the contrary, the appellant is entitled to say that the Salouna asthal and the properties appertaining thereto do not 'Constitute a public trust and the Act and its provisions do not apply to it. Our attention has been drawn to s. 43 of the Act as amended by Act XVII of 1956. That section says inter alia that all disputes as to whether any immovable property is or is not a trust property shall be inquired into, either on its own motion or on an application, by the authority appointed in this behalf by the State Government by notification in the official gazette. Without. expressing any opinion as to the constitutional validity of s. 43 of the Act we merely point out that no decision has been given under s. 43 of the Act (as it stood prior or after the amendment) against the appellant in respect of the Salouna asthal and the properties appertaining thereto. It would be open to the respondents to take such steps as may be

available to them in law to get it determined by a competent authority that the trust in question is a public trust.

We would accordingly allow this appeal, set aside the judgment and order of the High Court dated September 13, 1954, and direct the issue of an appropriate writ quashing the order of the respondent Board calling upon the appellant to file a statement of income and expenditure with regard to the properties of the Salouna asthal and also prohibiting the respondents from interfering with the rights of the appellant in the management of the Salouna asthal and the properties appertaining thereto, unless and until the respondents have obtained the necessary determination that the Salouna asthal is a public trust. The appellant will be entitled to his costs throughout. Appeal allowed.

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

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

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

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

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

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

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

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

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

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.

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

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

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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Lalit Miglani vs State of Uttarakhand and Others
30 March, 2017

Coram: Hon'ble Rajiv Sharma, J.

Hon'ble Alok Singh, J.
Per: Hon. Rajiv Sharma, J.

In sequel to the directions issued by this Court, Mr. Praveen Kumar, Director, National Mission for Clean Ganga, along with Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, have appeared.

Mr. Vinod Singhal, Member Secretary Uttarakhand Environmental Protection & Control Board is also present in person. The Court has a long interaction with him. He apprised the Court that few establishments have been sealed. However, the Court asked him why the Teams who go for sealing the establishments issue the fresh notice after issuance of Closure Notices. He could not answer it satisfactorily. There is no such provision for issuing notice over and time again once the closure notice has been issued. This practice is deprecated and be stopped forthwith.

The personal appearance of the Member Secretary of the State Board is dispensed with.

The present miscellaneous application (CLMA 3003/17) has been filed by the petitioner for declaring the Himalayas, Glaciers, Streams, Water Bodies etc. as legal entities as juristic persons at par with pious rivers Ganga and Yamuna.

In normal circumstances, we would not have permitted the petitioner to file an application after the disposal of petition but since the matter was kept alive on the principle of 'continuous mandamus' and for the compliance of the judgment, we have entertained this application in the larger public interest and to avoid further litigation. Moreover, the petition was filed as a public interest litigation.

It is settled law that the principles of pleadings are liberal in the public interest litigations and the technicalities should be eschewed.

Their Lordships of Hon. Supreme Court in (1989) Supp (1) SCC 504 in the case of 'Rural Litigation & Entitlement Kendra v. State of U.P.' have held that in matters of grave public importance, court is not bound by procedural technicalities. Their Lordships in paragraph nos.14, 16 and 17, have held as under: -

"14. One of the submissions advanced at the bar is that the decision of this Court dated 12-3-19851, was final in certain aspects including the release of the A category mines outside the city limits of Mussoorie from the proceedings and in view of such finality it is not open to this Court in the same proceedings at a later stage to direct differently in regard to what has been decided earlier. Connected with this submission is the contention that during the pendency of these writ petitions, the Environmental (Protection) Act of 1986 has come into force and since that statute and the Rules made thereunder provide detailed procedure to deal with the situations that arise in these cases, this Court should no more deal with the matter and leave it to be looked into by the authorities

under the Act. Counsel have relied upon what was stated by this Court while giving reasons in support of the order of 12-3-19851, namely, "it is for the Government and the Nation -- and not for the Court-- to decide whether the deposits should be exploited at the cost of ecology and environmental considerations". In the order of 12-3-1985, this Court had pointed out: (SCC pp. 435-36, para 9)

16. The writ petitions before us are not inter-partes disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time, it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata. As we have already pointed out when the order of 12-3-1985, was made, no reference to the Forest (Conservation) Act of 1980 had been done. We are of the view that leaving the question open for examination in future would lead to unnecessary multiplicity of proceedings and would be against the interests of society. It is meet and proper as also in the interest of the parties that the entire question is taken into account at this stage.

17. Undoubtedly, the Environment (Protection) Act, 1986 (29 of 1986) has come into force with effect from 19-11-1986. Under this Act power is vested in the Central Government to take measures to protect and improve the environment. These writ petitions were filed as early as 1983 -- more than three years before the Act came into force. This Court appointed several expert committees, received their reports and on the basis of materials placed before it, made directions, partly final and partly interlocutory, in regard to certain mines in the area. Several directions from time to time have been made by this Court. As many as four reportable orders have been given. The several parties and their counsel have been heard for days together on different issues during the three and a quarter year of the pendency of the proceedings. The Act does not purport to -- and perhaps could not -- take away the jurisdiction of this Court to deal with a case of this type. In consideration of these facts, we do not think there is any justification to decline the exercise of jurisdiction at this stage. Ordinarily the court would not entertain a dispute for the adjudication of which a special provision has been made by law but that rule is not attracted in the present situation in these cases. Besides it is a rule of practice and prudence and not one of jurisdiction. The contention against exercise of jurisdiction advanced by Mr Nariman for the intervener and reiterated by some of the lessees before this Court must stand overruled."

Gangotri Glacier is situated in District Uttarkashi of the State of Uttarakhand. It is 330.2 kilometres long and between 0.5 to 2.0 kilometres wide. It is one of the largest Glaciers in the Himalayas. However, it is receding since 1780. The receding is quick after 1971. According to the images of NASA, over the last 25 years, Gangotri glacier has retreated more than 850 meters, with a recession of 76 meters from 1996 to 1999 alone. River Ganga originates from Gangotri Glacier. River Yamuna originates from Yamunotri Glacier. It is also situated in District Uttarkashi. Yamunotri Glacier is also receding at an alarming rate. These Glaciers are receding due to pollution as well as climate change. The urgent remedial steps are required to be taken to ensure that the receding of these Glaciers is stopped. Both Ganga and Yamuna Rivers are revered as deities by Hindus. Glacial Ice is the largest reservoir of fresh water on earth.

In State of Uttarakhand, there are various natural parks. The natural parks are threatened due to human activities around these parks and overall degradation of environment. These natural parks function as lungs for the entire atmosphere. The forests are also threatened due to large scale deforestation. The mountains are denuded of the forests and jungles.

In one of the articles contained in "The Secret Abode of Fireflies, Loving and Losing Spaces of Nature in the City", the importance of trees is explained in article "Foresters without Diplomas" written by Sri Wangari Muta Maathai (Kenyan Environmentalist and Nobel Peace Winner-2004), which is as under :- "We could see Mount Kenya from my house, and I grew up hearing that God lives in Mount Kenya and all good things come from there. The clouds, the rains, the rivers in which I played with frogs' egg and tadpoles; they all start from there. And they said that sometimes Ngai likes to take a walk in the mountains and the forests. If anyone used their machetes to cut down trees, it was said that the trees would bleed. You were only allowed to collect dry, fallen wood for fuel these forests full of fig trees.

In the same book in article captioned "Nature has Rights too" written by Vikram Soni & Sanjay Parikh, the rights of Nature have been explained, as under: - "Human rights commissions are obligatory vigilantes in all democracies. Human rights are about inequities between one set of human beings and another. These range from usurping the sovereign rights of one nation by another more powerful one, to more local violations. They arise when the rich and powerful exploit the poor and disenfranchised. They reveal themselves in violence against women, violence against members of lower caste and creeds and other such instances. They are horrible acts and are often portrayed graphically. Violations against nature can be equally appalling despite being viewed through the filter of 'environmental damage'. The Stockholm Declaration accepts the environment as part of basic human rights-the right to life itself.

In the book, “The Secret Abode of Fireflies, Loving and Losing Spaces of Nature in the City", in an article under the caption "Under the Banyan Tree" written by Devdutt Pattanaik, the importance of trees under Indian Mythology has been explained as under:

"Trees are sacred in India, and are often associated with a god or a godless. Some Scholars believe that it is the tree that was worshipped first; perhaps for its medicinal or symbolic purpose, and that the gods and goddesses came later. That may be the case, but today, trees are an integral part of a deity's symbolism. The mango tree, for example is associated with the Love God Kama, the tulsi plant is dear to Vishnu, bilva is associated with Shiva worship, blades of dhruva grass are offered to Ganesha, neem or margosa is sacred to the Mother Goddess, coconut and banana are associated with Lakshim.

The bayan tree is associated with Yama, the God of Death, and the tree is often planted outside the village near crematoriums. It is believed to be the abode of ghosts. Vetals and pisachas are supposed to hang from its many branches.

Indians knew that banyan tree as the vata vriksha. When the British came to India, they notices that members of the trading or Bania community gathered under a large shady fig tree, which they named the banyan, from Bania. Technically, Ficus bengalensis, the banyan, belongs to the fig

family. There are various types of fig trees all over the world and some of these are sacred. The most popular one is the Ficus religiosa, or the peepul which became especially popular in the Buddhist times, because it was under this tree that Gautama Siddhartha of the Sakya clan attained enlightenment. It was the leaves of a fig tree that Adam and Eve used to cover their nakedness in Eden after they were tempted to eat the forbidden fruit by Satan.

The banyan tree does not let a blade of grass blow under it. Thus, it does not allow for any rebirth and renewal. While the banyan offers shade from the sun, it offers no food. That is why it is not part of fertility ceremonies like marriage and child birth where food-giving, rapidly renewing plants with a short lifespan such as banana, mango, coconut, betal, rice and even grass are included.

Marriage and rebirth are rites of passage; they represent major shifts in life. They are all about instability and flux; the banyan tree is the very opposite. It is stable and constant. It has a long lifespan, and hence seems immortal. Its roots descend from the branches and then anchor the tree to the ground, transforming into trunks eventually, so that decades later, it is difficult to distinguish root from stem. Things that evolve the notion of immortality become auspicious in India; for example, the immoral mountain, the immortal sea, the immortal diamond and indestructible ash. This is because since ancient times, Indian seers were acutely aware of the transitory nature of things around us. Everything dies-every plant, every animal, even moments die; the present becomes the past in an instant. In an ever-changing world, we seek constancy and permanence. The banyan tree is therefore worthy of veneration. It is evergreen and shady, hence an eternal refuge for all creatures unable to bear the vagaries of life.

Thus, it emerges that in Indian though, there are two types of sacredness- one that is associated with impermanent material reality, and the other, which is associated with permanent spiritual reality. The banana and the coconut fit into the previous category; the banyan fits into the latter. Banana is the symbol of flesh, constantly dying and renewing itself. Banyan is the soul-never needing to renew itself. The banyan is the botanical equivalent of the hermit.
Just as a hermit cannot raise a family, a banyan tree cannot support a household. It represents not the material aspiration of a people; it represents the spiritual aspiration. The banyan tree is said to be immortal; it is akshaya, that which survives parlaya, the destruction of the whole world.

The Mahabharata tells the story of a woman called Savitri, who lost her husband, as destined one year after her marriage near a banyan tree. She followed Yama to the land of the dead, and through determination and intelligence, managed to secure back her husband's life. In the memory of the event, Hindu women circle the banyan tree, tying seven stings around it. This is imitative magic; by symbolically going around the immortal tree, the women are binding immortality into their married lives. They are securing the lives of their husbands, the pillars of their households. They are protecting themselves from widowhood, which is believed by most Hindus to be the worst fate for a woman. Under the banyan tree sat the sages of India - those who rejected the flesh and the material world and aspired for the soul alone. This was the favourite tree of the sadhu, the wandering hermit. The greatest of hermits, Shiva, was often represented in its shade as stone called the Lingam. Being an ascetic, Shiva was not part of the village; he was a hermit, not a householder; he did not fear ghosts and so was comfortable staying in the shade of this immortal, never dying, and never renewing plant.

In iconography, Shiva is visualized as Dakhshinamurti, he who faces the South-South being the direction of death and change. He sits under the banyan tree, the botanical embodiment of the universal soul, facing the terror of death and change stoically, unafraid, because of his profound understanding of the world. At his feet sit sages who are recipients of Shiva's wisdom. In South Indian temples, Shiva's south facing form, under the banyan tree, is placed on the south facing wall of the temple. Like Shiva, Vishnu is also a form of God. But Vishnu is not associated with the banyan tree, perhaps because Vishnu is that aspect of God, which more associated with change. He goes with the flow- this attitude is called leela or playfulness- he does not fear change. Vishnu is therefore associated with the fragrant tulsi plant, or with flowering plants like champa and Kadamba. But there is one time when Vishnu is associated with the banyan tree. It is during the end of the world, when flood waters rise and dissolve all things. Sage Markandeya, who had a terrifying vision of this event, saw Vishnu as a baby lying on the leaf of banyan tree, cradled by the deadly waves. This form of Vishnu is called Vatapatra-Shayin, he who rests on the banyan leaf. The image is rich in symbols; the whole world may seem transitory, like the waves of the ocean, but all life can renew itself, as a baby replaces the older generation, because divine grace represented by Vishnu is eternal, like a banyan leaf."

The UN Conference on the Human Environment was held from 5 to 16 June, 1972 at Stockholm. It was convened pursuant to UN General Assembly Resolution 2398 of 3 December, 1968, on a proposal from Sweden. Delegates from 113 States attended the Conference, representing most of the UN membership with the exception of the USSR. The Conference call upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

II Principles States the common conviction that:

Principle 1 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2 The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3 The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

Principle 4 Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, 19 must therefore receive importance in planning for economic development.

Principle 5 The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

Principle 6 The discharge of toxic substances or of other substance and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported.

Principle 7 States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 8 Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 9 Environmental deficiencies generated by the conditions of underdevelopment and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

Principle 10 For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management, since economic factors as well as ecological processes must be taken into account.

Principle 11 The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Principle 12 Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environment safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

Principle 13 In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

Principle 14 Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

Principle 15 Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned.

Principle 16 Demographic policies which are without prejudice to basic human rights 20 and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment or development, or where low population density may prevent improvement of the human environment and impede development.

Principle 17 Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with a view to enhancing environmental quality.

Principle 18 Science & technology, as part their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common common good of mankind.

Principle 19 Education in environmental matters, for the younger generations as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminate information of an educational nature on the need to protect and improve the environment in order to enable man to developing every respect.

Principle 20 Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.

Principle 21 States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 22 States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Principle 23 Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

Principle 24 International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

Principle 25 States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment.

Principle 26 Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.
The world charter for Nature sought to have its guiding principles given effect through National legislation and international practice. These principles include respect for nature, safeguarding of habitats necessary to maintain sufficient population levels for the survival of all life forms, protection of unique areas, representative samples of all ecosystems and of habitats of rare or endangered species.

In the book of Forest Futures (Global Representations and Ground Realities in the Himalayas) authored by Antje Linkenbach has made following pertinent observations on the concept of Chipko Andolan which was nationally and internationally acclaimed:

"With the global emergence of the ecological debate the fame of the Chipko Andolan (i.e. the 'hug the trees' movement) spread in India and abroad. This andolan was represented national and internationally by two of its leading figures, Chandi Prasad Bhatt, and, especially, Sunderlal Bahuguna. Both received several awards for their ecological commitment and are widely accepted as spokesman in ecological matters. Chipko developed into a popular subject in print and audio-visual media; it has been taken up as an issue in academic debates; it served and still serves political and ideological arguments. Numerous publications have dealt with, or have at least referred to, Chipko's incidents. And differing re-presentations of the Chipko anodlan show that the movement became instrumental for various interest groups: it has been presented to the public as an 'ecological movement, as a 'peasant movement' with ecological impact, as a 'women's or eco-feminist movement' as a 'Gandhian movement' (forest satyagraha). In most of these publications a protective ('ecologically friendly') attitude is assumed to guide traditional relations with nature and the social practices of the people in Uttarakhand, who, accordingly, are believed to perceive environmental degradation as primarily an ecological problem."

According to the author, there are three most effective representations of Chipko Andolan which consist of Peasant movement, Ecological movement and Eco- feminist movement.

Author has translated Chipko song, composed and sung by Women of Lata which is as under :-

"Hey, didi, hey bhulli, let us all unite and with our own efforts let us save our jungle. The maldars and thekedars want to make money. Our cows and our cattle, they go to the jungle and with them our young people. Hey, Rishi Maharaj, come and show yourself with your real power. Chase for away the 600 trucks heavily loaded, and along with them drive back the strangers. Hey, Lata Bhagvati, come and show yourself with your real power, chase for away the maldars and thekedars. When our jungle is saved, only then will return (to our villages).

The Tilari Declaration was adopted by the people on 30.05.1968 in the memory of the martyrs who laid down their lives for the protection of the forest rights on 30.05.1968.
"Forests have been the basis of our cultural and economic life from the very beginning of this civilization. Our main duty is to protect the forest. We declare our birthright as being to fulfil our basic needs through forest products, through the forest, and to get employment from the forest. The harmonious relationship to the forest which is the basis of our happiness and prosperity should be permanent, for it is essential. The first use of forest wealth should be for the happiness and prosperity of the forest dwellers, of the people living near the forest. The forest products which are of daily use and which are used for village industries should be easily available for everybody. Forest industries based on forest products should be established near the forest.
The present system of forest exploitation by the contractors should be replaced with forest labour co-operatives of the local people. In order to link love with knowledge about the forest in forest areas, botany and geology should be a part of curriculum at every stage of education in forest areas. Their peaceful movement and brave martyrdom may inspire us and keep us alert for the protection of forest and forest rights. So we take a pledge to celebrate this day as 'Forest Day'.

Learned author has reproduced Chipko slogans as under: -

- Protection of forests means protection of the country! (Vanon ki raksha, desh ki raksha)

- This is the call of Uttarakhand-forest rights in panchayats hands!

(Uttarakhand ke yeh lalkar, panchayaton ko van adhikar) Stop our exploitation by the contactor system! Daily earnings from forest wealth - this is a right of forest dwellers! (Van sampada se rozgar, vanvasiyon ka adhikar) Learned author has also translated Chipko Song composed by Ghanshyam Shailani which reads as under:

"Brothers and Sisters from the hills! Let us all gather and unite.
Let us be ready to save our beloved jungle from the government's forest policy. Through auctioneers and contractors all the forests have been cut away.
Bad times have come and in the hills the forest has been destroyed. The whole benefit of the jungle has been taken away by contractors. For years, we have cared for the forest and for long we have protected the jungle. Today the rich capitalists are cutting forests and accumulating wealth, And young people of the hills, who have real rights to the forest go to the plains and wash their dishes.

Today the factory for resin processing is located in Bareilly, but the resin, the law material, they get from here; and the whole profit goes to the Bareilly resin factory in order to earn more wealth from the chir pines deep wounds were cut in them and resulted in too many trees dying.
The government and the rich capitalists together are sweeping the jungle clear, and nobody worries about plating new trees. Instead, the Forest Department has become the destroyer of forests. To save the jungle there are no hopes, to save the jungle there are no words. Cling to the trees and don't let them be cut! Don't let the forest's wealth be plundered! Through the establishment of small forest-based industries benefit will come to the hill region, and through it fortune and prosperity to forest dwellers. Everywhere in the hills socialism will come and from village to village the sound of the conch* will be heard.

The contribution of Sri Sunderlal Bahuguna is discussed as under:-

"In sum, Bahuguna's alternative concept of development is marked by an emphasis on sustainability and ethics which lead to an attitude towards nature instructed b worship and respect. To achieve sustainability, care for posterity should get at least that much, if not more' (1990:12). Therefore, the contract between the generations', to put it in the words of Jonas and King, demands not exploiting or over exploiting non-renewable as well as renewable resources. This alternative does not dismiss science and technology, but demands they be guided by 'wisdom', which is neither contained in volumes of books nor in the minds of great professors, but in the lives of the common people' (1992:9). And this wisdom lies, in part, in 'switching over from agriculture to tree farming' (1992:10). Such farming would not propagate species which are useful for commercial purposes:
The tree cover around the villages should be such as to provide food to human beings and fodder to the cattle. Priority should be given to trees yielding edible seeds, nuts, oilseeds, honey and seasonal fruits. In higher altitudes, above 1500 metres, soft walnut, sweet chestnut, hazelnut and wild apricot can be successfully cultivated. In lower altitudes mango, amla, bael, and jamun [indigenous names of local fruits] will thrive. An average hill family will need 300 nuts/fruits, 1500 fodder and 200 fibre trees (mulberry, ringal and bamboo) to be self-sufficient.(1989c:8).
Forest fires emanate carbon-dioxide posing serious threat to environment and ecology. It is the human beings who have encroached upon the forest land of wild animals. The habitat of wild animal is shrinking 39 resulting in wild animals coming in contact with the human beings.

The preamble and principles formulated by United Nations Conference on Environment and Development states that the forestry issues and opportunities should be examined in a holistic and balanced manner within the overall context of environment and development, taking into consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stress when these uses are constrained or restricted. All types of forests embody complex and unique ecological processes which are the basis for their present and potential capacity to provided resources to satisfy human needs as well as environmental values. Forests are essential to economic development and the maintenance of all forms of life. Forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual human needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. Appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests

and diseases, in order to maintain their full multiple value. The provision of timely, reliable and accurate information on forests and forest ecosystems is essential for public understanding and informed decision-making and should 40 be ensured. Governments should promote and provide opportunities for the participation of interested parties, including local communities and forest dwellers and women, in the development, implementation and planning of national forest policies. National policies and strategies should provide a framework for increased efforts, including the development and strengthening of institutions.

The vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels should be recognized. National forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. The full participation of women in all aspects of the management, conservation and sustainable development of forests should be actively promoted. The forests play an important role in meeting energy requirements through the provision of a renewable source of bio-energy. The role of planted forests and permanent agricultural crops as sustainable and environmentally sound be recognized, enhanced and promoted. Their contribution to the maintenance of ecological processes, to offsetting pressure on primary/old-growth forest and to providing regional employment and development with the adequate involvement of local inhabitants should be recognized and enhanced. Natural forests also constitute a source of goods and services, and their conservation, sustainable management and use should be promoted. Efforts should be made for increasing the forest 41 productivity.

National policies and/or legislation aimed at management, conservation and sustainable development of forests should include the protection of ecologically viable representative or unique examples of forests, including primary/or-growth forests, cultural, spiritual, historical, religious and other unique and valued forests of national importance. National policies should ensure that environmental impact assessments should be carried out where actions are likely to have significant adverse impacts on important forest resources. National policy should be formulated with respect to all types of forests taking into account of the pressures and demands imposed on forest ecosystems.

Lord Gautam Budha and Lord Mahavira also sat under the trees for enlightenment. The trees in India are worshipped as incarnations of the goddess: Bamani Rupeshwari, Vandurga. The goddess of the forest, Aranyi, has inspired a whole body of texts, known as 'Aranyi Sanskriti'. It means, "the Civilisation of Forest".

Animals and birds are trapped in the fire.
Birds lose their sense of direction due to heavy smog.
It is the human beings who have encroached upon the forest land of wild animals. The habitat of wild animal is shrinking resulting in wild animals coming contact with the human beings.
Trees and wild animals have natural fundamental rights to survive in their natural own habitat and healthy environment.

Mr. Praveen Kumar apprised that in compliance of the judgment rendered by this Court, a sum of Rs.662.00 crore has been released for setting up of Sewage Treatment Plants etc. He further apprised the Court that a sum of Rs.200.00 crore has also been released for rejuvenation of River Ganga as per the judgment of this Court. Thus, a total sum of Rs.882.00 crore has been released

by the Union of India for the rejuvenation of River Ganga. He further apprised the Court that 18 Crematoriums are under construction and tender process for 10 Crematoriums has started and construction of 40 Crematoriums is under pipeline.

Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange has drawn the attention of the Court to the Notification issued by the Government of India on 7.10.2016, whereby, the Ministry of Water Resources, River Development and Ganga Rejuvenation has issued the River Ganga (Rejuvenation, Protection and Management) Authorities Order, 2016.

Rivers and Lakes have intrinsic right not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to person.

Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system. The rivers are not just water bodies. These are scientifically and biologically living.

The rivers, forests, lakes, water bodies, air, glaciers, human life are unified and are indivisible whole. The integrity of the rivers is required to be maintained from Glaciers to Ocean.
However, we would hasten to observe that the local inhabitants living on the banks of rivers, lakes and whose lives are linked with rivers and lakes must have their voice too.

The rivers sustained the aquatic life. The flora and fauna are also dependent on the rivers.
Rivers are grasping for breath. We must recognize and bestow the Constitutional legal rights to the 'Mother Earth'.

The very existence of the rivers, forests, lakes, water bodies, air and glaciers is at stake due to global warming, climate change and pollution.

Trees are the buffer zone necessary to protect the glaciers from direct and indirect heat. One tree sustains life of thousand of insects. Birds chirp and make their nests on the trees. Trees are mini-reservoirs and have a capacity to store the water. The water stored by the trees is released slowly. The Oak tree preserves about 75,000/- gallon of pure water. Plucking of one leaf, grass blade also damages the environment universally.

The leading civilizations have vanished due to severe droughts. Water is elixir of life and we must conserve and preserve every drop of water. The value of water should not be undermined only for the reason that it is still available in plenty.

The past generations have handed over the 'Mother Earth' to us in its pristine glory and we are morally bound to hand over the same Mother Earth to the next generation.
With the development of society where the interaction of individuals fell short to upsurge the social development, the concept of juristic person was devised and created by human laws for the purposes 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. For a bigger thrust of socio-political-

scientific development, evolution of a fictional personality to be a juristic person becomes 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 63 subserving the needs and faith of the society. All the persons have a constitutional and moral responsibility to endeavour to avoid damage or injury to nature (in damno vitando). Any person causing any injury and harm, intentionally or unintentionally to the Himalyas, Glaciers, rivers, streams, rivulets, lakes, air, meadows, dales, jungles and forests is liable to be proceeded against under the common law, penal laws, environmental laws and other statutory enactments governing the field.

Corpus Juris Secundum, Vol.6, page 778 explains the concept of juristic persons/artificial persons thus: "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." A juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons. Juristic persons being the arbitrary creations of law, as many kinds of juristic persons have been created by law as the society require for its development. (See Salmond on Jurisprudence 12th Edition Pages 305 and 306). Thus, the Himalayan Mountain Ranges, Glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs are required to be declared as the legal entity/legal person/juristic person/ juridicial person/moral person/artificial person for their survival, safety, sustenance and resurgence.
Miscellaneous Application (CLMA 2924/2017) By way of this application, it is stated by the petitioner that despite the judgment of this Court, still beggars are found on the Ghats of Haridwar.

The District Magistrate, Haridwar is directed to ensure that the Beggars are not allowed to be present on the Ghats. The application stands disposed of.

Accordingly, the following directions are issued: -

1. The Union of India is directed to complete the tender process of 10 Crematoriums within eight weeks. Codal formalities for remaining 40 Crematoriums be also completed within three months.

2. We, by invoking our parens patriae jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/juridicial person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights.

3. The Chief Secretary, State of Uttarakhand, Director NAMAMI Gange Project, Mr. Praveen Kumar, Director (NMCG), Mr. Ishwar Singh, Legal Advisor, NAMAMI Gange Project, Advocate General, State of Uttarakhand, Dr. Balram K. Gupta, Director (Academics), Chandigarh Judicial Academy and Mr. M.C. Mehta, Senior Advocate, Hon. Supreme Court, are hereby declared the persons in loco parentis as the human face to 65 protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles,

forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand. These Officers are bound to uphold the status of these bodies and also to promote their health and well being.

4. The Chief Secretary of the State of Uttarakhand is also permitted to co-opt as many as Seven public representatives from all the cities, towns and villages of the State of Uttarakhand to give representation to the communities living on the banks of rivers near lakes and glaciers.

5. The rights of these legal entities shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harm/injury caused to the human beings.

6. There shall be a direction to the respondent no.2 to strictly comply by the judgment dated 02.12.2016 and to ensure that the industries, hotels, Ashrams and other establishments, which are discharging the sewerage in the rivers, are sealed.

7. Now, as far direction no.'A', issued vide judgment dated 02.12.2016, is concerned, the Union of India is directed to reconcile the constitution of Inter-State Council under Article 263 of the Constitution of India vis-à-vis the Statutory Authority created under Section 3 of the 66 Environment (Protection) Act, by making it Ganga specific, and the decision, to this effect, be taken within six months instead of one month, as undertaken by Mr. Praveen Kumar, Director (NMCG).

The Court appreciates the timely release of a sum of Rs.862.00 crores by the Union of India. The Court also places on record its appreciation for the sincere concern shown by Ms. Uma Bharti, Minister, Water Resources, River Development & Ganga Rejuvenation, Dr. Amarjit Singh, Secretary, Ministry of Water Resources, River Development & Ganga Rejuvenation, Mr. U.P. Singh, Director General (NMCG), Mr. Praveen Kumar, Director (NMCG) and Mr. Ishwar Singh, Legal Advisor, NAMAMI Ganga Project for their untiring efforts made to save River Ganga in particular and environment in general.

All pending applications stand disposed of in the above terms.

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

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[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

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"

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.

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

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.

* * * * *

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.

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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.

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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 — *Asvāmi-pratikrośe 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.*

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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

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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.

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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.

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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.

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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.

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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

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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.

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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-

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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.

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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.

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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.

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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.

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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-

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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).

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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.

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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.

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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.

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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

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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.

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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.

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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 *Saraswatīvilāsa*, p. 324.

4) 704.

5) q. by *Vyavahāranirṇaya*, p. 350.

6) V. 2.

7) *Social and Rural Economy*, p. 32.

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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 saṁcinoti*. 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.

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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.

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CHAPTER XXVII

DĀYABHĀGA*

(Partition of wealth)

The word *dāya* has been used even in the oldest period of the Vedic Literature. Rg. II. 32. 4 (*dadātu vīram śatadāyamukthyam*) has already been quoted above (on p. 388). In Rg. X. 114. 10 (*śramasya dāyam vibhajantyebhyaḥ*) the meaning of the word seems to be 'a share' or 'reward'. In the Tai. S. and the Brāhmaṇas the word dāya appears to be employed in the sense of 'paternal wealth' or simply 'wealth'. In the story of Nābhānediṣṭha[1010] it is stated that Manu divided his *dāya* among (for) his sons' (Tai. S. III 1. 9. 4). That 'dāya' here stands for 'dhana' follows from another passage of the Tai. S. (II. 5. 2. 7) 'Therefore they distinguish (or establish) the eldest son by wealth'. In the Tāṇḍya Brāhmaṇa[1011] 16. 4. 3–5 also it is said 'Therefore whoever among (a man's) sons secures the best or major portion of wealth as *dāya*, him they regard as the son who would be the lord of all'. Another word viz. *riktha* occurring in the sūtra and smṛti literature is also employed in the Ṛgveda[1012] III. 31. 2 'the son of the body does not give to his sister the ancestral wealth, but makes her the receptacle for the son of her husband'. The word *dāyāda* (meaning a co-sharer, one who takes a share) occurs frequently in the Vedic Literature. In the Tai. S. VI. 5. 8. 2[1013] it is said 'Therefore women being destitute of strength take no portion (of Soma)

1010. मनुः पुत्रेभ्यो दायं व्यभजत् । तै. सं. III. 1. 9. 4; तस्माज्ज्येष्ठं पुत्रं धनेन निरवसाययन्ति । तै. सं. II. 5. 2. 7. आप. ध. सू. (II. 6. 14. 11–12) quotes both these texts when combating the view that the eldest son gets the entire ancestral wealth. For the story of Nābhānediṣṭha with slight variation, vide Ait. Br. 22. 9, which is an attempt to explain the obscure hymns Rg. X. 61–62.

1011. तस्माद्यः पुत्राणां दायं धनतमामिवोपैति तं मन्यन्ते धनेवेदं भविष्यतीति । ताण्ड्य 16. 4. 3–4.

1012. न जामये तान्वो रिक्थमारैक् चकार गर्भं सनितुर्निधानम् । ऋ. III. 31. 2. This is explained in Nir. (III. 6) as 'न जामये भगिन्यै ... तान्वः आत्मजः पुत्रः रिक्थं धनरिक्थम् आदात् । चकार एनां गर्भनिधानीं सनितुर्ईश्वरस्याहरत्व'.

1013. तस्मात्स्त्रियो निरिन्द्रिया अदायादीरिव पापान्सुस उपसितरं वदन्ति । तै. सं. VI. 5. 8. 2. दायाद् is derived as दायमादत्ते (from दा with आ).

and speak more weakly than even a wretched (low) man'. In the Atharvaveda V. 18. 6 Soma is said[1014] to be the *dāyāda* of the brāhmaṇas. Viśvāmitra invites Sunaḥśepa to share in the spiritual wealth (dāya) belonging to him (Ait. Br. 33. 5), calls upon his sons to follow him and states that he (Śunaḥśepa) would accept them, his wealth (dāya) and his learning[1015]. The Nir. III. 4 quotes or summarizes other Vedic passages in which the words dāya and dāyāda occur. In Pāṇini II. 3. 39 and VI. 2. 5 the word dāyāda occurs.

The principal heads discussed under the *vyavahārapada* called *dāyabhāga* are two, viz. partition and inheritance. For at least a thousand years there have been two schools that widely differ on these two heads; they are respectively known as the school of the Mitākṣarā and that of the Dāyabhāga on account of the pre-eminent position of these works in the respective schools. The latter school is predominant in Bengal while the former prevails in the whole of India excepting Bengal. But even in Bengal there are in modern times families governed by the law of the Mitākṣarā. This work in intention and scope does not profess to be a treatise on modern Hindu Law. It concerns itself with pointing out what the law of the Smṛtis and writers of medieval digests was and has to eschew an exhaustive discussion of the modern case-law and legislative enactments that have made the Hindu Law appear in many respects to be entirely different from the law of the commentaries and digests. Generally speaking, only very important divergences made by legislation and case law in the ancient and medieval Hindu Law can and may be pointed out here.

The principal Sanskrit works of the Dāyabhāga school are three viz. the Dāyabhāga of Jīmūtavāhana, the Dāyatattva of Raghunandana and the Dāyakramasaṅgraha of Śrīkṛṣṇa Tarkālaṅkāra. The Mitākṣarā school is subdivided into four sub-schools in which besides the Mitākṣarā, the supreme authority, other works are referred to as supplementary to it and as modifying some of its doctrines viz. the Benares school (which regards the Viramitrodaya as of high authority), the

1014. न ब्राह्मणो हिंसितव्योग्निः मियसनोरिव । सोमो ह्यस्य दायादः इन्द्रो भ्रात्रभिजस्तिपाः । अथर्व V. 18. 6.

1015. उपेमा देवं मे दायं तेन दै स्वोपमन्त्रय इति । ऐ. ब्रा. 33. 5; एव वः कुशिकाः वीरो देवरातस्तमन्वित । युष्मांश्च दायं म उपेता विधा चातु च विद्मसि । ऐ. ब्रा. 33. 6.

Mithilā school (which relies on the Vivādaratnākara, the Vivādacandra and the Vivādacintāmaṇi), the Mahārāṣṭra or Bombay school (where the Vyavahāramayūkha is of the highest authority in Gujerat, Bombay Island and Northern Konkan even superseding the Mitākṣarā in some matters and the Vīramitrodaya and the Nirṇayasindhu are also relied upon), the Dravida or Madras school (where the Smṛticandrikā, the Vyavahāranirṇaya of Varadarāja, the Parāśara-mādhavīya and the Sarasvatīvilāsa are also works of authority). In spite of some differences in the rules accepted in different provinces in all of which the Mitākṣarā is of high authority, all the provinces except Bengal are held to be governed by one school. Vide *Ambabai* v. *Keshav* I. L. R. (1941) Bom. 250.

The words *dāya* and *vibhāga* have been variously defined in the digests. Nār. (*dāyabhāga*, verse 1) defines the vyavahārapada dāyabhāga as one in which sons arrange for the partition of their father's wealth. The Madanaratna as noted by the V. Mayūkha (text p. 94) reads 'arthasya pitryādeḥ' (wealth of the father and others) for 'pitryasya' in Nārada's verse. The Smṛtisaṅgraha quoted in the Sm. C. and other works states that the word dāya applies to wealth that comes to a man through the father or the mother and the Nighaṇṭu defines dāya as the paternal wealth that is to be divided.[1016] The Dāyabhāga, the Mit. and others explain that the words 'pitryasya' (father's) and 'putraiḥ' (by the sons) in Nār. are only illustrative, the real meaning being that the word 'dāyabhāga' applies wherever the wealth of a relative (father, grand-father &c.) is distributed among his relatives (sons, grandsons &c.) simply on account of their relation to the deceased[1017] owner. This is borne out by the fact that Manu and Nārada both speak of the distribution of the mother's wealth also under dāyabhāga. The Mit. while introducing Yāj. II. 114 says that the word *dāya* means the wealth which becomes another's property simply by reason of the fact of his relation to the owner. The V. Mayūkha (p. 93) defines dāya as that wealth which is to be divided and which is not the wealth of re-united members.

1016. विभक्तव्यं पितृद्रव्यं दायमाहुर्मनीषिणः। निघण्टु q. by स्मृतिच. II. p. 255, व्य. म. p. 93; पितृद्वारागतं द्रव्यं मातृद्वारागतं च यत्। कथितं दायशब्देन तद्विभागोधुनोच्यते॥ स्मृतिसंग्रह q. by स्मृतिच. II. p. 255, व्य. म. p. 93.

1017. पित्रवस्येति पुत्रैरिति च द्वयमपि सम्बन्धिमात्रोपलक्षणं सम्बन्धिमात्रेण सम्बन्धिमात्रधनविभागेपि दायभागपदप्रयोगात्। दायभाग I. 3; तत्र दायशब्देन यद्धनं स्वामिसम्बन्धादेव निमित्तादन्यस्य स्वं भवति तदुच्यते मिता.; असंसृष्ट विभजनीयं धनं दायः। व्य. म. p. 93.

The word 'dāya' though derived from the root 'dā' (to give) does not apply to 'heritable wealth' in the literal sense (of gift).[1018] The word dāya is rather conventionally used, though derived from the root 'dā'. In a gift (as stated in H. of Dh. vol. II. p. 841) there are two chief ingredients viz. 'abandoning one's ownership over a thing' and 'bringing about the ownership of another in that thing'. But in the case of dāya the deceased does not of his own accord abandon his ownership with the idea of creating ownership in another. The two (dāna and dāya) are analogous in this that in both there is cessation of the ownership of a man in a thing.

The Mit., the Par. M., the Madanaratna, the V. Mayūkha, the V. P. and other works that follow the doctrines of the Mit. divide dāya into two varieties viz. *apratibandha* (unobstructible)[1019] and '*sapratibandha*' (obstructible). The first occurs in the case of sons, grandsons and great-grandsons, who, by the very fact of their being the sons or grandsons, obtain ownership in the (ancestral) wealth held by the father or the grandfather. In this case the existence of the father or grandfather presents no obstacle (*pratibandha*) to the son's or grandson's taking an interest by the very fact of his birth in the family property that is in the hands of the father or grandfather. Therefore this is called *apratibandha dāya*. But when a man takes the wealth of his paternal uncle or a father succeeds to the wealth of his son because the uncle or the son dies issueless, it is *sapratibandha dāya*, as in these cases the nephew or the father has no right in the uncle's or son's property as long as the uncle or the son is alive or as long as the uncle or son has a son or grandson. That is, the life of the owner or the existence of a son presents an obstacle to the nephew's or father's succession. Hence it is *sapratibandha dāya*.

It is to be noted that the Dāyabhāga, the Dāyatattva and a few other works do not divide dāya into two kinds. According

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1018. दीयते इति व्युत्पत्त्या दायशब्दो ददातिप्रयोगश्च गौणः, सुतमव्रजितादिस्वत्व-निवृत्तिपूर्वकपरस्वत्वोत्पत्तिफलसाम्यात् । न तु सुतादीनां तत्र त्यागोस्ति । ततश्च पूर्वस्वामि-सम्बन्धाधीनं तत्तद्रव्योपरमे यत्र अन्ये स्वत्वं तत्र निरूढो दायशब्दः । दायभाग I. 4–5. Vide दायतत्त्व pp. 161, 163 for almost identical words. The व्य. म. (pp. 411–12) quotes these words and criticizes them.

1019. अयं च दायो द्विविधः सप्रतिबन्धोऽप्रतिबन्धश्चेति । यद् द्रव्यं स्वामिनस्तनुजादेरप्यभावे स्वं भवति स सप्रतिबन्धो दायः । यथा पित्रादीनां पुत्रादिधनम् । यत्पुत्रपौत्रयोः पितृपितामहधनं जन्मन आरभ्य स्वं भवति सोऽप्रतिबन्धो दायः । तत्र स्वामितत्पुत्रसद्भावरूपा-प्रतिबन्धकत्वात् । मदनरत्न (व्य. folio 89).

to them, all dāya is *sapratibandha* i. e. ownership arises in another only on the death of the previous owner[1020] or on the cessation of the latter's ownership owing to his becoming *patita* or a *sannyāsin* (ascetic).[1021] The doctrine of this school is called *uparamasvatvavāda* (ownership arising on death), while the school of the Mit. holds the view of *janmasvatvavāda*. This is the great difference between the school of the Dāyabhāga and that of the Mitākṣarā. The former does not recognise that the son, grandson or great-grandson acquires by birth any right of ownership in the ancestral property held by the father or other ancestor.

The two words '*sva*' and '*svāmin*' are correlative, the idea underlying both is the same and they are two aspects of the same question. 'Sva' means 'what belongs to a person' i. e. 'property'. It has direct reference to a thing and indirect reference to the owner of the thing. 'Svāmin' means 'master or owner' and directly refers to the person owning and indirectly to the thing. Vide Salmond's Jurisprudence, chap. XII. pp. 339-340 (9th ed. of 1937) for the idea of ownership. According to Śiromaṇibhaṭṭācārya *svatva* is a separate *padārtha* (category) by itself, while others say that it is a capacity.[1022]

1020. अतो जीवतोः पित्रोर्धने पुत्राणां स्वाभ्यं नास्ति किं तूपरतयोरिति ज्ञापनार्थं मन्वादिवचनम् । एकः शब्दोऽपरार्थः । न चोपरममात्रमेव विवक्षितं किंतु पतितप्रव्रजितत्वाद्युपलक्षयति स्वत्वविनाशहेतुतासाम्यात् । दायभाग I. 30-31, p. 18 : the वि. ता. (folio 99) says 'ते (जीमूतवाहनादयः) सर्वत्र सप्रतिबन्धस्यैव दायस्य सत्त्वात् रिक्थसंविभागयोर्भिदाभावात् पूर्वोक्तयुक्तिविरोधान्मूर्खा एव'.

1021. It is to be noted that becoming *patita* entailed loss of the ownership of wealth, even according to Indian writers, only if the proper prāyaścittas were not performed. For example, the V. P. (p. 429) states 'पातित्ये तु प्रायश्चितानाचरण एव स्वत्वनाशो विभागानर्हता च । अन्यथा द्रव्यसाध्यं प्रायश्चित्तमपि पित्रोः स्वद्रव्येण न स्यात् ।' Ancient and medieval Hindu jurists were very considerate if one compares their prescriptions with the harsh laws against Non-conformists and Roman Catholics prevalent only about a hundred years ago in England and Ireland as briefly disclosed in Pollard's work 'Conscience and Liberty' pp. 46-48. The Caste Disabilities Removal Act (XXI of 1850) provides that so much of any law or usage in force in British India, which inflicts on any person forfeiture of rights of property or may be held to impair or affect any right of inheritance by reason of his renouncing or having been excluded from the communion of any religion or being deprived of caste, shall cease to be enforced as law in British India. This act, therefore, did away with the effects of being *patita* without undergoing *prāyaścitta* or of being excommunicated by a caste for some grave lapse.

1022. स्वत्वं पदार्थान्तरमेवेति शिरोमणिभट्टाचार्याः । स्वमिति व्यवहारविषयत्वं शक्तिविशेषो वेत्यन्ये । तच्च स्वगन्यमिति केचित् । वि. ता. (ms.) folio 96.

Since in defining dāya the idea of *svatva* (ownership) was brought in, many of the digests enter upon a learned disquisition on the question whether *svatva* is to be understood from the *śāstra* alone or is a matter of popular understanding. There is also an ulterior purpose in the minds of some writers in this discussion, viz. that of denying that *svatva* can arise by mere birth. The reasoning of those who say that *svatva* is to be understood from śāstra alone is as follows: Gaut. (X. 39–42) lays[1022a] down five sources of ownership common to all viz. *riktha* (inheritance), purchase, partition, seizure, finding (of treasure and the like) and further states that in the case of brāhmaṇas acceptance of gifts is an additional source of ownership, conquest in the case of kṣatriyas, gain by agriculture and service in the cases of vaiśyas and śūdras respectively. If ownership were to be apprehended from means other than śāstras, then this text of Gautama laying down sources of ownership that are common to all varṇas and that are peculiar to each of the several varṇas would serve no useful purpose and would be superfluous. Further Manu (VIII. 340) states that if a brāhmaṇa seeks wealth even by teaching or officiating as a priest for a man whom he knows to be a thief, he would be punishable like a thief. If *svatva* is a matter of popular understanding then this is not proper, since the priest or teacher who obtains the wealth from one who is in possession of stolen things would have to be regarded as guilty of no offence as he merely pursues the methods of earning wealth specially prescribed for him by the smṛti texts. Further, if *svatva* is not to be apprehended from śāstra, such complaints as 'a thing that belongs to me has been stolen by this man' would not be possible, as svatva being a purely secular matter the thief would himself be (or would have to be deemed to be) the owner of the thing, because the latter is in possession of it. Thieving is forbidden by śāstra and so on the view of svatva being apprehended from śāstra alone, such a complaint is understandable[1023]. Besides eminent

1022a. स्वामी रिक्थक्रयसंविभागपरिग्रहाधिगमेषु । ब्राह्मणस्याधिकं लब्धं क्षत्रियस्य विजितं निर्विशं वैश्यशूद्रयोः । गौ. X. 39–42. The Mit. explains: तत्राप्रतिबन्धो दायो रिक्थम् । क्रयः प्रसिद्धः । संविभागः सप्रतिबन्धो दायः । परिग्रहोनन्यपूर्वस्य जलतृणकाष्ठादेः स्वीकारः । अधिगमो निधयादेः प्राप्तिः ।

1023. वर्तते यस्य यद्यस्ते तस्य स्वामी स एव न । अन्यस्वमन्यहस्ते तु चौर्याद्यैः किं न दृश्यते । तस्माच्छास्त्रत एव स्यात्स्वाम्यं नानुभवादपि । अस्यापहृतमेतेन न युक्तं वक्तुमन्यथा । विविधोर्थागमः शास्त्रे यथावर्णं पृथक् पृथक् । ... न च स्वमुच्यते तद्यत् स्वेच्छया विनियुज्यते । विनियोगोऽत्र सर्वस्य शास्त्रेणैव नियम्यते । संग्रह q. by स्मृतिच. II. pp. 256–257, मदनरत्न (folio 89), व्य. प्र. p. 416. The last notes that 'तथावर्णं पृथक् पृथक् is the reading of the मदनरत्न, but in my ms. of the मदनरत्न the reading is as in the स्मृतिच.

works and writers like the Smṛtisaṅgraha and Dhāreśvara[1024] support the view. Those who hold that svatva is known only from śāstra explain that riktha in Gautama's sūtra means simply dāya and saṁvibhāga means partition of dāya which establishes the separate ownership of a person on a portion of dāya (vide V. P. p. 415).[1025] They further urge that Gautama's text does not specifically mention birth as a source of ownership.

Others headed by the Mit. hold that *svatva* is apprehended from worldly usage and not from śāstra. Their reasoning is: (1) just as rice effects an ordinary worldly purpose, so svatva brings about worldly transactions such as sale. What is not owned by a man does not enable him to effect such worldly objects and transactions as sale or mortgage. Such matters as the Āhavanīya fire that are prescribed by the śāstras are not useful in effecting secular purposes, but only śāstric ones. The Āhavanīya fire may be used in cooking rice, but that is in virtue of its ordinary nature as fire and not in its śāstric nature of being the Āhavanīya fire.[1026] (2) Even among Mlecchas and lowest peoples who are quite innocent of the knowledge of śāstras, the ideas of ownership arising from transactions of sale and the like do exist. Further (3) learned men well-versed in

1024. एतत्संग्रहकारमतं धारेश्वरभट्टेनाप्याश्रितम् । मदनरत्न (folio 90); ग्रपश्चितं चैतद्धारेश्वरसूरिणा । स्मृतिच. II. p. 257. It is somewhat strange that Dhāreśvara who is no other than the celebrated king Bhoja of Dhārā should be styled *bhaṭṭa* by the Madanaratna and *ācārya* by the Mit. (on Yāj. III. 24) and the V. Mayūkha (p. 89).

1025. When a man dies his wealth is the dāya which several persons may inherit. In their case, it becomes their joint property. So their ownership, being joint, is denoted by the word 'riktha'. The joint owners become exclusive owners of definite parts of the dāya by partition; thus partition is a source of ownership (in this case exclusive ownership of distinct parts by several). But if there is a single heir then there can be no *saṁvibhāga* (partition) and so the source of his ownership is *riktha* and not samvibhāga. When there are several heirs riktha is on this view a source of joint ownership only. It must be said that on the hypothesis of Jīmūtavāhana, *riktha* and *saṁvibhāga* rather coalesce with one another and cannot be distinguished so well as on the theory of the Mit.

1026. *Vide* the Mit. (on Yāj. II. 114), V. P. pp. 419–422, V. Mayūkha pp. 89–90, Par. M. III. pp. 482–483 for elaboration of this view. The S. V. p. 396 ff while accepting the view that svatva is *laukika* does not accept the reasoning of the Mit., particularly with regard to the Āhavanīya fire.

the Mīmāṁsā such as Prabhākara[1027] (on Jaimini IV. 1. 2) and

1027. The Mit. (on Yāj. II. 114) quotes a passage of Prabhākara on the *lipsāsūtra* and explains it. Jaimini's sūtra (IV. 1. 2) is चोदितो धीतिः पुरुषस्य तस्य लिप्सार्थलक्षणाऽविभक्तत्वात्. In this sūtra the word *lipsā* occurs. Therefore this is called *lipsāsūtra*. The words अर्जनं स्वत्वं नापादयतीति विप्रतिषिद्धं occur in the Dāyabhāga also (II. 67 p. 49) and in Medhātithi on Manu VIII. 417. These words are quoted in the Mit. as taken from Prabhākara (called *Guru*) and so it follows that even Medhātithi quotes from Prabhākara. The earliest extant commentary of Śabara offers three explanations of this sūtra, which deals with the question of what is *kratvartha* and what is *puruṣārtha*. The third explanation concerns itself with the rules about acquiring wealth (which is necessary for performing every sacrifice) such as acceptance of gifts in the case of brāhmaṇas. The question is whether these rules about the means of acquiring wealth are kratvartha or puruṣārtha. If they are the former (i. e., if they are meant to be directly connected with the sacrifice) then a sacrifice performed with wealth not acquired according to the rules of śāstra will be defective or a nullity. But if the rules are puruṣārtha (i. e. addressed to the sacrificer only or to his conscience and sense of dharma) then even if the sacrifice is performed with wealth not acquired in accordance with śāstra there will be no defect in the sacrifice itself, only the acquirer will be at fault and may have to perform prāyaścitta. Says Śabara: एवं वा द्रव्यार्जनमुदाहरणम्। इह द्रव्यार्जनं तैस्तैर्नियमैः श्रूयते । ब्राह्मणस्य प्रतिग्रहादिना राजन्यस्य जयादिना वैश्यस्य कृष्यादिना । तत्र सन्देहः किं क्रत्वर्थो द्रव्यपरिग्रह उत पुरुषार्थ इति ।.

The Mit. points out that in the plausible view (pūrvapakṣa) and the established conclusion (siddhānta) it is assumed that acquisition of wealth by acceptance of gift is a matter known from worldly usage (*lokasiddha*). The comment of Prabhākara (called Guru) on this sūtra is not yet available in print. The Sm. C. II. pp. 257–258, the Madanaratna, and V. P. p. 420 quote a passage from the Nayaviveka of Bhavanātha on the same subject and explain it. The मदनरत्न says 'उक्तं चैतत्प्रपञ्चविवेके भावाकरमतानुसारेण भवनाथेन। लोकसिद्धं वा अर्जनं जन्मादि। अत एवानिन्द्यं प्रथमश्लोकधीविषयतया स्थिते नियन्धनार्था (°विषयतया व्यवस्थितनियन्धनार्था ?) स्मृतिर्व्याकरणादिस्मृतिवत्.' The passage as printed in V. P. p. 420 (अत एवानिन्द्यं प्रथमश्लोकधीविषयव्यवस्थितं तन्निबन्धनार्था स्मृतिः) is corrupt and hardly makes any sense. The V. Mayūkha simply refers to Bhavanātha without quoting him. The वि. ता. (folio 98) remarks 'मीमांसकैरप्युक्तं प्रतिग्रहादिनियमानां पुरुषार्थत्वं तेन विना अर्जितद्रव्ये पुरुषस्यैव दोषः क्रतुसिद्धिर्भवत्येव ।' Vide H. of Dh. vol. II. pp. 129–130 for quotations from several smṛtis laying down various means of livelihood. Manu X. 115 enumerates seven sources of wealth as sanctioned by śāstra viz. finding (of treasure), *dāya* (inheritance), purchase, conquest, lending for interest, work (agriculture and trade), acceptance of a gift from a worthy person and in X. 116 mentions ten means of maintaining oneself (in distress). The Mahābhāṣya (vol. I. p. 483) on Pāṇ. II. 3. 50 states that a thing becomes one's own in four ways viz. by purchase, by seizure, by begging or by exchange 'यद्येतत्स्वं नाम चतुर्भिरेतत्प्रकारैर्भवति क्रयणात्प्रहरणाद्याचनाद्या विनिमयाद्वेति.' It must be remembered that the enumeration of the means of acquiring property in the dharmaśāstra works is not exhaustive but only illustrative.

Bhavanātha, author of the Nayaviveka, hold that ownership which springs from certain fixed sources only (such as purchase) is a matter of worldly usage or experience. Bhavanātha says: the sources of acquisition such as birth and purchase &c. are known from the world. The conception about the sources of ownership was not started for the first time by the śāstra, but such sources have been known from times immemorial (long before the smṛtis). That is, the recognition of the sources of ownership is prior and śāstra only systematises them subsequently. Therefore the smṛti of Gautama (X. 39) only assigns their proper spheres to the several sources of ownership that are already well-known (viz. five are common to all, acceptance of gifts is peculiar to brāhmaṇas and so on). In this respect it is like the grammar of Pāṇini. Pāṇini does not create or lay down new words but he takes the words already current in the language and introduces a system about their formation. Similarly Gautama only voices a certain fixed system among the several sources of ownership. The Mit. and its followers say that Gautama simply repeats the several sources of ownership known in ordinary worldly life (as the V. Mayūkha says 'lokasiddhakāraṇānuvādakam)'. The Mit., Par. M. III. p. 481, S. V. p. 402 and others hold that riktha and saṁvibhāga in Gautama's sūtra stand for apratibandha dāya and sapratibandha dāya respectively.[1028] The Mit. meets the other arguments of its opponents by replying that in the first place that even ordinary popular usage does not recognise that the thief becomes the rightful owner by simply possessing the thing stolen and that in the case where a person says 'this man has stolen my property' there is doubt and dispute whether the man charged has got ownership by purchase or the like.

The purpose of this discussion of the topic whether ownership is only known from śāstra or is a secular matter is, according to the Mit., as follows:—Manu XI. 193 (= Viṣṇu Dh. S. 54. 28) states that when brāhmaṇas acquire wealth by reprehensible actions (such as accepting a gift from an unworthy person or engaging in the sale of articles which he should not sell)

1028. The word *riktha* is often used in the sense of sapratibandha dāya also as in Gaut. XII. 37 (rikthabhāja ṛṇam pratikuryuḥ) and Yāj. II. 51 (rikthagrāha ṛṇam dāpyaḥ), Baud. (riktham mṛtāyāḥ kanyāyāḥ) q. by the Mit. on Yāj. II. 146. Vide *Bai Parson v. Bai Somli* 36 Bom. 424 at pp. 428–434 for an exhaustive exposition of the basic principles underlying the two kinds of dāya in the Mit. and the Vyavahāra-mayūkha).

they are purified from the sin by abandoning that wealth, by repeating the sacred texts (like the Gāyatrī) and by austerities. If ownership springs from śāstra alone, what is earned by a person in ways condemned by śāstra cannot become the property of that man and so his sons cannot divide what is not his property. But if ownership is deemed to be a secular matter (*laukika*) then even what is obtained by condemned means becomes the property of that man, his sons incur no blame (though the acquirer may have to perform penance) and can divide that wealth (which is dāya), since Manu X. 115 enumerates dāya among the seven approved sources of wealth. The Madanaratna does not approve of this. Its reason briefly is that Manu XI. 193 simply lays down a penance, but does not say that wealth so obtained does not become the acquirer's property, that it is on account of this that Manu does not prescribe any special fine or punishment for one who acquires wealth by means of a bad gift, as he prescribes for a thief and that what is acquired by theft does not become the property of the thief and his sons cannot divide it and would incur punishment if they do so. V. P. (pp. 423-424) refers to the views of the Mit. and the Madanaratna and approves of the views of the former.

This discussion leads on to the next question, viz. whether ownership arises from partition or whether partition takes place of what already belongs to oneself (by birth). This subject has exercised the minds of writers on Dharmaśāstra from very ancient times. It should be noted that the difference of opinion relates only to the case of sons, grandsons and great-grandsons. All writers are agreed that persons other than these have no rights by birth in the wealth of their relatives. Those who oppose the view that sons acquire right by birth argue as follows:—

If sons have ownership by birth in ancestral property, then, on the birth of a son, the father cannot enter upon such religious duties as consecrating Vedic fires (which entail the expenditure of ancestral wealth) without the consent of the son. This would be opposed to the Vedic injunction "a man, whose hair is yet dark and who has had a son, should consecrate the sacred Vedic fires". Further, Smṛti passages stating that a gift made by the father to one out of several sons as a favour (Nār. dāyabhāga 6) or by the husband to his wife out of affection is not liable to partition would be meaningless, since such gifts cannot be made without the consent of the sons (on the

theory that sons acquire property by birth). Besides, there are smṛti texts like those of Devala[1029] which expressly negative the son's ownership during the father's lifetime. Manu IX. 104 and Nār. (dāyabhāga 2) enjoining that sons should divide wealth after the father goes to heaven (because the sons are not masters when the parents are alive, as Manu says) indicate that sons have no ownership by birth. Moreover *svatva* is apprehended only from śāstras (like Gautama), which do not expressly enumerate birth as a source of ownership along with purchase and the like. Therefore the ownership of the son or sons arises on the cessation of the ownership of the previous owner (by his death or by his becoming *patita* or becoming an ascetic). When there is a single son, he inherits on the death of the father and there is no necessity of a partition. But when there are several sons, they jointly inherit paternal wealth and can become exclusive owners of separate parts of the paternal wealth by partition alone. As this last is the most usual case, it is said that *svatva* arises from partition (*vibhāgāt svatvam*). If this doctrine that ownership arises by partition alone were literally interpreted, then an only son inheriting his father's property will have no ownership as urged by the Vyavahāra-nirṇaya, since there can be no partition in his case[1030].

The arguments advanced by those who hold that ownership in ancestral wealth arises by birth are as follows:—

It has been established that ownership is a matter of ordinary worldly usage. It cannot be denied that it is quite well-known to all ordinary people that sons acquire ownership by birth. Besides there is the text of Gautama[1031] "the ācāryas hold that one acquires ownership by birth itself". Moreover there are numerous smṛti passages like those of Yāj. II. 121,

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1029. पितर्युपरते पुत्रा विभजेयुर्धनं पितुः। अस्वाम्यं हि भवेदेषां निर्दोषे पितरि स्थिते॥ देवल q. by दायभाग I. 18, p. 13, दीपकलिका (on या. II. 114), वि. र. p 456, परा. मा. III. p. 480.

1030. तथा विभागात्स्वत्वपक्षे एकपुत्रस्य मातापित्रोरूर्ध्वं विभागाभावात् स्वत्वं न स्यात् तेन कुलप्रवेशादेव पितृपैतामहद्रव्येपि पुत्रस्य स्वाम्यमस्त्येव। व्यव. नि. p. 412.

1031. तथा 'उत्पत्तयैवार्थस्वामित्वं लभेतेत्याचार्याः' इति गौतमवचनाच्च। मिता. on या. II. 114. This is variously read by the digests and commentaries. The Madanaratna, Sm. C. II. p. 258 and Dāyatattva p. 162 read उत्पत्तयैवार्थ स्वामित्वाल्लभेतेत्याचार्याः. The व्य. म. p. 89. reads °लभन्त इत्याचार्याः, while स. वि. reads 'उत्पत्तयैवार्थं स्वामित्वं लभत इत्याचार्याः' (p. 402). Both Sm. C. and S. V. explain 'उत्पत्तयैव मातृगर्भे शरीरोत्पत्तयैवेत्यर्थः', while the सुबोधिनी and the बालम्भट्टी on the मिताक्षरा explain उत्पत्तयैव as जन्मनैव.

Br. (S. B. E. 33 p. 370 verse 3), Kāt. (839), Vyāsa and Viṣṇu Dh.[1032] S. XVII. 2 which expressly state that in the paternal grandfather's wealth, the father and the son have equal ownership (and so the right of the son must be by birth). Those who uphold the son's ownership by birth repel the arguments advanced in favour of the opposite theory as follows :—The Vedic text enjoining consecration of Vedic fires at a certain age indicates that the father has the power to spend for religious rites from ancestral wealth even after the birth of a son. Similarly as head of the family and its manager, the father has independent authority to spend ancestral wealth (except immovable property) for indispensable acts of religious duty expressly enjoined by Vedic and Smṛti texts and for making gifts of affection, for maintenance of the family and for ridding the family of distress. Further the father or the manager of the family can dispose of even immovable property by mortgage or sale in a season of distress or for the benefit of the family and for necessary religious purposes (such as śrāddhas[1033] etc.)

Ownership has to be distinguished from possession and custody. Further ownership is of various kinds, such as corporeal and incorporeal, sole ownership and joint ownership, ownership as trustee and beneficial ownership, vested and contingent. Even Western writers on Jurisprudence like Austin, Pollock and Salmond, find it difficult to define the exact meaning of ownership. Austin (Lecture XLVII) defines

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1032. द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा । सममंशित्वमाख्यात पितुः पुत्रस्य चैव हि ॥ बृह. q. by दायभाग II. 50 p. 46, अपरार्क p. 728, व्यव. नि. p. 410, दीपकालिका, स. वि. p. 374, वि. र. p. 461, व्य. म. p. 98. This is ascribed to व्यास by स्मृतिच. II. p. 279. पैतामहं समानं स्यात् पितुः पुत्रस्य चोभयोः । स्वयं चोपार्जिते पित्रा न पुत्रः स्वाम्यमर्हति ॥ कात्या. q. by अपरार्क p. 725, व्यव. नि. p. 410, स्मृतिच. II. p. 279; क्रमागते गृहक्षेत्रे पितृपुत्राः समांशिनः । पैतृके न विभागार्हाः सुताः पितुरनिच्छतः ॥ व्यास q. by अपरार्क p. 728, व्यव. नि. p. 410, स. वि. p, 475 (reads पुत्रपौत्राः समांशिनः), वि. र. p. 461; पैतामहे स्वर्थे पितृपुत्रयोः तुल्यं स्वामित्वम् । विष्णुधर्मसूत्र 17. 2.

1033. तस्मात् पैतृके पैतामहे च द्रव्ये जन्मनैव स्वत्वम्, तथापि पितुरावश्यकेषु धर्मकृत्येषु वाचनिकेषु प्रसादव्यानकुटुम्बभरणापद्विमोक्षादिषु च स्थावरव्यतिरिक्तद्रव्यविनियोगे स्वातन्त्र्यमिति स्थितम् । स्थावरे तु स्वार्जिते पित्रादिभाते च पुत्रादिपारतन्त्र्यमेव । ... अत्यापत्कालः । एकोपि स्थावरे कुर्यादाधमनविक्रयम् । आपत्काले कुटुम्बार्थे धर्मार्थे च विशेषतः ॥ इति । मिता. on या. II. 114. This is the basic passage of the Mit. on which innumerable decisions have been given in the law reports, one of the latest and most authoritative being *Brij Narain v. Mangla Prasad* L. R. 51 I. A. 129 quoted on p. 448 above.

property or dominion as the right to use or deal with some given subject in a manner or to an extent, which though not unlimited, is indefinite. Pollock defines ownership as the entirety of the powers of use and disposal allowed by law. But the idea of ownership does not require, according to Sanskrit works on Dharmaśāstra, that the owner should always be able to do with his property as he pleases. On the contrary the śāstras lay down restrictions on the owner, enjoining upon him not to make gifts to the detriment of his family (vide Yāj. II. 175 "*svam kuṭumbāvirodhena deyam*" and the verse of the Smṛti-saṅgraha "*na ca svamucyate*" quoted in note 963 above). Therefore property does not comprise only what one can dispose of at one's sweet will, but what is capable (in appropriate circumstances only) of being disposed of as one[1034] likes. A person may be prevented from dealing with his property as he likes by the king or by the rules of śāstra, by public opinion, by his own inclinations and by the pressure of those around him. But what he owns is theoretically capable of being disposed off by him as he likes. The Madanaratna puts forth the illustration that seeds kept dry in a granary do not sprout, yet they have the capacity of sprouting and so are as well denominated seeds as others that sprout. There are various grades of the limitations on property, such as the father's power, the widow's power and so on. What a person earns should belong to him, should be his property. But there are passages like Manu VIII. 416 and Nār. (abhyupetyāśuśrūṣā, verse 41) that state[1035] "three are declared to be without wealth viz. the wife, the son and the slave; whatever they earn is for him to whom they (wife, son and slave) belong". It has been stated

1034. न च यथेष्टविनियोज्यत्वं स्वत्वमिति वयं भ्रमः किं तर्हि यथेष्टाविनियोगेयोग्यत्वम्। तच्च शास्त्रे कुटुम्बभरणादिविनियोगनियमनेन विनियोगान्तरविषयतामलभमानस्याप्यर्जितत्वप्रयुक्तमस्त्येव। यथा कृतश्रिद्धेतोरङ्कुरोत्पादनमकुर्वतोपि कुशूलादिस्थितस्य बीजस्य बीजत्वप्रयुक्तमङ्कुरोत्पादनयोग्यत्वम्। उक्तं च नयविवेके। तच्च तस्य तदर्हं येनार्जितमिति। तदर्हं यथेष्टविनियोगार्हम्। भट्टमतानुसारिणि तन्त्ररत्नेपि। यथेष्टविनियोज्यत्वं हि स्वत्वं केवलक्रत्वर्थत्वेऽप्यक्रतौ विनियोगाद्यथेष्टविनियोज्यत्वाभाव (विनियोज्यत्वाभावात्स्वत्वाभाव?) इति। विनियोज्यमत्र विनियोगार्हं 'अर्हे कृत्यतृचश्चेति' पाणिनिस्मरणात्। मदनरत्न. 'अर्हे कृत्यतृचश्च' is पाणिनि III. 3. 169. The passage यथेष्टविनि ... त्वाभाव इति occurs in the तन्त्ररत्न (सरस्वतीभवन series) part 1 p. 19. Vide व्य. म. p. 416 for a similar statement and p. 422 for the illustration of seed in the granary.

1035. भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः। यत्ते समधिगच्छन्ति यस्य ते तस्य तद्धनम्॥ मनु VIII. 416; उद्योगपर्व 33. 64 reads त्रय एवाधना राजन् भार्या दासस्तथा सुतः। यत्ते &c.; नारद (अभ्यु. 41) is अधनाश्चय एवोक्ता भार्या दासस्तथा सुतः। यत्ते &c.

by such an ancient writer as Śabara-svāmin[1036] that this passage does not deny the ownership of the wife or son in what she or he earns, but is only intended to lay down that the wife or son cannot independently (without the consent of the husband or father) dispose of what she or he earns. This view of the text of Manu is accepted by the Dāyabhāga as well as by the Mitākṣarā School. The latter holds on the analogy of the interpretation of Manu VIII. 416 that the texts of Devala, Nār. and Manu IX. 104 which apparently deny ownership (*svāmya*)[1037] to the son during the father's lifetime over property in the hands of the father are to be interpreted only as denying the son's power of independent dealing with such property during the father's lifetime or as referring to the self-acquisitions of the father. On the other hand the Dāyabhāga and the Dāyatattva try to explain away such passages as those of Yāj. II. 121, Viṣṇu and others (quoted above) that speak of the son's ownership by birth. The Dāyabhāga offers two explanations of Yāj. II. 121.[1038] The first explanation offered by it and taken from Udyota is :— If A has two sons B and C of whom C dies first, leaving a son D and then A dies, then Yāj. says that both B (son of A) and D (grandson of A) will be equally entitled to the wealth left by A and not B alone, though he is nearer to A than D, because both B and D offer piṇḍas of the same efficacy to A in the pārvaṇa-śrāddha and so there should be no difference between the two. The words " sadṛśam svāmyam " refer to this equality of the son and grandson. The 2nd explanation is that of

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1036 On जै. VI. 1. 12 शबर says ' एवं स्मरति । भार्या दासश्च पुत्रश्च निर्धनाः सर्व एव ते । यत्ते ... तद्धनमिति ।'. Then on जै. VI. 1. 14 he remarks ' यत्पूर्वयते भार्यादयो निर्धना इति । स्मर्यमाणमपि निर्धनत्वमन्याय्यमेव श्रुतिविरोधात् । तस्माद्स्वातन्त्र्यमनेन प्रकारेणोच्यते संव्यवहारप्रसिद्ध्यर्थम् ।'.

1037. यत्तु देवलोऽपि पितर्युपरते ... स्थिते इति अत्रास्वात्र्यवचनमस्वातन्त्र्ययतिपादनार्थमिति मन्तव्यम् । स्मृतिच. II. 256; vide also अपरार्क p 718, व्यव. नि. p. 412, परा. मा. III. p. 480 for similar remarks. ' देवलः पितर्युपरते ... इति तत्पितृर्जिते स्वातन्त्र्यनिषेधार्थं न पैतामहे ' वि. ता. folio 96.

1038. यत्तु याज्ञवल्क्यवचनं ' भूर्या पितामहोपात्ता ... ओभयोः ' इति तस्य निरवद्यविद्योद्योतेन द्योतितस्तत्त्वतोऽयमर्थः । यत्र द्वयोर्भ्रात्रोर्जीवत्पितृकयोरभागयोरेकः पुत्रमुत्पाद्य विनष्टोऽन्यो जीवति अनन्तरं पिता मृतः तत्र पुत्र एव तद्धनं प्राप्नोतु अतिसंनिकर्षात् तद्वयं सहजं स्वित्यामिति वचनम् । यथा पैतामहभागे पितुः स्वाम्यं तथैव तस्मिन्मृते तत्पुत्राणामपि न तत्र सन्निकर्षविप्रकर्षाभ्यां द्रोपि विशेषः पार्वणविधिना पिण्डदानेन द्वयोरपि तदुपकारकत्वाविशेषादित्यभिप्रायः । दायभाग II. 9, p. 29. Here the Dāyabhāga appears to refer to a very learned predecessor called Udyota, who is styled निरवद्यविद्य (of unblemished learning). From the व्यवहारनिर्णय (pp. 78, 455) it appears that उद्योतन was an ancient author on vyavahāra spoken of in the same breath with धारेश्वर and असहाय.

Dhāreśvara viz. that when the father desires to make a partition, he may distribute his self-acquired property as he likes among his sons, but as to the property he got from his own father (i. e. the grandfather of his sons) he has the same ownership that sons have and he cannot make an unequal division at his sweet will. The Dāyabhāga[1039] rejects the view that Yāj. II. 121 enables the son to demand partition of the grand-father's property from the father even against the will of the latter or that father and son have equal shares in the grandfather's property. The same remarks apply to the texts of Viṣṇu and others viz. that in the grandfather's property father and son are equally owners and that the words " tulyam svāmyam " or " samamaṁśitvam " do not mean that father and son take the same share therein.

From the above discussion it will be clear that the two schools of the Dāyabhāga and of the Mitākṣarā were not started by them for the first time, but each had respectable antiquity behind it. Smṛtis like those of Manu, Nārada and Devala and eminent authors like Udyota and Dhāreśvara had put forward the doctrine of *uparama-svatvavāda*, while the Smṛtis of Yāj., Viṣṇu, Bṛ. espoused the doctrine of *janmasvatvavāda*. Viśvarūpa who commented on Yāj. (in the first half of the 9th century) holds that ownership arises by birth[1040]. The Mitākṣarā further supports that theory by citing a sūtra of Gautama (*utpadyate* etc.) which is not found in the extant Gautama-dharma-sūtra. This sūtra does not occur in Aparārka and several other works and is stated by Śrīkṛṣṇa Tarkālaṁkāra (on Dāyabhāga I. 21 p. 14) to be not authoritative (*amūla*). These facts emboldened Dr. Jolly to go so far as to make the facile suggestion that it was fabricated by Vijñāneśvara or his predecessors (Tagore Law Lectures p. 110). We have seen that so early a writer as Viśvarūpa was excited over the question whether ownership arises on partition or by birth. The learned Doctor has failed to note that the ancient commentator Medhātithi (about 900 A. D.) favoured the view of ownership by birth and quotes (without name) the sūtra in a slightly different form (on Manu

1039. अतः पितापुत्रयोः पैतामहभागे समविभागार्थं सदृशं स्वाम्यमिति वचनं पुत्राणां वा विभागस्तातन्त्र्यार्थमिति मतद्वयमपि हेयम् । दायभाग II. 18 p. 31.

1040. या स्वेच्छया विभागस्मृतिः सा स्वयमुपात्तद्रव्यवतो द्रष्टव्या । अतः स्वत्वे सति विभाग इति सिद्धम् । विश्वरूप on ' मूर्धा पितामहोपात्ता ' (या. II. 124).

IX. 156).[1041] So it was not necessary for Vijñāneśvara to fabricate a sūtra nor for any one else, for even in the absence of Gautama's sūtra the texts of Yāj. and others were quite capable of the interpretation put on them by the Mitākṣarā. It has to be noted that the Dāyabhāga[1042] does admit that in some (texts?) ownership is stated to arise by birth itself (*kvacit janmanaiveti*) and it explains that the words are not to be taken literally, but that birth is said to be the source in an indirect way, as the relation of father and son is based upon birth and on the death of the father the son's ownership arises (therefore though ownership directly arises on death, birth may be said to be the source of it as the son is the first heir because of his being born as a son to the father). The Dāyatattva does not say that the sūtra of Gautama is not authoritative, but explains it away on lines similar to those of the Dāyabhāga. It may be stated here briefly that the Dāyabhāga differs from the Mitākṣarā in four main points:—(1) The Dāyabhāga denies the theory that property is by birth, while the Mit. accepts it; (2) the Dāyabhāga lays down that the right to inherit and the order of heirs is determined by the principle of religious efficacy, while the Mit. school holds that blood relationship is the governing factor in this matter; (3) the Dāyabhāga holds that members of a joint family (such as brothers or cousins) hold their shares in quasi-severalty and can dispose of them even when there is no partition by metes and bounds; (4) the Dāyabhāga holds that even in an undivided family the widow succeeds

1041. On मनु IX. 209 मेधातिथि says 'यतस्ते पितामहधनस्येशाते। तथा चोक्तं भूर्या चोभयोरिति। ... सर्वे पितामहधनभाजः स्वत्वपूर्वकत्वाद्विभागस्य।; on मनु IX. 156 he says तथाप्युक्तं सवर्णापुत्रोऽन्यायवृत्तो न लभेतैकोनामिति। तदेतदसत्। जातेरत्यन्तमान्यत्वात्। जत्पन्नो वार्यस्वाम्यमित्याचार्या इति।

1042. क्वचिज्जन्मनैवेति (जन्मनैवेति?) च जन्मनिबन्धनत्वात् पितापुत्रसम्बन्धस्य पितुर्मरणस्य च स्वत्वकारणत्वात् परम्परया वर्णनम्। दायभाग I 20 p. 13. अच्युत and some of the commentators of the Dāyabhāga refer these words to the sūtra of Gautama which they read as 'उत्पन्नैवार्थे स्वामित्वाल्लभेतेत्याचार्याः'. यत्तु मिताक्षरायां 'उत्पन्नैवार्थे स्वामित्वाल्लभेतेत्याचार्याः' इति गौतमवचनं तदपि पितुस्त्वोपरमेऽङ्गजत्वहेतुत्वेनोत्पत्तिमात्रसम्बन्धेनान्यसम्बन्धाधिकेन जनकधने पुत्राणां स्वामित्वाद्धने पुत्रो लभेत नान्यसम्बन्धीत्याचार्या मन्यन्ते। दायतत्त्व p. 162. This is quoted almost in the same words by the व्य. प्र. p. 414 and on p. 418 the व्य. प्र. appears to hold that the explanation of the दायभाग quoted above relates to the sūtra of Gautama. अतश्च उत्पन्नैवार्थस्वामित्वमिति गौतमवचनस्य यज्ञीसूतवाह्नभरद्वुनन्दनार्यां पारम्परिकोत्पत्तिस्वत्वहेतुत्वेन व्याख्यानं कृतं तदपि व्यर्थमेव। व्य. प्र. p. 418; vide व्य. प्र. p. 426 for an elaborate refutation of the Dāyabhāga passage (quoted above) and other passages that follow.

to her husband's share on his death without male issue, while the Mit. school holds that she does not do so.

Various attempts have been made to explain why in Bengal alone the laws of succession and inheritance should diverge materially from the laws prevailing in the rest of India. In two learned papers 'on the origin and development of the Bengal school of Hindu Law' contributed to the Law Quarterly Review (vol. XXI for 1905 pp. 380–392 and vol. XXII for 1906 pp. 50–63) Mr. Justice Saradacharan Mitra tries at some length to advance a theory of his own: 'The commercial spirit of the newly formed nation in the eastern corner of the Indian peninsula with its deltaic character and nearness to the sea, the new ideas which other nations trading with it were bringing in every day, the necessary admixture of races in some parts of the country, the religion of Buddha which for centuries was here the religion of the sovereign as well as of the people and the influence of the Buddhistic *tantras* combined to bring about a law of property dissimilar in material respects from the rules propounded by Brahmanical sages of old and explained and commented upon in the Mitākṣarā and the books based on the same'. His idea is that, as Buddhism profoundly affected the position of women and as tantras like the Mahānirvāṇa subscribed to the exaltation of the feminine element in nature, the ancient law of property, particularly in relation to women, came to be affected and conceptions of individual ownership, of freedom from restrictions on alienation and of the rights of females arose in Bengal which were incorporated by Jīmūtavāhana in his Dāyabhāga. With the greatest respect to the learned writer, it must be said that the grounds he urges are far from convincing. A thorough examination of his thesis cannot be undertaken here for want of space. But a few remarks must be made. As regards maritime activity the West coast of India was far more in touch with seafaring and commerce with the West than even Bengal, as the mention of the ports of Barugaza (Broach) and Kalliéné (modern Kalyan) by Greek writers, the finding of hoards of Roman coins and the existence of Syrians on the West Coast clearly establish. Buddhism had spread to central and western India as early (if not earlier than) the period when it could have spread to Eastern Bengal and Assam. Sanchi, Bhilsa, Bharhut, the Nasik and Karla caves bear eloquent testimony to the influence of Buddhism in central and western India for centuries before and after the Christian era. Besides as Mr. Justice Mitra himself

admits 'Buddhism had not its own law of property' (Law Quarterly Review vol. XXI p. 388). Buddhist countries like Burma themselves borrowed their laws of succession and inheritance from the Manusmṛti. Vijñāneśvara is far more liberal to women than Jīmūtavāhana, who does not allow any woman to succeed as heir unless she is expressly mentioned as an heir in the smṛti texts. The Mahānirvāṇa-tantra treats a sister and stepmother as near heirs and allows even a paternal uncle's widow and son's daugther to succeed; but under the Dāyabhāga these are not at all heirs. One branch of the Mitākṣarā school, viz. that of the V. Mayūkha in Western India is far more liberal about the claims of women than any school. The Marumakkatayam and Aliyasantan law in force in some districts of South India and among certain communities like the Nambudri brāhmaṇas and Nairs go to the other extreme in their regard for women but no one has so far traced that law to Buddhist or Tantric influence. The peculiarity of the Dāyabhāga, viz. the principle of religious efficacy is far more remote from rules of affinity given in the Mahānirvāṇa-tantra than the principle of consanguinity espoused by the Mitākṣarā school. Mr. Justice Mitra is wrong in his estimate of the age of Jīmūtavāhana. As stated above (on p. 557) Jīmūtavāhana relies on authors like Udyota and the smṛtis of Devala and others. It is best to admit that no satisfactory explanation can be given of the peculiar doctrines of the Dāyabhāga. They have an indigenous and independent origin and growth.

Vibhāga (partition) is defined by the Mit.[1043] as the allotment to individuals of definite portions of aggregates of wealth over which many persons have joint ownership. The Dāyabhāga found several faults with this definition, the principal criticism being that it is cumbrous and farfetched to assume that the (joint) ownership of several (sons and the like) is first produced in the entire wealth of the father and then to hold that this joint ownership is subsequently destroyed. Its own definition is: "*Vibhāga* means the indication of the ownership (of one out of many) by the casting of a ball or pebble (on a definite part of the land or cash), which (ownership) arises with

1043. विभागो नाम द्रव्यसमुदायविषयाणामनेकस्वाम्यानां तदेकदेशेषु स्वत्वव्यवस्थापनम्। मिता. on या. II. 114, व्यवहारसार p. 212; अपरार्क p. 729 is almost the same: एकदेशोपलक्षणं चैतत् गृहिण्यादावप्युपलक्षणस्य स्वत्वस्य विनिवर्तमानमानाभावेन वैशेषिकव्यवहारानर्हतया अव्यवस्थितस्य गुटिकापातादिना व्यञ्जनं विभागः। विशेषेण भजनं स्वत्वज्ञापनं वा विभागः। वृद्ध भाग 1. 8-9, p. 8.

reference to a portion only (of the heritage of land and cash), but which is indefinite because it is not possible (for one man) to deal specifically with a particular portion (of the heritage) since there is nothing to show for certain what portion belongs to whom". The Dāyabhāga denies that ownership jointly arises in all co-sharers (before partition) over every portion of the heritage and states that it arises in portions of it but there is no certain indication to show which part belongs to whom and that the portion of each is made definite and ascertained by partition effected by casting a ball or pebble on a portion (saying 'this is A's exclusive portion' etc.). The Dāyatattva[1044] (p. 163) criticizes this definition. If before partition each of the co-heirs has ownership in part only of the entire heritage, what assurance is there that the allotment of a part to one co-heir by means of casting a ball will be as to the same portion over which his ownership arose before the partition? The Dāyatattva, though differing[1045] from the Mit. as to the doctrine of ownership by birth, agrees with it as to the definition of vibhāga. The differing definitions of vibhāga given by the Mit. and the Dāyabhāga lead to different results. Under the Mit. when there is a joint family of father and sons or grandsons, all these are coparceners and the ownership of the coparcenary property is in the whole body of coparceners i. e. there is unity of ownership while the family remains joint, no coparcener can say that he is owner of a definite share, one fourth or one fifth etc. A coparcener's interest is fluctuating, is capable of being enlarged by deaths and is liable to be diminished by births. It is only on partition that a coparcener becomes entitled to a definite share. On the other hand according to the Dāyabhāga there is no ownership by birth, the sons on the father's death constitute a coparcenary but the ownership of the family property is not in all the sons as a body. Every son takes a defined share, the moment the ownership of the father ceases (owing to death etc.). The share so taken does not fluctuate with births and deaths. The sons are coparceners in the sense that their possession of the property

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1044. तत्र विभागस्तु सम्बन्ध्यन्तरसम्बन्धेन भूहिरण्यादावुत्पन्नस्य...गुडिकापातादिना अमुकरपेदमिति विशेषेण भजने स्वत्वज्ञापनमिति वदन्ति तच्च समीचीनम् । यत्र अस्य स्वत्वं तत्रैव गुडिकापात इति कथं वचनाभावान्निश्चेतव्यः । दायतत्त्व p. 163.

1045. वस्तुतस्तु पूर्वस्वामिस्वत्वोपरमे सम्बन्धाविशेषात् सम्बन्धिनां सर्वधनप्रसृतस्वत्वस्य गुडिकापातादिना प्रादेशिकस्वत्वव्यवस्थापनं विभागः । एवं कृत्स्नधनगतस्वत्वोत्पादविनाशावपि कल्प्येते । दायतत्त्व p. 163.

inherited from the father is joint i. e. there is *unity of possession*, though there is no *unity of ownership*.

According to the Mitākṣarā sons take by birth an interest in ancestral estate. Suppose A is sole owner of an ancestral estate and has no issue. In that case there is no coparcenary. But the moment a son is born to him, a coparcenary is started. That is, under the Mitākṣarā the birth of a son starts a coparcenary. Under the Dāyabhāga there is no coparcenary between father and sons as the latter acquire no rights by birth even in ancestral property but it may subsist between brothers or uncles and nephews. Under the Dāyabhāga, the *death* of a man may start a coparcenary among his sons (who will be brothers).

Partition has two senses, (1) division by metes and bounds and (2) separation or severance in interest. Under the Mitākṣarā it is possible to have partition in both these senses. The members of a coparcenary may define, at a particular moment, the shares that each would be entitled to; but the actual division of property by metes and bounds may be postponed to a future date and in the intervening period they may enjoy the property in common as before. This is clearly brought out by the Vyavahāramayūkha[1046] when it says " even in the absence of joint (family) property severance (of interest) takes place also by a mere declaration in the form 'I am separate from thee'; for severance is merely a particular mode (or state) of the mind and this declaration merely manifests that (state or mode of the mind)". The S. V. (p. 347) has a similar passage. It is here stated that an unequivocal declaration of intention to separate effects the severance of a member from the joint family and that it is not absolutely necessary that there should be any joint property or that the property be divided by metes and bounds. This last follows as a matter of course when there is a severance of interest. This proposition has been accepted by the Privy Council[1047] and this passage of the Vyavahāra-

1046. द्रव्यसामान्याभावेपि त्वत्तोऽहं विभक्त इति व्यवस्थामात्रेणापि भवत्येव विभागः। बुद्धिविशेषमात्रमेव हि विभागः। तस्यैवाभिव्यक्तिकोयं व्यवस्था। व्य. म. p. 94; अनेन ज्ञापते परिभाषां विना सङ्कल्पमात्रेणापि विभागसिद्धिः। स. वि. p. 347.

1047. Vide *Pandit Suraj Narain v. Iqbal Narain* 40 I. A. p. 40 (=15 Bom. L. R. 456) for this proposition and *Soundararajan v. Arunachalam* 39 Mad. 159 (F. B.) at pp. 174-175, 185 and *Girjabai v. Sadashiv* 43 I. A. 151 at p. 160 (=18 Bom. L. R. 621) for citation of the above passage of the V. Mayūkha.

mayūkha has been quoted in several cases. What constitutes an unequivocal declaration of intention to separate has as usual given rise to a good deal of case law which has to be passed over here. Under the Dāyabhāga heirs succeed on the death of the previous owner in certain definite shares and therefore partition has ordinarily only the first sense viz. assigning to the coparceners specific portions of the property inherited. Another way of separating a member[1048] is also mentioned by Manu IX. 207 and Yāj. II. 116, viz. that when a member of the family is able to fare for himself and does not desire to have a share in the family property, he should be separated by giving him some trifle (as a token). The Mit. adds that the trifle is given as a piece of evidence to prevent his sons claiming a share later on.

The principal matters to be discussed under *Dāyabhāga* or *Dāyavibhāga* are, as stated by the Saṅgraha and the Mit., four, viz. the time of partition, the property liable to partition, the mode of partition and the persons entitled to partition[1049].

Time for partition. The evolution of the son's right to demand a partition has been a process of ages. It would not be out of place to say a few words on this topic here. In most primitive societies where the patriarchal family system prevailed, the father had absolute power over the son, it was the son's duty to obey the father, alienation of family property was not allowed, the father had power over the acquisitions of all persons including the son and women were incompetent to hold property. Faint traces of these can be detected in the Vedic literature. The legend of Śunaḥśepa narrated in the Ait. Br. (33. 1 ff), where we are told that Ajīgarta sold his son for being offered as a victim to Varuṇa, that Viśvāmitra adopted Śunaḥśepa as his son, though he had already a hundred and one sons, and that he cursed and disinherited his fifty sons for their disobedience to

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1048. शक्तस्यानीहमानस्य किञ्चिद्दत्वा पृथक् क्रिया । या. II. 116 on which the मिता. says 'तत्पुत्रादीनां दायजिघृक्षा मा भूदिति'; व्य. प्र. p. 449 notes that प्रकाश explained या. II. 116 and मनु. IX. 207 differently (taking अनीहमानस्य as meaning 'who does not work though able to do so') 'प्रकाशकारस्तु यो भागिषु धनार्थं व्यापृतेषु प्रमादालस्यादिना नेहेत न व्यामिश्रेत साहाय्यं न कुर्यात् स्वकर्मणा स्वव्यापारेण शक्तः साहाय्यकर्मणि श्रमोपि सन् स स्वकार्यशात् स्वव्यापारजनिताद्धनाद् बहिः कार्यः किञ्चिदुपजीवनं कृत्वा मूलधनमात्रभागीकरणीय इति ।'. अपरार्क p. 719 gives both these meanings.

1049. यस्मिन्काले यया भङ्ग्या यैरेव क्रियतेपि च । याज्ञवल्क्य च दायस्य यथाशास्त्रं प्रवक्ष्यते । संग्रह q. by स्मृतिच. II. p. 255, स. वि. p. 349 ; इदमिह निरूपणीयम् । कस्मिन्काले कस्य कथं केषु विभागः कर्तव्य इति । मिता. on या. II. 114.

Property in Daybhaga

दायभाग की अवधारणा

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दाय का अर्थ एवं स्वरुप

धर्मग्रन्थों में विभाज्य वस्तु को दाय अथवा रिक्थ की संज्ञा दी गयी है। दाय तथा रिक्थ शब्दों का प्रयोग वैदिक काल से चला आ रहा है।[1] आचार्य सायण दाय का अर्थ वसीयत के रुप में करते हैं।[2] तैत्तिरीय संहिता एवं ब्राह्मण ग्रन्थों में 'दाय' पैतृक सम्पत्ति या केवल सम्पत्ति के अर्थ में प्रयुक्त है।[3] निघण्टुकार ने विभाजित होने वाली पैतृक सम्पत्ति को 'दाय' कहा है।[4] आचार्य नीलकण्ठ का भी यही मत है। उनका कथन है कि 'दाय' वह धन है जो विभाजित होता है और उन लोगों को प्राप्त नहीं होता, जो पुनः संयुक्त हो जाते हैं।[5] मनुस्मृति के प्रसिद्ध टीकाकार मेधातिथि ने अन्वयागत या वंश परंपरागत से प्राप्त धन को 'दाय' कहा है।[6] बृहस्पति का मत है कि जो धन पिता पुत्रों को देता है वह 'दाय' कहलाता है।[7] आचार्य जीमूतवाहन बृहस्पति द्वारा दी गयी उपर्युक्त परिभाषा के उत्तरार्द्ध का समर्थन करते हुए कहते हैं कि **'दीयते'** यह दूसरी व्युत्पत्ति ही उपयुक्त है तथा **'ददाति'** यह पहली व्युत्पत्ति गौण है।[8] मित्रमिश्र दाय शब्द को यौगिक न मानकर रुढ़ शब्द स्वीकार करते हैं।[9] पावटे महोदय ने मित्रमिश्र के आधार पर दाय शब्द का मूल, विस्तृत करने का अर्थ बताने वाली, एक द्रविड़ धातु स्वीकार किया है।[10] इस सम्बन्ध में विद्वानों का मत है कि दानार्थक **'दा'** धातु से दाय का इतना घनिष्ट सम्बन्ध है कि मित्रमिश्र के तर्क के आधार पर उसे रुढ़ मानना तथा पावटे की कल्पना के अनुसार उसे द्रविड़ शब्द स्वीकार करना समुचित प्रतीत नहीं होता।

अनेक विद्वानों द्वारा दी गयी 'दाय' शब्द की व्याख्या के आधार पर निष्कर्षतः यह कहा जा सकता है कि स्थावर एवं जगम सम्पत्ति जो माता–पिता के द्वारा कुल–परम्परा से चली आ रही है, उसका पुत्रों में

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[1] – ऋ., 2/132/14 एवं ऋ., 3/31/2

[2] – ऋ., 10/114/10

[3] – क– मनुः पुत्रेभ्यो दायं व्यभजत्। तै. सं., 3/1/9/4
ख– तत्माज्ज्येष्ठं पुत्रं धनेन निरवसाययन्ति। तै. सं., 2/5/2/7
ग– तस्माद्यः पुत्राणां दायं धनतमयिवोपैति तं मन्यन्ते यमेवेदं भविष्यतीति। ता.ब्रा., 16/4/3–4

[4] – विभक्तव्यं पितृद्रव्यं दायमाहुर्मनीषिणः। निघण्टु, स्मृ. चं., 2/255

[5] – असंसृष्टविभाजनीयं धनं दायः। व्य.म. पृ. 93

[6] – मनु., 9/103

[7] – ददाति दीयते, पित्रा पुत्रेभ्यः स्वस्य यद्धनम्। तद् दायम्। बृह. स्मृ., 26/1 एवं स0वि0 पृ0 344

[8] – दीयते इति व्युत्पत्त्या दाय शब्दो ददाति प्रयोगश्च गौणः मृत प्रव्रजितादि स्वत्वनिवृत्तिपूर्वकपरस्वत्वोपत्ति–फलसाम्यात्, न तु तत्र मृतादीनां त्यागोऽस्ति। ततश्च पूर्वस्वामिसम्बन्धाधीनं तत्सवाम्योपरमे यत्र द्रव्ये स्वाम्यं तत्र निरुढो दाय शब्दः। दायभाग, 1/4–5

[9] – मित्रमिश्रस्तु जीमूतवाहन मतं निराकुर्वन् कथयति ''स्वत्वस्य लौकिकत्वात् जन्मत एव लोके पुत्रादीनां स्वत्वं स्वीक्रियते।''। दा.स., पृ. 4, द्रष्टव्य व्य. प्र., पृ0 412

[10] – पावटे कृत दायभाग।

बँटवारा 'दायभाग' कहलाता है। 'दायभाग' का वास्तविक अर्थ है – सम्बन्धियों (पिता, पितामह आदि) के धन का सम्बन्धियों (पुत्रों, पौत्रों आदि) में विभाजित होना इसका कारण है, मृत स्वामी से उनका सम्बन्ध। इसके अतिरिक्त माता के धन का विभाजन भी 'दायभाग' के अन्तर्गत ही रखा गया है। दाय शब्द 'दा' धातु से निष्पन्न है, किन्तु इसके अर्थ में परम्परा निहित है। 'दाय' में मृत व्यक्ति किसी अन्य का स्वामित्व उत्पन्न करने के लिए अपना स्वामित्व नहीं छोड़ता, किन्तु इसमें वस्तु के स्वामित्व का त्याग रहता है।

उपर्युक्त विवेचन से स्पष्ट है कि प्राचीन हिन्दू ग्रन्थों में संयुक्त सम्पत्ति के लिए 'रिक्थ' एवं 'दाय' शब्द का प्रयोग हुआ है। 'दाय' अथवा 'रिक्थ' (सम्पत्ति) तथा 'दायभाग' अथवा 'रिक्थहरण' (सम्पत्ति–विभाजन) की विवेचना करने वाले प्रमुख ग्रन्थों में विज्ञानेश्वर कृत मिताक्षरा (याज्ञवल्क्य स्मृति पर आधारित) एवं जीमूतवाहन प्रणीत दायभाग उल्लेखनीय ग्रन्थ है। पिछले लगभग एक सहस्त्र वर्षों से हिन्दू परिवारों में पैतृक सम्पत्ति का विभाजन इन्हीं दो ग्रन्थों के आधार पर होता आ रहा है। अर्थात् पैतृक सम्पत्ति में अधिकारों की दृष्टि से सम्पूर्ण भारत मिताक्षरा एवं दायभाग इन दो प्रधान सम्प्रदायों में विभक्त है। बंगाल और आसाम में दायभाग तथा शेष भारत में मिताक्षरा प्रामाणिक ग्रन्थ माना जाता है। आधुनिक काल में बंगाल के कुछ क्षेत्रों में भी मिताक्षरा के ही कानून मान्य हैं, जिन विषयों पर दायभाग मूक है। तात्पर्य यह है कि मिताक्षरा पद्धति का इतना सर्वोपरि प्राबल्य है कि बंगाल और आसाम में दायभाग के अवर्णित विषयों पर मिताक्षरा के नियमों को ही प्रमुखता दी गयी है।

मिताक्षरा विज्ञानेश्वर रचित याज्ञवल्क्यस्मृति की टीका ही नहीं, अपितु समस्त स्मृतियों का सारग्रन्थ भी है। मिताक्षरा के समर्थक ग्रन्थों में वीरमित्रोदय, विवादरत्नाकर, विवादचन्द्र, विवादचिन्तामणि, व्यवहारमयूख निर्णयसिन्धु, स्मृतिचन्द्रिका, व्यवहारनिर्णय, पराशरमाधवीय एवं सरस्वतीविलास प्रमुख ग्रन्थ हैं। दायभाग के समर्थक ग्रन्थ दायतत्त्व तथा दायक्रमसंग्रह हैं। इन्हीं ग्रन्थों के आधार पर देश के विभिन्न भागों में दाय का उत्तराधिकार क्रम निश्चित किया जाता है।

मिताक्षरा एवं दायभाग सम्प्रदायों में मौलिक मतभेद इस प्रश्न पर है कि पैतृक सम्पत्ति पर पुत्र का स्वत्व किस प्रकार उत्पन्न होता है। मिताक्षरा के अनुसार जन्म लेते ही पुत्र का पैतृक सम्पत्ति में स्वत्व उत्पन्न हो जाता है। अतः यह मत 'जन्मस्वत्ववाद' कहलाता है। किन्तु दायभाग के अनुसार पुत्र का यह स्वत्व पिता की मृत्यु के उपरान्त ही उत्पन्न होता है, अतः यह मत 'उपरमस्वत्ववाद' कहलाता है। इन दोनों सिद्धान्तों में परस्पर विरोध का कारण इनके द्वारा प्रस्तुत की गयी 'दाय' शब्द की पृथक् व्याख्या ही है।

मिताक्षरा के अनुसार दाय वह सम्पत्ति है, जिस पर उसके स्वामी के साथ सम्बन्ध होने से ही सम्बन्धित व्यक्ति का स्वामित्व स्थापित हो जाता है।[11] पिता की सम्पत्ति पर पुत्र का स्वामित्व उसके जन्म के कारण पिता के साथ सम्बन्ध होने से है। अतः पैतृक सम्पत्ति पर पुत्र का स्वत्व जन्म से ही होता है। यहां पूर्व स्वामी से सम्बन्ध होने के कारण धन की प्राप्ति से भ्रम उत्पन्न होता है क्योंकि यह सम्बन्ध किसी से भी हो सकता है। यदि कोई वस्तु क्रय की जाती है तो वहां भी क्रेता और विक्रेता का सम्बन्ध होता है, परन्तु यह आक्षेप युक्ति संगत नहीं है क्योंकि इस सम्बन्ध के अतिरिक्त यहां क्रयकर्ता पूर्व स्वामी अर्थात् विक्रेता को वस्तु का मूल्य प्रदान करता है। दाय में मूल्य नहीं दिया जाता, केवल सम्बन्ध से ही स्वामित्व की उत्पत्ति होती है। अतः उपर्युक्त कथन में छिपे हुए शब्द 'इव' (सम्बन्ध मात्र) पर ध्यान देना आवश्यक है जो यह स्पष्ट करता है कि दाय के अन्तर्गत प्राप्त होने वाला धन सम्बन्ध मात्र के कारण ही पूर्व स्वामी से प्राप्त होता है।[12]

दायभाग का मत है कि पूर्व स्वामी के साथ सम्बन्ध होने के कारण उसके मरने पर जिस सम्पत्ति में स्वत्व प्राप्त होता है, उस सम्पत्ति के लिए दाय शब्द रुढ़ है।[13] वे दाय शब्द की दानार्थक 'दा' धातु से मानते हुए इस प्रकार परिभाषित करते हैं – 'जो दिया जाय, वह दाय (दान) है।'[14] इस प्रकार दान में दो बातें एक साथ पायी जाती हैं – दाता के स्वत्व की निवृत्ति तथा ग्रहणकर्ता के स्वत्व की उत्पत्ति। प्रथम के अभाव में दूसरे का सृजन नहीं हो सकता है। अतः जब तक पिता जीवित है और दाय से उसके स्वत्व की निवृत्ति नहीं होती, तब तक उस सम्पत्ति पर पुत्र के स्वत्व की उत्पत्ति कैसे हो सकती है? यह पिता की मृत्यु होने पर ही सम्बभव है। इस प्रकार जीमूतवाहन ने पिता की मृत्यु के उपरान्त ही दाय पर पुत्र का स्वाम्याधिकार स्वीकार किया है।[15]

मिताक्षरा सम्प्रदाय में दाय योग्य सम्पत्ति को दो भागों में विभाजित किया गया है – 1. अप्रतिबन्ध दाय और 2. सप्रतिबन्ध दाय।[16]

अप्रतिबन्ध दाय

अप्रतिबन्धदाय वह है जिसमें व्यक्ति कुल में जन्म लेने मात्र से ही वंशपरम्परा से आगत पैतृक सम्पत्ति को अपने सम्बन्ध द्वारा प्राप्त कर लेता है। अर्थात् पुत्र, पौत्र एवं प्रपौत्र अपने सम्बन्ध से ही अपने

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[11] – तत्र दाय शब्देन यद्धनं स्वामिसम्बन्धादेव निमित्तादन्यस्य स्वं भवति तदुच्यते। याज्ञ0स्मृ0, 2/114 की अवतरिणका।

[12] – असहायविज्ञानयोगिप्रभृतीनान्तु यत् स्वामिसम्बन्धादेव निमित्तादन्यस्य स्वं भवति तद् दाय शब्देनोच्यते इति तन्न सहन्ते भारुचि उपरार्कप्रभृतयः..। स.वि., पृ0 347 तथा आई. एस. पावटे कृत दायभाग, अध्याय 11, पृ. 9–90

[13] – ततश्च पूर्वस्वामिसम्बन्धाधीनं तत्स्वाम्योपरमे यत्र द्रव्ये स्वत्वं तत्रनिरुढ़ो दाय शब्दः। दा.भा., 1/3–4

[14] – दायभाग, 1/4–5

[15] – हि0 प0 मी0, पृ0 291, पं0 9–11

[16] – स च द्विविधः – अप्रतिबन्धः, सप्रतिबन्धश्च। तत्र पुत्राणां पौत्राणां च पुत्रत्वेन पौत्रत्वेन च पितृधनं पितामहधनं च स्वं भवतीत्यप्रतिबन्धो दायः। पितृव्यभ्रात्रादीनां तु पुत्राभावे स्वाम्यभावे, मिताक्षरा, याज्ञ. स्मृ. 2/113

पिता, पितामह एवं प्रपितामह की सम्पत्ति को वंश परम्परा के अनुसार प्राप्त कर लेते हैं। इसमे पिता या पितामह की उपस्थिति से पुत्रों एवं पौत्रों की कुल सम्पत्ति के प्रति अभिरुचि में कोई प्रतिबन्ध नहीं लगता, क्योंकि वे उसी कुल में उत्पन्न हुए रहते हैं। पिता एवं पितामह की जीवितावस्था दायांश–ग्रहण में किसी प्रकार से बाधक न होने के कारण ही यह '**अप्रतिबन्ध दाय'** कहलाता है। इसे ही **'समांशी दाय'** भी कहते हैं।

सप्रतिबन्ध दाय (Coparcenary Property)

जब किसी व्यक्ति को उसके चाचा, भाई, भतीजा, मामा, नाना आदि की सम्पत्ति प्राप्त होती है, तो वह **'सप्रतिबन्ध दाय'** कहलाती है, क्योंकि यह सम्पत्ति उस व्यक्ति को उन व्यक्तियों अथवा उनके अन्य उत्तराधिकारियों के अभाव में ही प्राप्त होती है। उदाहरणस्वरुप यदि कोई व्यक्ति अपने संतानहीन चाचा के मृत हो जाने पर अथवा कोई पिता अपने संतानहीन पुत्र के मृत हो जाने पर सम्पत्ति प्राप्त करता है तो वह सप्रतिबन्ध दाय कहा जाता है, क्योंकि इन परिस्थितियों में भतीजा या पिता क्रम से अपने चाचा या पुत्र की सम्पत्ति पर तब तक स्वामित्व नहीं प्राप्त कर पाता, जब तक कि चाचा या पुत्र अथवा उस पुत्र के पुत्र एवं पौत्र जीवित रहते हैं। स्पष्ट है कि इन व्यक्तियों की उपस्थिति भतीजे एवं पिता के दायांश–ग्रहण में प्रतिबन्धक हैं। अतः यह सप्रतिबन्ध दाय है। यहाँ यह उल्लेखनीय है कि इस प्रकार की सम्पत्ति उस व्यक्ति की अपनी पृथक् सम्पत्ति होती है, जिसके यथेच्छ विनियोग का उसे पूर्ण अधिकार होता है और इसका विभाग भी समांशी सम्पत्ति से भिन्न होता है।

इस प्रकार मिताक्षरा सम्प्रदाय 'अप्रतिबन्ध' एवं 'सप्रतिबन्ध' इन दो रुपों में 'दाय' का उल्लेख करता है, किन्तु दायभाग सम्प्रदाय ने उपर्युक्त दाय के द्विविध रुपों को न स्वीकारते हुए सभी प्रकार के दाय को 'सप्रतिबन्ध' कहा है। इस सम्प्रदाय के अनुसार पूर्व स्वामी के न रहने (मृत, पतित अथवा संन्यासी हो जाने) पर ही दाय किसी अन्य व्यक्ति को प्राप्त होता है। अतः दायभाग सम्प्रदाय का सिद्धान्त **'उपरमस्वत्ववाद'** (मृत्यु के उपरान्त ही स्वामित्व की उत्पत्ति) कहलाता है। इसके विपरीत जन्म लेते ही पुत्र का पैतृक सम्पत्ति में स्वत्व उत्पन्न हो जाने के कारण मिताक्षरा सम्प्रदाय का सिद्धान्त **'जन्मस्वत्ववाद'** के नाम से जाना जाता है। यही दायभाग एवं मिताक्षरा में प्रमुख भेद है।

दाय चाहे किसी व्यक्ति को उसके स्वामी की मृत्यु के उपरान्त प्राप्त हो अथवा उसके जीवनकाल मे ही प्राप्त हो, दोनों ही अवस्थाओं में वह पैतृक सम्पत्ति या दाय ही है। वर्तमान न्यायालयों में दाय के स्वरुप को इस प्रकार स्पष्ट किया गया है – अपने पिता, पितामह और प्रपितामह से प्राप्त सम्पत्ति ही **'दाय'** या

'पैतृक सम्पत्ति' है।[17] इन सम्बन्धियों के अतिरिक्त अन्य सम्बन्धियों से प्राप्त दाय व्यक्ति की **'पृथक् सम्पत्ति'** होती है। पिता, पितामह आदि से उत्तराधिकार में यदि कोई व्यक्ति सम्पत्ति प्राप्त करता है तो उस सम्पत्ति पर उसके पुत्र, पौत्र और प्रपौत्र का संयुक्त स्वत्व हो जाता है, किन्तु जब कोई व्यक्ति अपने चाचा, भाई, भतीजा, मामा, नाना आदि से सम्पत्ति ग्रहण करता है तो उस सम्पत्ति पर उसका पृथक् स्वत्व होता है। इस प्रकार की सम्पत्ति को 'पैतृक सम्पत्ति' या दाय की संज्ञा नहीं दी जायेंगी।[18]

विभाग का अर्थ एवं स्वरुप –

संयुक्त सम्पत्ति के किसी अंश पर वैयत्तिक स्वत्व की उत्पत्ति विभाग (बटँवारे) से होती है। विभाग का सामान्य अर्थ है 'विशेष रुप से उपभोग'। विभाजन की प्रक्रिया का प्रारम्भ मूलतः वैदिक युग में सम्पादित यज्ञ की क्रियाओं द्वारा ही हुआ। ऋग्वेद में 'भाग' शब्द की उपलब्धि होती है, जिसका अर्थ यज्ञ में दिये जाने वाले देवताओं के हविभाग से है।[19] यह भाग उनके (देवता विशेष) स्वत्व को स्पष्ट करता है। इसके अतिरिक्त ऋग्वेद में 'भग' नामक देवता की उपस्थिति से विभाजन का महत्व प्रमाणित किया गया है तथा उसे विभाग करने वाला कहा गया है।[20] अथर्ववेद में प्रायः भग को भाग्य के देवता के रुप में प्रस्तुत किया गया है।[21] जो विभाजन में सम्पत्ति प्राप्ति का संकेत देता है, क्योंकि भाग्य का आधार धन तथा ऐश्वर्य की प्राप्ति में ही था। उत्तर वैदिक काल में 'भाग' शब्द दाय या सम्पत्ति के विभाजन के अर्थ में प्रयोग होने लगा और विभाजन की प्रक्रिया से सम्बन्धित विभिन्न नियमों की गणना भी इसमें होने लगी। इस प्रकार वैदिक काल से ही दाय की प्राप्ति और उसके विभाजन का प्रचलन चला आ रहा है।

धर्मशास्त्रकार विज्ञानेश्वर ने 'विभाग' का लक्षण इस प्रकार प्रस्तुत किया है – ''जहाँ संयुक्त स्वामित्व हो वहाँ सम्पूर्ण सम्पत्ति के भागों की निश्चित व्यवस्था ही **'विभाग'** है।''[22] किन्तु विज्ञानेश्वर (मिताक्षरा) द्वारा दी गयी विभाग की इस परिभाषा में दायभाग को कई दोष दृष्टिगोचर होते हैं। अतः दायभाग ने विभाग को निम्न प्रकार से परिभाषित किया है – ''यह किसी निश्चित भूमिभाग या धन पर गोली या ढेला फेंकने से भाग्यवश प्राप्त (बहुतों में एक के) स्वामित्व का द्योतक है, जो (स्वामित्व) केवल (भूमिभाग एवं धन के दाय

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[17] – क– मुहम्मद हुसैन कृत बम्बई लॉ रिपोर्ट्स, 1937
ख– इलाहाबाद की इण्डियन लॉ रिपोर्ट्स, 250
ग– रामब्राह्मण कृतं इण्डियन लॉ रिपोर्ट्स, 1950
घ– मद्रास की इण्डियन लॉ रिपोर्ट्स, पृ0 1084
च– कलकत्ता इण्डियन लॉ रिपोर्ट्स, 1939

[18] – क– मद्रास की इण्डियन लॉ रिपोर्ट्स, 863
ख– लाहौर इण्डियन लॉ रिपोर्ट्स, 708

[19] – क– कस्ते भागः किं वयो दुध खिद्ध पुरुहूत। – ऋ., 6/22/4
ख– प्रजाभ्यः पुष्टिं विभजन्त। ऋ, 2/13/4

[20] – भगो विभक्ता शवसावसा गमदुरुव्यचा अदितिः। ऋ. 5/46/6

[21] – अथर्व., 3/16/2, ह्विटनी, पृ. 113

[22] – विभागो नाम द्रव्य समुदायविषयाणामनेक स्वाम्यानां तदेकदेशेषु व्यावत्थापनम्। – याज्ञ. स्मृ. 2/114 पर मिता.।

के) एक अंश से मिलकर उदित होता है, किन्तु जो अनिश्चित है, क्योंकि (किसी व्यक्ति के लिए) दाय के किसी विशिष्ट अंश को स्पष्ट रुप से बताना असम्भव है, क्योंकि कौन सा अंश किसका है, यह कहने के लिए कोई निश्चित बात ज्ञात नहीं रहती।''[23]

इस प्रकार मिताक्षरा एवं दायभाग द्वारा दी गयी परिभाषाएँ भिन्न–भिन्न मतों का प्रतिपादन करती हैं। मिताक्षरा के अनुसार संयुक्त परिवार में पैतृक सम्पत्ति पर सब समांशियों का साझा स्वामित्व रहता है। अर्थात् जब तक परिवार संयुक्त रहता है तब तक स्वामित्व की एकता रहती है और किसी भी दायाद को सम्पत्ति के किसी विशेष भाग का स्वत्व नहीं प्राप्त होता। अभिप्राय यह है कि कोई सहभागी यह नहीं कह सकता है कि वह किसी निश्चित भाग यथा चौथाई या पाँचवे भाग का स्वामी है। क्योंकि अंशहर या सहभागियों का अंश या हित जन्म एवं मृत्यु की दरों से घटता–बढ़ता रहता है। विभाजन के उपरान्त ही सहभागी या अंशहर किसी निश्चित भाग या अंश के अधिकारी हो पाते हैं।

उपरिवर्णित विभाजन से पूर्व सहभागियों में स्वामित्व संयुक्त रुप से उत्पन्न हो जाता है, मिताक्षरा के इस मत का निराकरण करते हुए दायभाग ने यह स्वामित्व उसके (दाय के) अंशों में उत्पन्न होना स्वीकार किया है। वे विभाग का अर्थ स्वत्वों के पृथक्करण की व्यवस्था नहीं मानते, अपितु उसे विशेष रुप से विभिन्न व्यक्तियों के स्वत्वों का प्रकटीकरण समझते हैं। उनके मतानुसार जहाँ विशेष रुप से स्वत्वों की व्यवस्था न हो वहाँ गुटिकापाठ (लाटरी डालना) द्वारा स्वत्वों की अभिव्यक्ति ही 'विभाग' है। तात्पर्य यह है कि संयुक्त कुटुम्ब में विभाग से पूर्व किसी व्यक्ति का सम्पूर्ण संयुक्त सम्पत्ति पर सामूहिक स्वामित्व नहीं रहता, अतः उसमें कोई साझेदारी अथवा समांशिता नहीं हो सकती। वहाँ पिता की मृत्यु के उपरान्त ही पुत्र अपना निश्चित भाग ले सकते हैं। सम्मिलित रहने की दशा में संयुक्त सम्पत्ति पर प्रत्येक व्यक्ति का संयुक्त अधिकार है, परन्तु संयुक्त स्वामित्व नहीं। इस प्रकार मिताक्षरा सम्प्रदाय में पैतृक सम्पत्ति में समांशिता का स्वत्व जन्म से उत्पन्न होता है और दायभाग सम्प्रदाय में मृत्यु के द्वारा।

दायभाग द्वारा दी गयी उपर्युक्त विभाग की परिभाषा में आपत्ति प्रकट करते हुए आचार्य रघुनन्दन कहते हैं कि यदि विभाग से पूर्व समान अंशभागियों का संयुक्त सम्पत्ति के किसी एक हिस्से पर अधिकार था तो इसका क्या भरोसा है कि लाटरी उसे वही हिस्सा देगी, जो उसका पहले से था। इस प्रकार जन्मस्वत्ववाद के विषय मे दायतत्त्व का मिताक्षरा से मतभेद होने पर भी 'विभाग' की परिभाषा में दोनों एक मत हैं।

[23] – ननु किं दायस्य विभागो विभक्तावयवत्वं, यद्वा दायेन सह विभागो असंयुक्तत्वं, न तावत् पूर्वः, दाय विनाशापतेः। नापि द्वितीयः संयुक्तेऽपि न ममेदं विभक्तं स्वं भ्रातुरिदमिति प्रयोगात्। एकदेशोपत्तस्यैव भूहिरण्यादावुत्पन्नस्य स्वत्वस्य विनिगमनाप्रमाणाभावेः वैशेषिकव्यववहारानर्हतया अव्यवस्थितस्य गुटिकापातादिना व्यंजनं विभागः। विशेषेण भजनं स्वत्वज्ञापनं वा विभागः। – दायभाग, पृ. 8

विभाजन के दो अर्थ हैं – 1. नाप–तौल एवं सीमा के निर्धारण से विभाजन, एवं 2. हित के पृथकत्व या अलगाव द्वारा विभाजन। मिताक्षरा ने इन दोनों ही अर्थों में विभाजन स्वीकार किया है। समांशिता (सहभागिता) के सदस्य किसी भी क्षण अपने अंशो के अधिकारों का निपटारा कर सकते हैं, किन्तु नाप–तौल आदि के द्वारा सम्पत्ति का विभाजन आगे के समय के लिए स्थगित किया जा सकता है और तब तक वे पहले की भाँति ही एक साथ सम्पत्ति का उपभोग कर सकते हैं।[24]

दायभाग ने उपर्युक्त प्रथम विभाजन (नाप–तौल एवं सीमा के निर्धारण से विभाजन) के अर्थ को ही स्वीकार किया है, क्योंकि इनके मतानुसार पूर्व स्वामी की मृत्यु के उपरान्त ही उत्तराधिकार आरम्भ होता है और निश्चित भाग निर्धारित होते हैं।

विभाजन के सम्बन्ध में मनु एवं याज्ञवल्क्य का यह भी मत है कि यदि परिवार का कोई सदस्य अपना जीवन निर्वाह करने में स्वयं समर्थ है और परिवार की सम्पत्ति का कोई भाग नहीं चाहता, तो उसे कोई साधारण वस्तु चिन्ह के रुप में देकर अलग किया जा सकता है। मिताक्षरा ने यहाँ यह भी जोड़ दिया है कि यह चिन्ह उसे इसलिए दिया जाता है कि उसके पुत्र आगे चलकर अपना अधिकार न जताने लगे।[25]

दाय विभाजन के स्वरुप स्पष्टीकरण में स्वत्व का उल्लेख हुआ है। स्वत्व का दाय एवं विभाजन से अभिन्न सम्बन्ध है। अतः शास्त्रकारों ने स्वत्व को **'उत्तराधिकार'** के अर्थ में प्रयुक्त किया है, क्योंकि किसी वस्तु का विभाजन तभी सम्भव है जब उस वस्तु में उस व्यक्ति का स्वत्व अथवा अधिकार हो अर्थात् व्यक्ति के स्वामी होने में उस वस्तु का स्वत्व मूलकारक होता है। तात्पर्य यह है कि किसी वस्तु का स्वामित्व उस व्यक्ति के स्वत्व (Property) की ओर संकेत करता है, जिसके नियन्त्रण मे वह वस्तु होती है। इस प्रकार दाय के विभाजन में स्वत्व और स्वामित्व की भावना निहित है। स्वत्व वस्तु में तथा स्वामित्व व्यक्ति में निहित होता है। स्वत्व का सामान्य अर्थ है – जो किसी का है अर्थात् सम्पत्ति, एवं स्वामित्व (Ownership) का अर्थ है – अधिकारी। दोनों मूलतः एक हैं अर्थात् एक ही अभिन्न रुप के दो भिन्न रुप हैं, जो अपने प्रयोग के द्वारा एक दूसरे के अस्तित्व का (क्रमशः वस्तु और व्यक्ति का) बोध कराते हैं और जिनका सम्बन्ध अन्योन्याश्रित है। विद्वानों ने इसे 'निरुप्य निरुपकभाव' के रुप में स्वीकार किया है।

स्वत्व के विषय में शास्त्रकारों ने भिन्न–भिन्न मतों का प्रतिपादन किया है। कुछ विद्वानों ने स्वत्व का अर्थ शास्त्रों के आधार पर तथा कुछ ने इसे सामान्य लौकिक अर्थ में प्रयुक्त किया है, किन्तु इन विद्वानों के मतों का उल्लेख करने से पूर्व यहाँ स्वत्व की व्याख्या आवश्यक है।

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[24] – व्य. म., पृ. 14 एवं स.वि., पृ. 347

[25] – क– भ्रातृणां यस्तु नेहेत धनं शक्तः स्वकर्मणा। स निर्भाज्यः स्वकादंशात्किंचिद्दत्वोपजीवनम्।। – मनु. 9/207
ख– शक्तस्यानीहमानस्य किंचिद् दत्त्वा पृथक्क्रिया – याज्ञ. स्मृ. 2/116

स्वत्व का अर्थ एवं स्वरुप

दायभाग के टीकाकार श्रीकृष्णतर्कालंकार ने 'स्वत्व' को परिभाषित करते हुए कहा है कि '**यथेच्छ विनियोगार्हत्वेन शास्त्रबोधित त्वमित प्राञ्चः**'[26] अर्थात् स्वत्व वह है जो कि 1. शास्त्रानुमोदित हो, तथा 2. जिसके यथेच्छ विनियोग का अधिकार उसके स्वामी को प्राप्त हो। श्रीकृष्णतर्कालंकार द्वारा प्रस्तुत 'स्वत्व' की इस व्याख्या पर टीकाकारों और निबन्धकारों में पर्याप्त मतभेद है।

'स्वत्व तथा स्वामित्व शास्त्रसम्मत होना चाहिए' – श्रीकृष्णतर्कालंकार की इस प्रथम मान्यता का धारेश्वर, जीमूतवाहन एवं उनके अनुयायियों ने समर्थन किया है, जबकि विज्ञानेश्वर और उनके अनुयायियों ने इसके विपरीत स्वत्व का शास्त्रानुमोदित होना आवश्यक नहीं माना है। उनका मत है कि स्वामित्व को लोक मान्यताओं पर आधारित होना चाहिए, शास्त्र का कार्य तो केवल इस प्रकार की मान्यताओं को प्रतिबिम्बित करना है। विज्ञानेश्वर तथा उनके समर्थकों की इस मान्यता को 'लौकिक स्वत्ववाद' की संज्ञा दी गयी है, परन्तु स्वामित्व को प्रकट करने वाले अनेक ऐसे भी प्रकार हैं जो कि शास्त्रसम्मत भी हैं और लोकमान्य भी। इस सम्बन्ध मे विज्ञानेश्वर एवं मित्रमिश्र का कथन है कि शास्त्रों ने लोकमान्यताओं को आधार बनाकर उन्हें प्रदर्शित किया है किन्तु जीमूतवाहन और धारेश्वर के मतानुसार लोकमान्यताएं ही शास्त्रवचनों पर अवलम्बित हैं।

वीरमित्रोदय ने एक दृष्टान्त के माध्यम से स्वत्व के शास्त्रसम्मत होने का प्रसंग स्पष्ट किया है। वे उदाहरण देते हुए कहते हैं कि यदि शास्त्र यह विधान करता है कि मनुष्य को किसी निश्चित दिशा यथा पूर्व दिशा की ओर मुख करके ही भोजन करना चाहिए और कोई व्यक्ति इस विधान के विपरीत पश्चिम अथवा किसी अन्य दिशा की ओर मुख करके भोजन करता है तो इसका यह अर्थ कदापि नहीं है कि वह व्यक्ति भोजन के यथेष्ट स्वाद से वंचित रह जाता है अथवा उस भोजन से उसकी क्षुधाशांति नहीं होती। अपितु इसका आशय मात्र इतना ही है कि शास्त्रानुमोदित विधि से भोजन न करने से वह व्यक्ति वाञ्छित कल्याण की फलप्राप्ति से वंचित रह सकता है, किन्तु जिस उद्देश्य (स्वाद या क्षुधाशान्ति) को लेकर भोजन किया जाता है, उसकी पूर्ति तो हो ही जाती है। इसी प्रकार जब शास्त्र यह विधान करते हैं कि अमुक रीति से उपक्रम करने पर ही स्वत्व की प्राप्ति होती है तो इसका अभिप्राय यह कदापि नहीं है कि इसके विपरीत उपक्रम करने पर स्वत्व की प्राप्ति हो ही नहीं सकती अथवा इस प्रकार का स्वत्व शास्त्रसम्मत न होने के कारण अवैध हो जायेगा। इसका अभिप्राय मात्र इतना ही है कि शास्त्रवचनों का उल्लंघन अनुचित है और जहाँ तक हो सके इसका उल्लंघन नहीं करना चाहिए। अन्य शब्दों मे, कहने का अभिप्राय यह है कि स्वत्व का सृजन शास्त्रवचनों से ही नहीं होता, शास्त्र इस सन्दर्भ में स्वत्व–प्रणेता नहीं, अपितु अंशतः

[26] – दायभाग, 1/5 पर श्रीकृष्ण की टीका।

दृष्टान्त–दर्शक (illustrative) और अंशतः नियामक (regulative) होते हैं।[27] अतः स्पष्ट है कि स्वत्व के सम्बन्ध में अलिखित लोक मान्यताओं का प्रचलन पहले हुआ और लिखित शास्त्रों का प्रतिपादन बाद में। इस प्रकार इन लोक मान्यताओं को शास्त्रों ने अधिक विस्तृत और स्पष्ट बना दिया।

श्रीकृष्णतर्कालंकार ने स्वत्व की व्याख्या में 'यथेच्छ विनियोग की स्वतन्त्रता' को स्वत्व का दूसरा महत्वपूर्ण पक्ष स्वीकार किया है। उनके मतानुसार 'स्वत्व' तभी पूर्ण माना जायेगा, जबकि वह स्वामी द्वारा यथेच्छ विनियोग के उपयुक्त हो। यह सत्य है कि सामान्य व्यवहार में स्वामी अपने स्वत्व का विनयोग मनोनुकूल रुप से नहीं कर सकता। इस सम्बन्ध में वह राज्यनीतियों अथवा शास्त्रवचनों द्वारा दिग्दर्शित होता है, परन्तु यदि वह राज्यनीतियों अथवा शास्त्रवचनों का उल्लंघन करके अपने स्वत्व का विनियोग अपनी इच्छानुसार करे तो इसका तात्पर्य यह नहीं है कि उसका स्वत्व ही अवैध है। ऐसी दशा में शास्त्रवचनों की अवहेलना होन पर स्वत्व का विनियोग अनुचित माना जा सकता है न कि स्वयं स्वत्व। वीरमित्रोदय का भी यही मत है कि स्वत्व के विनियोग में शास्त्रवचनों का अतिक्रमण होने पर स्वामी इस अतिक्रमण के फल का भागी हो सकता है, किन्तु इससे स्वत्व के यथेच्छ विनियोग के उसके अधिकार पर कोई प्रभाव नहीं पड़ता। स्वत्व शब्द का अर्थ ही 'यथेच्छ विनियोग का अधिकार' है। इस सम्बन्ध में वीरमित्रोदय का कथन है कि जिस प्रकार किसी बीज में उसके पेड़ तथा फल के गुण विद्यमान होते हैं, उसी प्रकार स्वत्व में उसके यथेच्छ विनियोग का अधिकार निहित होता है। यह तथ्य जीमूतवाहन के इस कथन द्वारा और भी स्पष्ट हो जाता है कि 'सैकड़ो ग्रन्थ (texts) एक सत्य का विकल्प नहीं बन सकते।' अपने इस कथन को स्पष्ट करते हुए जीमूतवाहन कहते हैं कि पिता सम्पत्ति का पूर्ण स्वामी होता है, पुत्र उसकी संतान होने के कारण उसके स्वामित्व में भागीदार नहीं हो सकता, किन्तु अनेक ऐसे ग्रन्थ हैं जो यह विधान करते हैं कि पिता कुछ वस्तुओं का उपभोग अथवा विनियोग अपने पुत्रों की सहमति के बिना नहीं कर सकता, परन्तु ये निषेध पिता के स्वत्व को प्रभावित नहीं करते। वह इनका अतिक्रमण कर सकता है, क्योंकि स्वत्व में विनियोग का अधिकार निहित होता है। पाश्चात्य विद्वानों ने भी स्वत्व में अन्तर्निहित यथेच्छ विनियोग के अधिकार को स्वीकार किया है। उपर्युक्त यथेच्छ विनियोग के लिए स्वतन्त्र स्वत्व के अतिरिक्त हिन्दू शास्त्रों में ऐसे स्वत्व का भी उल्लेख हुआ है, जिसके यथेच्छ विनियोग का अधिकार उसके स्वामी को नहीं होता। इनमें प्रथम प्रकार के स्वत्व को **'अप्रतिबन्धदाय'** तथा द्वितीय प्रकार के स्वत्व को **'सप्रतिबन्धदाय'** की संज्ञा दी गयी है। अतः स्पष्ट है कि यथेच्छ विनियोग की स्वतन्त्रता न होने पर भी स्वत्व उपस्थित रहता है।

[27] – दायभाग 1/5 पर श्रीकृष्ण की टीका, पृ. 45

सूत्रकार गौतम ने स्वत्व को शास्त्रानुमोदित माना है। उनके द्वारा प्रयुक्त रिक्थ शब्द का अर्थ – 'दाय' एवं संविभाग का अर्थ – 'दाय का विभाजन' है, जो दाय के किसी भाग पर किसी व्यक्ति का सर्वथा पृथक् स्वत्व स्थापित करता है। अभिप्राय यह है कि जब कोई व्यक्ति मृत हो जाता है तो उसकी सम्पत्ति दाय हो जाती है जिसे बहुत से व्यक्ति प्राप्त कर सकते हैं। इस रुप में वह सम्पत्ति संयुक्त सम्पत्ति हो जाती है। अतः उसका स्वामित्व, संयुक्त होने के कारण रिक्थ कहलाता है। संयुक्त स्वामित्व के अधिकारी विभाजन द्वारा दाय के निश्चित भागों के पृथक्–पृथक् स्वामी हो जाते हैं। इस प्रकार विभाजन स्वत्व का एक साधन है, किन्तु जब अधिकारी केवल एक ही व्यक्ति होता है तो वहाँ संविभाग (विभाजन) नहीं होता और वहाँ स्वामित्व का साधन रिक्थ ही हो जाता है न कि संविभाग। जब अधिकारी कई होते हैं तो इस दृष्टिकोण से रिक्थ केवल संयुक्त स्वामित्व का साधन हो जाता है। यहाँ यह कहा जा सकता है कि जीमूतवाहन के अनुमान के आधार पर रिक्थ एवं संविभाग एक–दूसरे से मिल से जाते हैं और भली प्रकार से उनमें वह अन्तर नहीं किया जा सकता है, जिसे मिताक्षरा ने अपने सिद्धान्त द्वारा व्यक्त किया है। इस प्रकार दायभाग के कथनानुसार गौतम ने जन्म को स्वामित्व के साधन के रुप में स्पष्ट रुप से ग्रहण नहीं किया है।

मिताक्षरा तथा उसके अनुयायियों ने स्वत्व का अर्थ शास्त्र के आधार पर न लेकर सामान्य प्रयोग के अर्थ में लिया है। वे अनेक तर्क देते हुए कहते हैं कि गौतम ने लोक में प्रचलित स्वामित्व के उद्गमों के एक निश्चित मिश्रित नियम का निरुपण कर स्वामित्व साधनों के कतिपय कारणों या साधनों को मात्र दोहराया है। उनका यह भी मत है कि रिक्थ एवं संविभाग, जो गौतम के सूत्र में पाये जाते हैं, वे क्रमशः अप्रतिबन्ध दाय एवं सप्रतिबन्धदाय हैं।[28]

ऊपर वर्णित किये गये स्वत्व (स्वामित्व) की मीमांसा करने पर एक नवीन तथ्य की उत्पत्ति होती है कि क्या स्वामित्व (स्वत्व) का उद्भव विभाजन से होता है अथवा व्यक्ति के जन्म द्वारा ? वस्तुतः यह विषय प्राचीनकाल से ही विवादास्पद रहा है किन्तु इस विषय में सभी शास्त्रकार एक मत हैं कि पुत्रों, पौत्रों एवं प्रपौत्रों के अतिरिक्त अन्य व्यक्ति का अपने सम्बन्धियों की सम्पत्ति पर जन्म से अधिकार नहीं होता।

[28] – मिताक्षरा, पराशरमाधवीय, 3, पृ. 481 एवं सरस्वतीविलास, पृ0 402

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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.

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> 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.

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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 4th 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."

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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'."

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"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.

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"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

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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."

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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

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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

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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 ∩ A ∩ 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.

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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 δ 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 ε_2, the smaller the increase in the expected fine if one violates the law, making a violation less costly to the individual."

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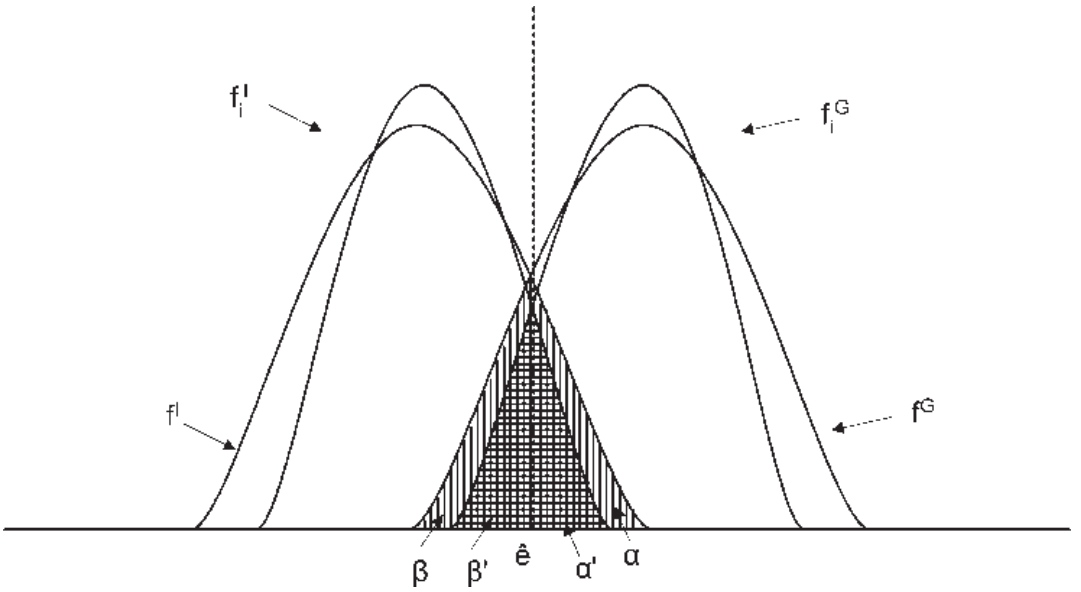


Figure 1. (f^I) and (f^G) indicate the initial probability distributions of evidence against an innocent person and a guilty person respectively. f_i^I and f_i^G are the respective probability distributions with reduced variances of evidence against an innocent person and a guilty person and α' and β' 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 α to α^1 and the Type II error was reduced from β to β^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.

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(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."

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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

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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

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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."

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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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RAWLS ON JUSTICE

A *THEORY OF JUSTICE*[1] is a rich, complicated, and fundamental work. It offers an elaborate set of arguments and provides many issues for discussion. This review will focus on its contribution to the more abstract portions of ethical theory.

The book contains three elements. One is a vision of men and society as they should be. Another is a conception of moral theory. The third is a construction that attempts to derive principles expressive of the vision, in accordance with methods that reflect the conception of moral theory. In that construction Rawls has pursued the contractarian tradition in moral and political philosophy. His version of the social contract, a hypothetical choice situation called the original position, was first presented in 1958 and is here developed in great and explicit detail. The aim is to provide a way of treating the basic problems of social choice, for which no generally recognized methods of precise solution exist, through the proxy of a specially constructed parallel problem of individual choice, which can be solved by the more reliable intuitions and decision procedures of rational prudence.

If this enterprise is to succeed, and the solution to the clearer prudential problem is to be accepted as a solution to the more obscure moral one, then the alleged correspondence between the two problems must bear a great deal of weight. Critics of the theory have tended to take issue with Rawls over what principles would be chosen in the original position, but it is also necessary to examine those features of the position that are thought to support the most controversial choices and to ask why the results of a decision taken under these highly specific and rather peculiar conditions should confirm the justice of the principles chosen. This doctrine of correspondence is both fundamental and obscure, and its defense is not easy to extract from the book. A proper treatment of the subject will have to cover considerable ground, and it is probably best to begin with Rawls's moral epistemology.

Rawls believes that it will be more profitable to investigate the foundations of ethics when there are more substantive ethical results

[1] *A Theory of Justice.* By John Rawls. (Cambridge, Mass., Harvard University Press, 1971. Pp. xv, 607.)

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to seek the foundations of. Nevertheless, in Section 9 he expounds a general position that helps to explain his method of proceeding. Ethics, he says, cannot be derived from self-evident axioms nor from definitions, but must be developed, like any other scientific subject, through the constant interaction between theoretical construction and particular observation. In this case, the particular observations are not experiments but substantive moral judgments. It is a bit like linguistics: ethics explores our moral sense as grammar explores our linguistic competence.[2]

Intuitionism attempts to capture the moral sense by summarizing our particular moral intuitions in principles of maximum generality, relying on further intuitions to settle conflicts among those principles. This is not what Rawls means. He intends rather that the underlying principles should possess intuitive moral plausibility of their own, and that the total theory should not merely summarize but illuminate and make plausible the particular judgments that it explains. Moreover, its intrinsic plausibility may persuade us to modify or extend our intuitions, thereby achieving greater theoretical coherence. Our knowledge of contingent facts about human nature and society will play a substantial part in the process.

When this interplay between general and particular has produced a relatively stable outcome, and no immediate improvements on either level suggest themselves, then our judgments are said to be in a state of *reflective equilibrium*. Its name implies that the state is always subject to change, and that our current best approximation to the truth will eventually be superseded. The indefinite article in Rawls's title is significant: he believes that all present moral theories "are primitive and have grave defects" (p. 52). His own results are provisional. "I doubt," he says (p. 581), "that the principles of justice (as I have defined them) will be the preferred conception on anything resembling a complete list."

If the principles and judgments of a theory are controversial and do not command immediate intuitive assent, then the support they receive from the underlying moral conception assumes special impor-

[2] This seems to me a false analogy, because the intuitions of native speakers are decisive as regards grammar. Whatever native speakers agree on is English, but whatever ordinary men agree in condemning is not necessarily wrong. Therefore the intrinsic plausibility of an ethical theory can impel a change in our moral intuitions. Nothing corresponds to this in linguistics (*pace* Rawls's suggestion on p. 49), where the final test of a theory is its ability to explain the data.

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tance. To a certain extent that conception may reveal itself directly in the basic principles of the theory, but it is more clearly visible when the theory contains a model or construction that accounts for the principles and for their relation to one another. Alternative theories of justice are intuitively represented by different models (utilitarianism, for example, by the impartial sympathetic observer). Rawls's model is the original position, and the principles it is used to support are controversial. To enhance their appeal, the construction must express an intuitive idea that has independent plausibility. Before turning to the model itself, it will be useful to review briefly the substantive conclusions of the theory, identifying their controversial elements and thus the respects in which they are most in need of independent support.

Rawls's substantive doctrine is a rather pure form of egalitarian liberalism, whose controversial elements are its egalitarianism, its anti-perfectionism and anti-meritocracy, the primacy it gives to liberty, and the fact that it is more egalitarian about liberty than about other goods. The justice of social institutions is measured not by their tendency to maximize the sum or average of certain advantages, but by their tendency to counteract the natural inequalities deriving from birth, talent, and circumstance, pooling those resources in the service of the common good. The common good is measured in terms of a very restricted, basic set of benefits to individuals: personal and political liberty, economic and social advantages, and self-respect.

The justice of institutions depends on their conformity to two principles. The first requires the greatest equal liberty compatible with a like liberty for all. The second (the difference principle) permits only those inequalities in the distribution of primary economic and social advantages that benefit everyone, in particular the worst off. Liberty is prior in the sense that it cannot be sacrificed for economic and social advantages, unless they are so scarce or unequal as to prevent the meaningful exercise of equal liberty until material conditions have improved.

The view is firmly opposed to mere equality of opportunity, which allows too much influence to the morally irrelevant contingencies of birth and talent; it is also opposed to counting a society's advanced cultural or intellectual achievements among the gains which can make sacrifice of the more primary goods just. What matters is that everyone be provided with the basic conditions for the realization of his own aims, regardless of the absolute level of achievement that may represent.

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When the social and political implications of this view are worked out in detail, as is done in Part Two of the book, it is extremely appealing, but far from self-evident. In considering its theoretical basis, one should therefore ask whether the contractarian approach, realized in terms of the original position, depends on assumptions any less controversial than the substantive conclusions it is adduced to support.

The notion that a contract is the appropriate model for a theory of social justice depends on the view that it is fair to require people to submit to procedures and institutions only if, given the opportunity, they could in some sense have agreed in advance on the principles to which they must submit. That is why Rawls calls the theory "justice as fairness." (Indeed, he believes that a similar contractual basis can be found for the principles of individual morality, yielding a theory of rightness as fairness.) The fundamental attitude toward persons on which justice as fairness depends is a respect for their autonomy or freedom.[3] Since social institutions are simply there and people are born into them, submission cannot be literally voluntary, but (p. 13) "A society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair."

Before considering whether the original position embodies these conditions, we must ask why respect for the freedom of others, and the desire to make society as near to voluntary as possible, should be taken as the mainspring of the sense of justice. That gives liberty a position of great importance from the very beginning, an importance

[3] Expanding on this point, Rawls submits that his view is susceptible to a Kantian interpretation, but the details of the analogy are not always convincing. See, e.g., the claim on p. 253 that the principles of justice are categorical imperatives, because the argument for them does not assume that the parties to the agreement have particular ends, but only that they desire those primary goods that it is rational to want whatever else one wants. First of all, the desire for those primary goods is not itself the motive for obeying the principles of justice in real life, but only for choosing them in the original position. Secondly, imperatives deriving from such a desire would be hypothetical and assertoric in Kant's system, not categorical. But since our adherence to the two principles is supposed to be motivated by a sense of justice growing out of gratitude for the benefits received from just institutions, the imperatives of justice as fairness would in fact appear to be hypothetical and problematic (*Foundation of the Metaphysics of Morals*, pp. 415-416 of the Prussian Academy Edition).

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that it retains in the resulting substantive theory. But we must ask how the respect for autonomy by itself can be expected to yield further results as well.

When one justifies a policy on the ground that the affected parties would have (or even have) agreed to it, much depends on the reasons for their agreement. If it is motivated by ignorance or fear or helplessness or a defective sense of what is reasonable, then actual or possible prior agreement does not sanction anything. In other cases, prior agreement for the right reasons can be obtained or presumed, but it is not the agreement that justifies what has been agreed to, but rather whatever justifies the agreement itself. If, for example, certain principles would be agreed to because they are just, that cannot be what makes them just. In many cases the appeal to hypothetical prior agreement is actually of this character. It is not a final justification, not a mark of respect for autonomy, but merely a way of recalling someone to the kind of *moral* judgment he would make in the absence of distorting influences derived from his special situation.

Actual or presumable consent can be the *source* of a justification only if it is already accepted that the affected parties are to be treated as certain reasons would incline each of them to want to be treated. The circumstances of consent are designed to bring those reasons into operation, suppressing irrelevant considerations, and the fact that the choice would have been made becomes a further reason for adhering to the result.

When the interests of the parties do not naturally coincide, a version of consent may still be preserved if they are able to agree in advance on a procedure for settling conflicts. They may agree unanimously that the procedure treats them equally in relevant respects, though they would not be able to agree in advance to any of the particular distributions of advantages that it might yield. (An example would be a lottery to determine the recipient of some indivisible benefit.)

For the result of such a choice to be morally acceptable, two things must be true: (*a*) the choice must be unanimous; (*b*) the circumstances that make unanimity possible must not undermine the equality of the parties in other respects. Presumably they must be deprived of some knowledge (for example, of who will win the lottery) in order to reach agreement, but it is essential that they not be unequally deprived (as would be the case, for example, if they agreed to submit a dispute to an arbitrator who, unknown to any of them, was extremely biased).

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The more disparate the conflicting interests to be balanced, however, the more information the parties must be deprived of to insure unanimity, and doubts begin to arise whether any procedure can be relied on to treat everyone equally in respect of the relevant interests. There is then a real question whether hypothetical choice under conditions of ignorance, as a representation of consent, can by itself provide a moral justification for outcomes that could not be unanimously agreed to if they were known in advance.

Can such a procedure be used to justify principles for evaluating the basic structure of social institutions? Clearly the preferences of individuals are so divergent that they would not voluntarily agree on a common set of principles if all were given an equal voice. According to the theory of the original position, the appeal to prior agreement can be utilized nevertheless, by requiring the hypothetical choice to be made on the basis of reasons that all men have in common, omitting those which would lead them to select different principles and institutions. By restricting the basis of the hypothetical agreement in this way, however, one may lose some of its justifying power. We must therefore look carefully at the conditions imposed on a choice in the original position. Since Rawls does not, in any case, offer an abstract argument for the contractarian approach, its defense must be found in its application.

The original position is supposed to be the most philosophically favored interpretation of a hypothetical initial status quo in which fundamental agreements would be fair. The agreements can then be appealed to in disputes over the justice of institutions. The parties have an equal voice and they choose freely: in fact, they can all arrive independently at the same conclusions. Each of us, moreover, can enter the original position at any time simply by observing its rather special restrictions on arguments, and choosing principles from that point of view.

All this is possible because the grounds of choice are severely restricted as follows. The parties are mutually disinterested—that is, neither altruistic nor envious. About their own desires they know only what is true of everyone: that they have some life plan or conception of the good and a personal commitment to certain other individuals. Whatever the details, they know these interests can be advanced by the employment of very basic primary goods under conditions of liberty. They also possess general knowledge about economics, politics, and sociology and they know that the circumstances of justice, conflicting interests and moderate scarcity, obtain. Finally,

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they believe that they have a sense of justice which will help them to adhere to the principles selected, but they know enough about moral psychology to realize that their choices must take into account the strains of commitment which will be felt when the principles are actually adopted, and the importance of choosing principles that will, when put into application, evoke their own support and thereby acquire psychological stability. Everything else—their talents, their social position, even the general nature or stage of development of their particular society—is covered over with a thick veil of ignorance on the ground that it is morally irrelevant. The choice should not be influenced by social and natural contingencies that would lead some parties to press for special advantages, or give some of them special bargaining power.

Rawls contends (p. 21) that these restrictions "collect together into one conception a number of conditions on principles that we are ready upon due consideration to recognize as reasonable. . . . One argues," he says (p. 18), "from widely accepted but weak premises to more specific conclusions. Each of the presumptions should by itself be natural and plausible; some of them may seem innocuous or even trivial. The aim of the contract approach is to establish that taken together they impose significant bounds on acceptable principles of justice."

I do not believe that the assumptions of the original position are either weak or innocuous or uncontroversial. In fact, the situation thus constructed may not be fair. Rawls says that the aim of the veil of ignorance is "to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice" (p. 18). Let us grant that the parties should be equal and should not be in possession of information which would lead them to seek advantages on morally irrelevant grounds like race, sex, parentage, or natural endowments. But they are deprived also of knowledge of their particular conception of the good. It seems odd to regard that as morally irrelevant from the standpoint of justice. If someone favors certain principles because of his conception of the good, he will not be seeking special advantages for himself so long as he does not know who in the society he is. Rather he will be opting for principles that advance the good for everyone, as defined by that conception. (I assume a conception of the good is just that, and not simply a system of tastes or preferences.) Yet Rawls appears to believe that it would be as unfair to permit people to press for the realization

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of their conception of the good as to permit them to press for the advantage of their social class.

It is true that men's different conceptions of the good divide them and produce conflict, so allowing this knowledge to the parties in the original position would prevent unanimity. Rawls concludes that the information must be suppressed and a common idea substituted which will permit agreement without selecting any particular conception of the good. This is achieved by means of the class of primary goods that it is supposedly rational to want whatever else one wants. Another possible conclusion, however, is that the model of the original position will not work because in order to secure spontaneous unanimity and avoid the necessity of bargaining one must suppress information that is morally relevant, and moreover suppress it in a way that does not treat the parties equally.

What Rawls wishes to do, by using the notion of primary goods, is to provide an Archimedean point, as he calls it, from which choice is possible without unfairness to any of the fuller conceptions of the good that lead people to differ. A *theory* of the good is presupposed, but it is ostensibly neutral between divergent particular conceptions, and supplies a least common denominator on which a choice in the original position can be based without unfairness to any of the parties. Only later, when the principles of justice have been reached on this basis, will it be possible to rule out certain particular interests or aims as illegitimate because they are unjust. It is a fundamental feature of Rawls's conception of the fairness of the original position that it should not permit the choice of principles of justice to depend on a particular conception of the good over which the parties may differ.

The construction does not, I think, accomplish this, and there are reasons to believe that it cannot be successfully carried out. Any hypothetical choice situation which requires agreement among the parties will have to impose strong restrictions on the grounds of choice, and these restrictions can be justified only in terms of a conception of the good. It is one of those cases in which there is no neutrality to be had, because neutrality needs as much justification as any other position.

Rawls's minimal conception of the good does not amount to a weak assumption: it depends on a strong assumption of the sufficiency of that reduced conception for the purposes of justice. The refusal to rank particular conceptions of the good implies a very marked tolerance for individual inclinations. Rawls is opposed not only to

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teleological conceptions according to which justice requires adherence to the principles that will maximize the good. He is also opposed to the natural position that even in a nonteleological theory what is just must depend on what is good, at least to the extent that a correct conception of the good must be used in determining what counts as an advantage and what as a disadvantage, and how much, for purposes of distribution and compensation. I interpret him as saying that the principles of justice are objective and interpersonally recognizable in a way that conceptions of the good are not. The refusal to rank individual conceptions and the reliance on primary goods are intended to insure this objectivity.

Objectivity may not be so easily achieved.[4] The suppression of knowledge required to achieve unanimity is not equally fair to all the parties, because the primary goods are not equally valuable in pursuit of all conceptions of the good. They will serve to advance many different individual life plans (some more efficiently than others), but they are less useful in implementing views that hold a good life to be readily achievable only in certain well-defined types of social structure, or only in a society that works concertedly for the realization of certain higher human capacities and the suppression of baser ones, or only given certain types of economic relations among men. The model contains a strong individualistic bias, which is further strengthened by the motivational assumptions of mutual disinterest and absence of envy. These assumptions have the effect of discounting the claims of conceptions of the good that depend heavily on the relation between one's own position and that of others (though Rawls is prepared to allow such considerations to enter in so far as they affect self-esteem). The original position seems to presuppose not just a neutral theory of the good, but a liberal, individualistic conception according to which the best that can be wished for someone is the unimpeded pursuit of his own path, provided it does not interfere with the rights of others. The view is persuasively developed in the later portions of the book, but without a sense of its controversial character.

Among different life plans of this general type the construction is neutral. But given that many conceptions of the good do not fit into the individualistic pattern, how can this be described as a fair choice situation for principles of justice? Why should parties in the original position be prepared to commit themselves to principles that

[4] For the ideas in this paragraph I am indebted to Mary Gibson.

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may frustrate or contravene their deepest convictions, just because they are deprived of the knowledge of those convictions?

There does not seem to be any way of redesigning the original position to do away with a restrictive assumption of this kind. One might think it would be an improvement to allow the parties full information about everyone's preferences and conception of the good, merely depriving them of the knowledge of who they were. But this, as Rawls points out (pp. 173-174), would yield no result at all. For either the parties would retain their conceptions of the good and, choosing from different points of view, would not reach unanimity, or else they would possess no aims of their own and would be asked to choose in terms of the aims of all the people they might be—an unintelligible request which provides no basis for a unified choice, in the absence of a dominant conception. The reduction to a common ground of choice is therefore essential for the model to operate at all, and the selection of that ground inevitably represents a strong assumption.

Let us now turn to the argument leading to the choice of the two principles in the original position as constructed. The core of this argument appears in Sections 26-29, intertwined with an argument against the choice of the principle of average utility. Rawls has gone to some lengths to defend his controversial claim that in the original position it is rational to adopt the maximin rule which leads one to choose principles that favor the bottom of the social hierarchy, instead of accepting a greater risk at the bottom in return for the possibility of greater benefits at the top (as might be prudentially rational if one had an equal chance of being anyone in the society).

Rawls states (p. 154) that three conditions which make maximin plausible hold in the original position to a high degree. (1) "There must be some reason for sharply discounting estimates of . . . probabilities." (2) "The person choosing has a conception of the good such that he cares very little, if anything, for what he might gain above the minimum stipend that he can, in fact, be sure of by following the maximin rule." (3) "The rejected alternatives have outcomes that one can hardly accept." Let us consider these in turn.

The first condition is very important, and the claim that it holds in the original position is not based simply on a general rejection of the principle of insufficient reason (that is, the principle that where probabilities are unknown they should be regarded as equal). For one could characterize the original position in such a way that the parties would be prudentially rational to choose as if they had an

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equal chance of being anyone in the society, and the problem is to see why this would be an inappropriate representation of the grounds for a choice of principles.

One factor mentioned by Rawls is that the subject matter of the choice is extremely serious, since it involves institutions that will determine the total life prospects for the parties and those close to them. It is not just a choice of alternatives for a single occasion. Now this would be a reason for a conservative choice even if one knew the relative probabilities of different outcomes. It would be irresponsible to accept even a small risk of dreadful life prospects for oneself and one's descendants in exchange for a good chance of wealth or power. But what is needed is an account of why probabilities should be totally discounted, and not just with regard to the most unacceptable outcomes. The difference principle, for example, is supposed to apply at all levels of social development, so it is not justified merely by the desire to avoid grave risks. The fact that total life prospects are involved does not seem an adequate explanation. There must be some reason against allowing probabilities (proportional, for instance, to the number of persons in each social position) to enter into the choice of distributions above an acceptable minimum. Let me stress that I am posing a question not about decision theory but about the design of the original position and the comprehensiveness of the veil of ignorance. Why should it be thought that a just solution will be reached only if these considerations are suppressed?

Their suppression is justified, I think, only on the assumption that the proportions of people in various social positions are regarded as morally irrelevant, and this must be because it is not thought acceptable to sum advantages and disadvantages over persons, so that a loss for some is compensated by a gain for others. This aspect of the design of the original position appears, therefore, to be motivated by the wish to avoid extending to society as a whole the principle of rational choice for one man. Now this is supposed to be one of the *conclusions* of the contract approach, not one of its presuppositions. Yet the constraints on choice in Rawls's version of the original position are designed to rule out the possibility of such an extension,[5] by requiring that probabilities be discounted. I can see no way to avoid presupposing some definite view on this matter in the design of a contract situation. If that is true, then a contract approach cannot give any particular view very much support.

[5] I.e., they do not just refuse to assume that the extension is acceptable: they assume that it is unacceptable.

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Consider next the second condition. Keeping in mind that the parties in the original position do not know the stage of development of their society, and therefore do not know what minimum will be guaranteed by a maximin strategy, it is difficult to understand how an individual can know that he "cares very little, if anything, for what he might gain above the minimum." The explanation Rawls offers (p. 156) seems weak. Even if parties in the original position accept the priority of liberty, and even if the veil of ignorance leaves them with a skeletal conception of the good, it seems impossible that they should care very little for increases in primary economic and social goods above what the difference principle guarantees at any given stage of social development.

Finally, the third condition, that one should rule out certain possibilities as unacceptable, is certainly a ground for requiring a social minimum and the priority of basic personal liberties, but it is not a ground for adopting the maximin rule in that general form needed to justify the choice of the difference principle. That must rely on stronger egalitarian premises.[6]

Some of these premises reveal themselves in other parts of the argument. For example, the strongly egalitarian idea that sacrifice at the bottom is always worse than sacrifice at the top plays a central role in the appeal to strains of commitment and psychological stability. It is urged against the utilitarian alternative to the difference principle, for example, that the sacrifices utilitarianism might require would be psychologically unacceptable.

[6] A factor not considered in Rawls's argument, which suggests that the difference principle may be too weak, is the following. If differential social and economic benefits are allowed to provide incentives, then the people at the top will tend to be those with certain talents and abilities, and the people at the bottom, even though they are better off than they would be otherwise, will tend to lack those qualities. Such a consistent schedule of rewards inevitably affects people's sense of their intrinsic worth, and any society operating on the difference principle will have a meritocratic flavor. This is very different from the case where an unequal distribution that benefits the worst off is not visibly correlated with any independent qualities. Rawls does suggest (p. 546) that "excusable envy" may be given its due in the operation of the difference principle by including self-esteem among the primary goods. But he does not stress the *bases* of income inequality. The phenomenon I have described is not *envy*. Rawls is too willing to rely on equal liberty as the support of self-esteem; this leads him to underrate the effect of differential rewards on people's conception of themselves. A reward that is consistently attached to a certain quality stops being perceived as mere good luck.

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> The principles of justice apply to the basic structure of the social system and to the determination of life prospects. What the principle of utility asks is precisely a sacrifice of these prospects. We are to accept the greater advantages of others as a sufficient reason for lower expectations over the whole course of our life. This is surely an extreme demand. In fact, when society is conceived as a system of cooperation designed to advance the good of its members, it seems quite incredible that some citizens should be expected, on the basis of political principles, to accept lower prospects of life for the sake of others [p. 178].

Notice that if we substitute the words "difference principle" for "principle of utility," we get an argument that might be offered against the difference principle by someone concentrating on the sacrifices it requires of those at the top of the social order. They must live under institutions that limit their life prospects unless an advantage to them also benefits those beneath them. The only difference between the two arguments is in the relative position of the parties and of their sacrifices.[7] It is of course a vital difference, but that depends on a moral judgment—namely, that sacrifices which lessen social inequality are acceptable while sacrifices which increase inequality are not.

This appeal to psychological stability and the strains of commitment therefore adds to the grounds of choice in the original position a moral view that belongs to the substantive theory. The argument may receive some support from Rawls's idea about the natural development of moral sentiments, but they in turn are not independent of his ethical theory. If a hypothetical choice in the original position must be based on what one can expect to find morally acceptable in real life, then that choice is not the true ground of acceptability.[8]

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[7] Exactly the same sacrifice could, after all, be either at the bottom or at the top, depending on the stage of advancement of the society.

[8] A similar objection could be made to Rawls's claim that the difference principle provides a condition of reciprocal advantage that allows everyone to co-operate willingly in the social order. Obviously, those at the bottom could not prefer any other arrangement, but what about those at the top? Rawls says the following:

> "To begin with, it is clear that the well-being of each depends on a scheme of social cooperation without which no one could have a satisfactory life. Secondly, we can ask for the willing cooperation of everyone only if the terms of the scheme are reasonable. The difference principle, then, seems to be a fair basis on which those better endowed, or more fortunate in their social circumstances, could expect others to collaborate with them when some workable arrangement is a necessary condition of the good of all" [p. 103].

But if some scheme of social cooperation is necessary for *anyone* to have a satisfactory life, everyone will benefit from a wide range of schemes. To assume that the worst off need further benefits to co-operate willingly while the best off do not is simply to repeat the egalitarian principle.

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Another strong conclusion of the theory is the priority of equal liberty, expressed in the lexical ordering of the two principles. The argument for *equal* liberty as a natural goal is straightforward. No analogue of the difference principle can apply permanently to liberty because it cannot be indefinitely increased. There will come a point at which increases in the liberty of the worst off can be achieved not by further increasing the liberty of the best off, but only by closing the gap. If one tries to maximize for everyone what really has a maximin, the result is equality.

The priority of liberty over other goods, however, is chosen in the original position on the basis of a judgment that the fundamental interest in determining one's plan of life assumes priority once the most basic material needs have been met, and that further increases in other goods depend for their value primarily on the ability to employ them under conditions of maximum liberty. "Thus the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course. The veil of ignorance forces them to abstract from the particulars of their plans of life thereby leading to this conclusion. The serial ordering of the two principles then follows" (p. 543). The parties also reflect that equal liberty guarantees them all a basic self-esteem against the background of which some differences in social position and wealth will be acceptable. Here again an explicitly liberal conception of individual good is used to defend a choice in the original position.

I have attempted to argue that the presumptions of the contract method Rawls employs are rather strong, and that the original position therefore offers less independent support to his conclusions than at first appears. The egalitarian liberalism which he develops and the conception of the good on which it depends are extremely persuasive, but the original position serves to model rather than to justify them. The contract approach allied with a non-liberal conception of the good would yield different results, and some conceptions of the good are incompatible with a contract approach to justice altogether. I believe that Rawls's conclusions can be more persuasively defended by direct moral arguments for liberty and equality, some of which he provides and some of which are indirectly represented in his present account through the grounds and conditions of choice in the original position. He remarks that it is worth

> noting from the outset that justice as fairness, like other contract views, consists of two parts: (1) an interpretation of the initial situation and of the problem of choice posed there, and (2) a set of principles which, it is

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> argued, would be agreed to. One may accept the first part of the theory (or some variant thereof), but not the other, and conversely [p. 15].

He suggests that the principles are more likely to be rejected than their contractual basis, but I suspect the reverse. It seems to me likely that over the long term this book will achieve its permanent place in the literature of political theory because of the substantive doctrine that it develops so eloquently and persuasively. The plausibility of the results will no doubt be taken to confirm the validity of the method, but such inferences are not always correct. It is possible that the solution to the combinatorial problems of social choice can be reached by means of a self-interested individual choice under carefully specified conditions of uncertainty, but the basis of such a solution has yet to be discovered.

This is already a famous and influential book, and inevitably for a certain time it will engage the attention of students of philosophy, politics, law, and economics. The longer life of a work and its broader impact on the habits of thought of reflective persons can never be predicted with certainty, but it is an interesting question. Although *A Theory of Justice* is for the most part very readable, it does not possess the literary distinction that has helped to make other important political works—those of Hobbes or Mill, for example—part of the common intellectual property of mankind. It does, however, possess another feature of great importance. Reading it is a powerful experience, because one is in direct contact at every point with a striking temperament and cast of mind. It is in that sense a very personal work, and the perceptions and attitudes one finds in it are vivid, intelligent, and appealing. The outlook expressed by this book is not characteristic of its age, for it is neither pessimistic nor alienated nor angry nor sentimental nor utopian. Instead it conveys something that today may seem incredible: a hopeful affirmation of human possibilities. Yet the hope has a basis, for Rawls possesses a deep sense of the multiple connections between social institutions and individual psychology. Without illusion he describes a pluralistic social order that will call forth the support of free men and evoke what is best in them. To have made such a vision precise, alive, and convincing is a memorable achievement.

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Searching for Substantive Justice:
Lessons from Lon Fuller's Natural Law

Robert C. L. Moffat*

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

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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).

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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

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[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.

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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).

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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

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[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).

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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

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[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

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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.

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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

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[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).

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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

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[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).

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"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.

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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).

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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.

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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).

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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

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[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,

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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).

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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).

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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).

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Distributive Justice
Robert Nozick

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The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. Yet many persons have put forth reasons purporting to justify a more extensive state. It is impossible within the compass of this book to examine all the reasons that have been put forth. Therefore, I shall focus upon those generally acknowledged to be most weighty and influential, to see precisely wherein they fail. In this chapter we consider the claim that a more extensive state is justified, because necessary (or the best instrument) to achieve distributive justice; in the next chapter we shall take up diverse other claims.
The term "distributive justice" is not a neutral one. Hearing the term "distribution," most people presume that some thing or mechanism uses some principle or criterion to give out a supply of things. Into this process of distributing shares some error may have crept. So it is an open question, at least, whether redistribution should take place; whether we should do again what has already been done once, though poorly. However, we are not in the position of children who have been given portions of pie by someone who now makes last minute adjustments to rectify careless cutting. There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be 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 the 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. The total result is the product of many individual decisions which the different individuals involved are entitled to make. Some uses of the term "distribution," it is true, do not imply a previous distributing appropriately judged by some criterion (for example, "probability distribution"); nevertheless, despite the title of this chapter, it would be best to use a terminology that clearly is neutral. We shall speak of people's holdings; a principle of justice in holdings describes (part of) what justice tells us (requires) about holdings. I shall state first what I take to be the correct view about justice in holdings, and then turn to the discussion of alternate views.

Section 1

The Entitlement Theory

The subject of justice in holdings consists of three major topics. The first is the *original acquisition of holdings,* the appropriation of unheld things. This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held, the things that may come to be held by

these processes, the extent of what comes to be held by a particular process, and so on. We shall refer to the complicated truth about this topic, which we shall not formulate here, as the principle of justice in acquisition. The second topic concerns the *transfer of holdings* from one person to another. By what processes may a person transfer holdings to another? How may a person acquire a holding from another who holds it? Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society. The complicated truth about this subject (with placeholders for conventional details) we shall call the principle of justice in transfer. (And we shall suppose it also includes principles governing how a person may divest himself of a holding, passing it into an unheld state.)

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

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 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.

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

A distribution is just if it arises from another just distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate first "moves" are specified by the principle of justice in acquisition. Whatever arises from a just situation by just steps is itself just. The means of change specified by the principle of justice in transfer preserve justice. As correct rules of inference are truth-preserving, and any conclusion deduced via repeated application of such rules from only true premisses is itself true, so the means of transition from one situation to another specified by the principle of justice in transfer are justice-preserving, and any situation actually arising from repeated transitions in accordance with the principle from a just situation is itself just. The parallel between justice-preserving transformations and truth-preserving transformations illuminates where it fails as well as where it holds. That a conclusion could have been deduced by truth-preserving means from premisses that are true suffices to show its truth. That from a just situation a situation *could* have arisen via justice-preserving means does *not* suffice to show its justice. The fact that a thief's victims voluntarily *could* have presented him with gifts does not entitle the thief to his ill-gotten gains. Justice in holdings is historical; it depends upon what actually has happened. We shall return to this point later.

Not all actual situations are generated in accordance with the two principles of justice in holdings: the principle of justice in acquisition and the principle of justice in transfer. Some people steal from others, or defraud them, or enslave them,

seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges. None of these are permissible modes of transition from one situation to another. And some persons acquire holdings by means not sanctioned by the principle of justice in acquisition. The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings. If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices? What obligations do the performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, than it would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? I do not know of a thorough or theoretically sophisticated treatment of such issues. Idealizing greatly, let us suppose theoretical investigation will produce a principle of rectification. This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.

The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice (as specified by the first two principles). If each person's holdings are just, then the total set (distribution) of holdings is just. To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here (Locke's principle of justice in acquisition is discussed below.)... .

How Liberty Upsets Patterns

It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings. For suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is

your favorite one and let us call this distribution D_1; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. (Also suppose contracts run only for a year, with players being free agents.) He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. (We ignore the question of whether he is "gouging" the owners, letting them look out for themselves.) The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with $250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D_2, unjust? If so, why? There is no question about whether each of the people was entitled to the control over the resources they held in D,; because that was the distribution (your favorite) that (for the purposes of argument) we assumed was acceptable. Each of these persons *chose* to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review* But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. If D, was a just distribution, and people voluntarily moved from it to D_2, transferring parts of their shares they were given under D, (what was it for if not to do something with?), isn't *D,* also just? If the people were entitled to dispose of the resources to which they were entitled (under D,), didn't this include their being entitled to give it to, or exchange it with, Wilt Chamberlain? Can anyone else complain on grounds of justice? Each other person already has his legitimate share under D_1. Under D_p there is nothing that anyone has that anyone else has a claim of justice against. After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed. By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer? To cut off objections irrelevant here, we might imagine the exchanges occurring in a socialist society after hours. After playing whatever basketball he does in his daily work, or doing whatever other daily work he does, Wilt Chamberlain decides to put in *overtime* to earn additional money. (First his work quota is set; he works time over that.) Or imagine it is a skilled juggler people like to see, who puts on shows after hours.

Why might someone work overtime in a society in which it is assumed their needs are satisfied? Perhaps because they care about things other than needs. I like to write in books that I read, and to have easy access to books for browsing at odd hours. It would be very pleasant and convenient to have the resources of Widener Library in my back yard. No society, I assume, will provide such resources close to each person who would like them as part of his regular allotment (under *DO.* Thus, persons

either must do without some extra things that they want, or be allowed to do something extra to get some of these things. On what basis could the inequalities that would eventuate be forbidden? Notice also that small factories would spring up in a socialist society, unless forbidden. I melt down some of my personal possessions (under D,) and build a machine out of the material. I offer you, and others, a philosophy lecture once a week in exchange for your cranking the handle on my machine, whose products I exchange for yet other things, and so on. (The raw materials used by the machine are given to me by others who possess them under D_1, in exchange for hearing lectures.) Each person night participate to gain things over and above their allotment under D,. Some persons even might want to leave their job in socialist industry and work full time in this private sector. I shall say something more about these issues in the next chapter. Here I wish merely to note how private property even in means of production would occur in a socialist society that did not forbid people to use as they wished some of the resources they are given under the socialist distribution D_1. The socialist society would have to forbid capitalist acts between consenting adults.

The general point illustrated by the Wilt Chamberlain example and the example of the entrepreneur in a socialist society is that no end-state principle of distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them. (But if some time limit is to be set on how long people may keep resources others voluntarily transfer to them, why let them keep these resources for *any* period of time? Why not have immediate confiscation?) It might be objected that all persons voluntarily will choose to refrain from actions which would upset the pattern. This presupposes unrealistically (1) that all will most want to maintain the pattern (are those who don't, to be "reeducated" or forced to undergo self-criticism"?), (2) that each can gather enough information about his own actions and the ongoing activities of others to discover which of his actions will upset the pattern, and (3) that diverse and far-flung persons can coordinate their actions to dovetail into the pattern. Compare the manner in which the market is neutral among persons' desires, as it reflects and transmits widely scattered information via prices, and coordinates persons' activities.

It puts things perhaps a bit too strongly to say that every patterned (or end-state) principle is liable to be thwarted by the voluntary actions of the individual parties transferring some of their shares they receive under the principle. For perhaps some *very* weak patterns are not so thwarted. Any distributional pattern with any egalitarian component is overturnable by the voluntary actions of individual persons over time; as is every patterned condition with sufficient content so as

actually to have been proposed as presenting the central core of distributive justice. Still, given the possibility that some weak conditions or patterns may not be unstable in this way, it would be better to formulate an explicit description of the kind of interesting and contentful patterns under discussion, and to prove a theorem about their instability. Since the weaker the patterning, the more likely it is that the entitlement system itself satisfies it, a plausible conjecture is that any patterning either is unstable or is satisfied by the entitlement system….

Taxation of earnings from labor is on a par with forced labor. Some persons find this claim obviously true: taking the earnings of *n* hours labor is like taking *n* hours from the person; it is like forcing the person to work *n* hours for another's purpose. Others find the claim absurd. But even these, *if* they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. But a system that takes five hours' wages in taxes does not seem to them like one that forces someone to work five hours, since it offers the person forced a wider range of choice in activities than does taxation in kind with the particular labor specified. (But we can imagine a gradation of systems of forced labor, from one that specifies a particular activity, to one that gives a choice among two activities, to ... ; and so on up.) Furthermore, people envisage a system with something like a proportional tax on everything above the amount necessary for basic needs. Some think this does not force someone to work extra hours, since there is no fixed number of extra hours he is forced to work, and since he can avoid the tax entirely by earning only enough to cover his basic needs. This is a very uncharacteristic view of forcing for those who *also* think people are forced to do something *whenever* the alternatives they face are considerably worse. However, *neither view is* correct. The fact that others intentionally intervene, in violation of a side constraint against aggression, to threaten force to limit the alternatives, in this case to paying taxes or (presumably the worse alternative) bare subsistence, makes the taxation system one of forced labor and distinguishes it from other cases of limited choices which are not forcings.

The man who chooses to work longer to gain an income more than sufficient for his basic needs prefers some extra goods or services to the leisure and activities he could perform during the possible nonworking hours; whereas the man who chooses not to work the extra time prefers the leisure activities to the extra goods or services he could acquire by working more. Given this, if it would be illegitimate for a tax system to seize some of a man's leisure (forced labor) for the purpose of serving the needy, how can it be legitimate for a tax system to seize some of a man's goods for that purpose? Why should we treat the man whose happiness requires certain material goods or services differently from the man whose preferences and desires make such goods unnecessary for his happiness? Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at a sunset (and hence need earn no extra money) is not? Indeed, isn't it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while

adding yet another burden to the poor unfortunate who must work for his pleasures? If anything, one would have expected the reverse. Why is the person with the nonmaterial or nonconsumption desire allowed to proceed unimpeded to his most favored feasible alternative, whereas the man whose pleasures or desires involve material things and who must work for extra money (thereby serving whomever considers his activities valuable enough to pay him) is constrained in what he can realize? ...

Locke's Theory of Acquisition

Before we turn to consider other theories of justice in detail, we must introduce an additional bit of complexity into the structure of the entitlement theory. This is best approached by considering Locke's attempt to specify a principle of justice in acquisition. Locke views property rights in an unowned object as originating through someone's mixing his labor with it. This gives rise to many questions. What are the boundaries of what labor is mixed with? If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot? Which plot does an act bring under ownership? The minimal (possibly disconnected) area such that an act decreases entropy in that area, and not elsewhere? Can virgin land (for the purposes of ecological investigation by high-flying airplane) come under ownership by a Lockean process? Building a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).

Why does mixing one's labor with something make one the owner of it? Perhaps because one owns one's labor, and so one comes to own a previously unowned thing that becomes permeated with what one owns. Ownership seeps over into the rest. But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice? Perhaps the idea, instead, is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created. (Reinforcing this, perhaps, is the view that laboring is unpleasant. If some people made things effortlessly, as the cartoon characters in *The Yellow Submarine* trail flowers in their wake, would they have lesser claim to their own products whose making didn't cost them anything?) Ignore the fact that laboring on something may make it less valuable (spraying pink enamel paint on a piece of driftwood that you have found). Why should one's entitlement extend to the whole object rather than just to the *added value* one's labor has produced? (Such reference to value might also serve to delimit the extent of ownership; for example, substitute "increases the value of" for "decreases entropy in" in the above entropy criterion.) No workable or coherent value-added property scheme has yet been devised, and any such scheme presumably would fall to objections (similar to those) that fell the theory of Henry George.

It will be implausible to view improving an object as giving full ownership to it, if the stock of unowned objects that might be improved is limited. For an object's coming under one person's ownership changes the situation of all others. new idea must convince to try it out; private property enables people to decide on the pattern and types of risks they wish to bear, leading to specialized types of risk bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on. These considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the "enough and as good left over" proviso, *not* as a utilitarian justification of property. They enter to rebut the claim that because the proviso is violated no natural right to private property can arise by a Lockean process. The difficulty in working such an argument to show that the proviso is satisfied is in fixing the appropriate base line for comparison. Lockean appropriation makes people no worse off than they would be *how?* This question of fixing the baseline needs more detailed investigation than we are able to give it here. It would be desirable to have an estimate of the general economic importance of original appropriation in order to see how much leeway there is for differing theories of appropriation and of the location of the baseline. Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material *in situ,* and by the percentage of current wealth which represents such income in the past.

We should note that it is not only persons favoring *private* property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).

The Proviso

Whether or not Locke's particular theory of appropriation can be spelled out so as to handle various difficulties, I assume that any adequate theory of justice in acquisition will contain a proviso similar to the weaker of the ones we have attributed to Locke. 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. It is important to specify *this* particular mode of worsening the situation of others, for the proviso does not encompass other modes. It does not include the worsening due to more limited opportunities to appropriate (the first way above, corresponding to the more stringent condition), and it does not include how I "worsen" a seller's position if I appropriate materials to make some of what he is selling, and then enter into competition with

him. Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one. A theory of appropriation incorporating this Lockean proviso will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.

A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. Some reflection of the proviso about appropriation constrains later actions. If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.) This proviso (almost?) never will come into effect; the more someone acquires of a scarce substance which others want, the higher the price of the rest will go, and the more difficult it will become for him to acquire it all. But still, we can imagine, at least, that something like this occurs: someone makes simultaneous secret bids to the separate owners of a substance, each of whom sells assuming he can easily purchase more from the other owners; or some natural catastrophe destroys all of the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. His later acquisition of it all does not show that the original appropriation violated the proviso (even by a reverse argument similar to the one above that tried to zip back from Zto A). Rather, it is the combination of the original appropriation *plus* all the later transfers and actions that violates the Lockean proviso.

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Similarly, an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso…

The fact that someone owns the total supply of something necessary for others to stay

alive does *not* entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one. A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated. The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso. Nor would someone else's purchasing the total supply of the synthesized substance from the medical researcher. The fact that the medical researcher uses easily available chemicals to synthesize the drug no more violates the Lockean proviso than does the fact that the only surgeon able to perform a particular operation eats easily obtainable food in order to stay alive and to have the energy to work. This shows that the Lockean proviso is not an "endstate principle"; it focuses on a particular way that appropriative actions affect others, and not on the structure of the situation that results.

Intermediate between someone who takes all of the public supply and someone who makes the total supply out of easily obtainable substances is someone who appropriates the total supply of something in a way that does not deprive the others of it. For example, someone finds a new substance in an out-of-the-way place. He discovers that it effectively treats a certain disease and appropriates the total supply. He does not worsen the situation of others; if he did not stumble upon the substance no one else would have, and the others would remain without it. However, as time passes, the likelihood increases that others would have come across the substance; upon this fact might be based a limit to his property right in the substance so that others are not below their baseline position; for example, its bequest might be limited. The theme of someone worsening another's situation by depriving him of something he otherwise would possess may also illuminate the example of patents. An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others). Furthermore, a known inventor drastically lessens the chances of actual independent invention. For persons who know of an invention usually will not try to reinvent it, and the notion of independent discovery here would be murky at best. Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.

I believe that the free operation of a market system will not actually run afoul of the Lockean proviso.

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The Idea of Justice[1]

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1.

John Dryden wrote in 1698, in the *Epistle to Peter Antony Motteux*, ''Words, once my stock, are wanting to commend/So great a poet and so good a friend.'' It is not easy to talk about a close friend, and I am afraid this applies to me when I consider what to say about Mahbub ul Haq, or even to talk on subjects that have been so radically influenced by Mahbub's contributions. My problems lie not only in the closeness of our personal ties, but also in the difficulty in getting an adequate understanding of the greatness of Mahbub ul Haq. Indeed, Mahbub ul Haq as a person was much larger than all the parts that combined to make him the person he was. He was, of course, an outstanding economist, a visionary social thinker, a global intellectual, a major innovator of ideas who bridged theory and practice, and the leading architect in the contemporary world of the assessment of the process of human development. These achievements are justly celebrated, but, going beyond the boundaries of each, this was a human being whose combination of curiosity, lucidity, open-mindedness, dedication, courage and creativity made all these diverse achievements possible.

I have been extremely fortunate in knowing Mahbub for most of my — and his — life. When I first met him as a fellow undergraduate at Cambridge University more than half a century ago, in early October 1953, neither of us was yet 20. Elegantly attired (at least by undergraduate standards), Mahbub was walking rapidly down King's Parade on his way to the first lecture of the term by the redoubtable economist, Joan Robinson, towards which I was also heading. We began a conversation while walking, and Mahbub asked me whether I knew what to expect from Joan Robinson's lectures. I did not, of course.

In Mahbub's mind there were huge expectations: Joan Robinson was such an extraordinary leader of non-conformist economic thinking. But it became clear to me within a few weeks that Mahbub was very disappointed — as I must confess I was too — that despite Joan Robinson's scintillating reasoning and iconoclastic brilliance, she was such a real conformist in judging economic progress largely by the pace of economic growth. The 19-year-old Mahbub told me, ''She hasn't done the numbers, has she?''

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Then Mahbub told me something very like what would find expression in his first book, *The Strategy of Economic Planning* published in 1963, where he would write: ''If India and Pakistan manage to maintain an annual growth rate of 5% and pass through roughly the same 'take-off' period as [W.W.] Rostow identifies for many of the Western countries, the per capita income after another twenty years will be no higher than the present-day per capita income in Egypt.'' I should explain that Mahbub had nothing against Egypt, but he made sense when he looked at me and asked, ''Is that all you and I want? Can't we do better in taking more immediate action against the deprivations, the miseries and the injustices in the world?'' If Mahbub's creative impatience was one of his life-long characteristics, the commitment to do things without waiting was already strong in the mind of the young man who, when I met him first, was impatiently awaiting his adulthood.

When I visited Mahbub and his wife Khadija (or Bani) in Karachi in Pakistan, almost ten years later, in the spring of 1963, Mahbub explained to me what he had learned in his experience with the process of economic planning in Pakistan (he was working for the Planning Commission of Pakistan after his return from Cambridge, Yale and Harvard). There were things that could be made to happen by making good use of applied economic reasoning, but the barriers to progress were, he explained, immense. As the sun set on a magically bewitching Karachi, Mahbub's voice rose and his intense analysis was radically heretical. He knew what to confront, but was sceptical of any immediate means of doing it.

To make things happen, Mahbub later tried various routes, including accepting senior Ministerial positions in a military-led government in Pakistan, but the results would have been deeply disappointing for him. But then he broadened his encounter to the world stage and made a huge — and almost instant — impact. He left Pakistan to join the United Nations in 1989, as a Special Adviser to the Administrator of the United Nations Development Programme. It was in this capacity that he launched the now-famous *Human Development Reports*, which have been published annually since 1990. He gathered around him a dedicated team of economists and social scientists. By the time Mahbub returned to Pakistan in 1996 to establish the new Human Development Centre in Islamabad, he could leave on a note of triumph, with clear evidence that the perspective of human development was already well established and remarkably influential right across the world.

I saw Mahbub last when he came to visit me at Trinity College in Cambridge in 1998 shortly before his death. We talked not far from where we had first met 45 years earlier. He was excited about a new initiative especially for South Asia: to cut military expenditure drastically. The subcontinental nuclear explosions, which occurred soon afterwards just before Mahbub's death, have not advanced the fulfilment of his dreams. And yet Mahbub's careful arguments against the arms race in the subcontinent — and in general in the world — remain just as robust and strong today.

2.

As my topic for this lecture I have chosen 'the idea of justice.' This is only partly because I am right now fairly comprehensively immersed in that subject (trying to complete my long-postponed book on the theory of justice, called — like this lecture — *The Idea of Justice*), but also because Mahbub ul Haq's life can be usefully seen in the light of his long battle against injustice in the world. He never theorized about justice, perhaps because he did not want to be distracted from his practical efforts to reduce the grip of privation and poverty in the world. There was, however, a serious matter of taste here as well. In fact, Mahbub had an almost instinctive aversion to talking about philosophy. Perhaps he thought that philosophy could not but be rather abstract in content, or diverting in consequence. In response to my spurring him to be more explicit on his foundational ideas and basic philosophy, he retaliated more than once to say ''Why don't you do it: tell me what my philosophy is?''

Well, I think that this Mahbub ul Haq Lecture might well be a good occasion for me to try to do just that. In trying to rise to the challenge, I should also explain that I do think that it is useful to try to persuade the activists to tell us more about what drives them, because of the important support that their practical commitments get from their implicit philosophy. Since the discussant of this talk is George Soros — no less — I thought this could perhaps be a particularly suitable topic on which to get started here. There are few people in the world who can be compared with Soros in terms of huge efforts to make the world less unjust and more tolerable, and at the same time, he has often discussed, with powerful reasoning, the basic philosophical ideas that have moved his dedicated work.

Let me begin with the question: how do the ideas that have been so influential in shaping Mahbub's priorities and commitments relate to modern political philosophy, in general, and to contemporary theories of justice, in particular? Let me separate out four special features of what I would argue is the conception of justice that lie behind Mahbub's priorities in his work (however implicit the connections might be). I shall call them, respectively:

(1) focus on lives and freedom;
(2) linking responsibility to effective power;
(3) comparative, not transcendental, assessment; and
(4) globally unrestricted coverage.

In each of these respects, I would argue that this philosophy is in some conflict, in varying degrees, with mainstream theories of justice in contemporary philosophy.

I would also argue that these differences can be seen as the basis of a critique of mainstream theories of justice in modern political philosophy. Given the limited time available for this lecture, I can only touch the

main points here rather briefly, although they do get more attention, along with other issues, in my forthcoming book, *The Idea of Justice*.[2]

3.

The first issue — the focus on lives and freedoms — is easy to see in the strategy of the human development approach. The breadth of that understanding contrasts with the common attempt in mainstream economics to see development in the narrow perspective of the expansion of the supply of objects of convenience (represented, for example, by the Gross Domestic Product or the Gross National Product). But it is not just in mainstream economics that there is a tendency to miss this important distinction. Much of modern political philosophy — led by the leading political philosopher of our times, John Rawls — has tended to reflect, I would argue, the same disorientation. Rawls's own analysis of equity in the interpersonal distribution of advantages is done through an index of what Rawls calls ''primary goods,'' which are general-purpose means, like income and wealth, rights and liberties, that are useful to achieve a variety of ends that human beings may reasonably pursue. This fails to take into account the wide variations that people have in being able to *convert* primary goods into good living. For example, a disabled person can do far less with the same level of income and other primary goods than can an able-bodied human being. Income does less for a person's freedom or well-being if she is born in a country or a region with wide prevalence of occasional epidemics and regular endemic diseases.

The expansion of primary goods is, of course, important, but we have to take into account the variability of the relation between increases in primary goods and the enhancement of basic human freedoms and capabilities. This was one of my major preoccupations at the time when Mahbub asked me to join him in developing the human development perspective and to help him initiate the *Human Development Reports*. The focus on capabilities links closely with the richness of human lives, and I have to say it was extremely reassuring for me to see how the youthful involvement of the 19-year-old Mahbub on human lives had matured well into an implicit but extremely firm philosophical belief on the importance of looking at human lives themselves, rather than at the commodity possessions and other facilitating factors that have some influence over our lives. The distinction here has, by now, been much discussed in the literature and its implications have been widely explored in the contributions of many economists, social scientists and philosophers.[3]

4.

I turn now to the second question, that of linking responsibility to effective power. The underlying issue involved in this connection is, I think, somewhat complicated and I can only make a brief statement here on the

nature, relevance and reach of this issue (again promising a fuller discussion in my book *The Idea of Justice*). What is the implicit understanding in the human development approach, seen as a call to action, of the responsibility of people to bring about the changes that would enhance human development in the world? The question here is not so much whether everyone will act according to what they see as reasonable (that congruence is a different issue, demanding further analysis), but what exactly they should see as reasonable and for what particular reason.

Reasoned justification for social action is a big issue in political philosophy, and theories of justice have tended to be based on some presumption that all persons can gain from a social contract that goes about setting up a just system. The arguments for this way of seeing things were clearly presented by Thomas Hobbes and Jean-Jacques Rousseau, and those arguments based on cooperative grounds have been centrally important, in one form or another, in the mainstream political philosophy of justice.

The big difference that John Rawls made to that approach was to start from the demands of fairness to arrive at his principles of justice. This he did through the device of a hypothetical 'original position' of primordial equality when the parties involved have no knowledge of their respective personal identities *within* the group as a whole. They have to choose, under this 'veil of ignorance' (i.e. ignorance specifically about their own personal interests and particular desires), what exact rules should govern the society they are, as it were, about to 'create.' Rawls tries to get rid of selfish reasoning in the derivation of principles of justice through a hypothetical exercise, but the overwhelming motivation is to harvest the mutual benefits from cooperation in that imagined original position.

There are several difficulties with this approach, some of which I will discuss later on in this talk, but the idea of mutual obligations for social cooperation because of joint benefits has become the central point of concentration in mainstream theories of justice. There is, however, another type of reasoning that does not focus on benefits of cooperation, at least not exclusively, and which has been relatively neglected in on-going political philosophy. It is based on the argument that if someone has the power to make a change that he or she can see will reduce injustice in the world, then there is a strong social argument for doing just that (without having to dress all this up in terms of some imagined cooperative benefits enjoyed by all). This obligation of effective power contrasts with the mutual obligation for cooperation, at the basic plane of motivational justification.

The point was made with clarity by Gautama Buddha, 2500 years ago, in *Sutta Nipata*. Buddha argued that human beings have responsibility to animals precisely because of the asymmetry between human beings and other animals, not because of any symmetry that takes us to a contractarian solution for efficient cooperation. He argued that since we are enormously

more powerful than the other species, we have some responsibility towards other species that links exactly with this asymmetry of power. Buddha went on to illustrate the point by an analogy with the responsibility of the mother towards her child, not because she has given birth to the child (that connection is not invoked in this particular argument — there is room for it elsewhere), but because she can do things to influence the child's life that the child itself cannot do. The mother's reason for action is not guided by the rewards of cooperation, but precisely from her recognition that she can, asymmetrically, do things for the child effectively that will make a huge difference to the child's life.

Mahbub's informal understanding of social obligation fitted well with this feature of responsibility of effective power. He was impatient with having to give any reason to someone to do something that the person could see would yield social betterment (the recognition of social betterment, Mahbub thought, was an adequate reason in itself), as if an indirect justification were needed to show that the change would benefit each agent personally. I do not have the time to pursue the richness of this line of reasoning, but I will quickly make two points of clarification that might be helpful here.

First, the understanding of obligations related to the human rights approach have always had a strong element of this kind of social reasoning, linked with the responsibility of effective power. For example, both Tom Paine's and Mary Wollstonecraft's writings on what Wollstonecraft called 'vindication' of the rights of women and men drew a great deal on this type of motivation derived from reasoning from the obligation of effective power.[4]

Second, capability is a kind of power, and it would be a mistake to see capability only as a concept of human advantage, not also as a central concept in human obligation. It should be noticed, incidentally, that this consideration yields a huge contrast between happiness and capability as basic informational ingredients in a theory of justice, since happiness does not generate obligation in the way that capability inescapably must do, if the responsibility of effective power is taken seriously.[5]

5.

I turn now to the third feature, namely the focus on *comparative* issues in the assessment of justice. The comparative question concentrates on how to make society more just, rather than speculating about the nature and the demands of 'the perfectly just society.' The former (i.e. the discipline of comparative assessments) was certainly Mahbub ul Haq's focus. It is, however, the latter (the identification of the perfectly just society) that has been the main area of concentration of contemporary political philosophy — a concentration that gives the theory of justice a 'transcendental' form.[6] Mahbub's deliberations were all aimed at exploring ways and means of

making the world less unjust than it is — not at chasing some idea of a perfectly just society.

In contrast, the transcendental issue is seen as the *predominant* question in the theory of justice in contemporary political philosophy — in fact it is sometimes the *only* question that is patiently explored in that literature. The shared starting point in most of the modern theories of justice is the identification of the demands of a 'just' society, and the nature of 'just institutions.' The exercise begins by asking 'what is a just society?' and, related to that, 'what are the principles on the basis of which just institutions could be set up for the society?' Indeed, in most theories of justice in contemporary political philosophy, those questions about impeccably just societies and exactly just institutions occupy the centre stage.

The transcendental approach to justice is not new (it can be traced at least to the writings of Thomas Hobbes in the seventeenth century), but recent contributions have done much to consolidate the reliance on this approach. In his investigation of 'justice as fairness,' Rawls explores in depth the nature of an entirely just society seen in the perspective of fairness. Even those political philosophers who have taken a different approach to the demands of justice from Rawls, for example Robert Nozick (who differs quite radically on the primacy of entitlements and historically founded rights) or Thomas Nagel (whose differences from Rawls are more subtle), tend to accept the transcendental approach to be the only one that can take us towards an understanding of the nature of justice.

However, the transcendental identification does not tell us much about how to compare, in terms of their justice-related characteristics, two arrangements neither of which actually satisfy the social contract of complete justice. How might we compare, say, (1) the USA today as it is, with its totality of problems, including the absence of medical insurance for more than 40 million people, and (2) an alternative where that lack of guaranteed medical insurance had been fully remedied, although all the other problems existing in the USA remained? Neither of these alternatives can, of course, be seen as a perfectly just society, but we can hardly take them to be much the same in terms of justice (and see them only as belonging to the large Rawlsian box called 'not just'). Nor, to take another example, would it have given Adam Smith or Marquis de Condorcet or Mary Wollstonecraft any well-theorized support for their efforts to abolish slavery in their eighteenth-century world without taking on, at the same time, all the other justice-related infelicities that ailed the world they tried to reform.

Transcendence is a lumped-together view of the world, with all possible social arrangements seen either as 'unjust' or as 'just,' without further distinctions. In contrast, the human development approach, and the social choice theory on which the human development reasoning draws explicitly or by implication, are firmly tied to asking 'comparative' questions: how can we advance justice or reduce injustice in the world?

Is this contrast significant? I would argue that it certainly is. It may well turn out that in a comparative perspective the introduction of social policies that eliminate widespread hunger, or remove rampant illiteracy, can be shown to yield an advancement of justice. But the implementation of such policies would still leave the societies involved far away from the transcendental requirements of a fully just society, which would have a great many other demands as well.

Can it be argued that the practical concentration on comparative questions, well exemplified by Mahbub's predilection in that direction, is not at all enough for the philosophy of justice, since underlying the comparative questions there must be — at some deeper level — some transcendental understanding of the demands of a perfectly just society? Can it be said that knowing about the nature of a fully just society is *necessary* for a well-grounded practical reasoning on justice? I think that thesis would be very hard to defend.

Indeed, in the discipline of comparative judgments in any field, relative assessment of two alternatives tends in general to be a matter between them, without there being the necessity to beseech the help of a third — 'irrelevant' — alternative. Indeed, it is not at all obvious why in making the judgment that some social arrangement x is better than an alternative arrangement y, we have to invoke the identification that some quite different alternative z is the 'best' or exactly the 'right' social arrangement. In arguing for a Picasso over a Dali we do not need to get steamed up about identifying the perfect picture in the world, which would beat the Picassos and the Dalis and all other paintings: we are simply judging a Picasso against a Dali.

It might, however, be thought that the analogy with aesthetics is problematic since a person might not even have any idea of a perfect picture, in a way that the idea of a perfectly just society has appeared to be identifiable, in transcendental theories of justice. I will presently argue that the existence of transcendence is actually not guaranteed even in the field of justice, but let me for the moment proceed on the generous presumption that such an identification can be made. But the possibility of having an identifiably inviolate, or best, alternative does not indicate that it is necessary (or indeed useful) to refer to it in judging the relative merits of two non-supreme alternatives. For example, we may indeed be willing to accept, with great certainty, that Everest is the tallest mountain in the world, completely unbeatable in terms of stature by any other peak, but that understanding is neither needed, nor particularly helpful, in comparing the peak heights of, say, Kilimanjaro and Mount McKinley. There would be something very deeply odd in a general belief that a comparison of any two alternatives cannot be sensibly made without a prior identification of a supreme alternative.

Let me now propose two other — perhaps milder — putative defences of the relevance of transcendental identification. First, while transcendental identification may not be necessary for answering

comparative questions, would it be sufficient, or at least be helpful, in addressing those questions? In particular, can a clear answer to the transcendental search take us indirectly to comparative assessments of justice as well (as a kind of 'by-product'), in particular through comparisons of 'distances' from transcendence at which any particular set of societal arrangements stands?

This procedure, I would argue, does not — indeed cannot — work. The difficulty lies in the fact that there are different features involved in identifying distance, related, among other distinctions, to (1) different fields of departure, (2) varying dimensionalities of transgressions, and (3) diverse ways of weighing separate infractions. The identification of transcendence does not yield any means of addressing these problems to arrive at a relational ranking of departures from transcendence.

For example, in the context of the Rawlsian analysis of the just society, departures may occur in many different spaces. They can include the breaching of liberty, which, furthermore, can involve diverse violations of distinctive liberties (many of which figure in Rawls's capacious coverage of liberty and its priority under his first principle of justice). There can also be violations — again in possibly disparate forms — of the demands of equity in the distribution of primary goods or whatever other information we decide to rely on for judging individual advantage (there can be many different departures from the demands of Difference Principle, which forms a part of Rawls's second principle).

The absence of comparative implications of transcendental identification is not, of course, an embarrassment for a transcendental theory of justice, seen as a free-standing achievement. The relational silence is not, in any sense, an internal difficulty of a transcendental theory of justice. Indeed, some pure transcendentalists would be utterly opposed even to flirting with gradings and comparative assessments, and may quite plausibly shun relational conclusions altogether. They may point in particular to their understanding that a 'right' social arrangement must not, in any way, be understood as a 'best' social arrangement, which could open the door to what is sometimes seen as the intellectually mushy world of graded evaluations in the form of 'better' or 'worse' (linked with the relationally superlative 'best'). The absoluteness of the transcendental 'right' — against the relativities of the 'better' and the 'best' — may well have a powerfully reasoned standing of its own. But it does not, of course, help at all in comparative assessments of justice.

The other supplementary question is this: would a sequence of pairwise comparisons — of being better or more just — invariably lead us to the very best or the perfectly just society? That presumption has some appeal, since the superlative might indeed appear to be the natural end point of a robust comparative. But this conclusion would, in general, be a *non-sequitur*. In fact, it is only with a 'well-ordered' ranking (e.g. a complete and transitive ordering over a finite set) that we can be sure that the set of pairwise comparisons must also identify a 'best' alternative.

I have discussed elsewhere why a systematic and disciplined theory of normative evaluation need not take a 'totalist' form; that is, one that insists on a complete ranking.[7] Incompleteness may be of the lasting kind for several different reasons, including unbridgeable gaps in information and judgmental unresolvability involving disparate considerations that cannot be entirely eliminated, even with full information.

And yet the incompleteness of rankings would not prevent making comparative judgments of justice in a great many cases, where there might be fair agreement on particular pairwise rankings, about how to enhance justice and reduce injustice. A partial ordering can be very useful without being able to lead to any transcendental identification of a fully just society. The approach of the human development is a special application of this general strategy of making do with what can be very widely accepted, without expecting that this strategy will solve every decisional problem we face.

6.

The last of the four features that were identified concerns the globally unrestricted coverage of the human development approach. The underlying concept of justice in the human development approach does not recognize any national boundaries about whom to include and whom not. How does this compare with the mainstream political philosophy of justice today? There is a remarkable contrast here since the basic focus of the ruling theories of justice are effectively national, or are confined to a polity (or what Rawls calls a 'people'). The approach of the social contract requires a strong institutional base, and, in the absence of a state running all that, we cannot proceed far on this track, as Thomas Hobbes had noted more than 300 years ago. In fact, it is the combination of the institutional view and the transcendental understanding of justice that makes considerations of global justice impossible to entertain within the boundaries of mainstream theories of justice today.

The point is made with characteristic clarity by Thomas Nagel (in an article called 'The Problem of Global Justice':[8] ''It seems to me very difficult to resist Hobbes's claim about the relation between justice and sovereignty,'' and ''if Hobbes is right, the idea of global justice without a world government is a chimera.'' In the global context, Nagel concentrates, therefore, on clarifying other demands, distinguishable from the demands of justice, such as 'minimal humanitarian morality' (which 'governs our relations to all other persons').

In the Rawlsian approach too, the application of a theory of justice requires an extensive cluster of institutions that determines the basic structure of a fully just society. Not surprisingly, Rawls actually abandons his own principles of justice when it comes to the assessment of how to go about thinking about global justice. In a later contribution, *The Law of Peoples*, Rawls invokes a kind of 'supplement' to his national

(or, within-one-country) pursuit of the demands of what he calls ''justice as fairness.'' But this supplementation comes in a very emaciated form, through a kind of negotiation between the representatives of different countries on some very elementary matters. In fact, Rawls does not try at all to derive 'principles of justice' that might emanate from these negotiations, and concentrates instead on certain general principles of humanitarian behaviour.

This is something of a normative collapse here. When people across the world agitate to get more global justice — and I emphasize here the comparative word 'more' — they are not clamouring for some kind of 'minimal humanitarianism.' Nor are they — no matter how deluded they might be in other ways — agitating for a perfectly just world society. They would tend to find their voice better reflected in a poem of Seamus Heaney:

> History says, don't hope
> On this side of the grave,
> But then, once in a life-time
> The longed-for tidal wave
> Of justice can rise up,
> And hope and history rhyme.

Hugely upbeat as this longing about justice rising up is, transcendental justice, so dominant in contemporary political philosophy, is not a part of that rhyme.

Notes

1 Text of the first Mahbub ul Haq Memorial Lecture of the Human Development and Capability Association, given at the New School in New York on 19 September 2007.

2 Underlying the approach is the major issue of what Hilary Putnam calls the denial of a ''fact\value dichotomy.'' I shall not have the chance to address that methodological question here (although I do discuss it in the book; Sen, A. (forthcoming) *The Idea of Justice*, Penguin, London and Harvard University Press, Cambridge, Mass.); but see Hilary Putnam's contribution to this issue. See also Putnam, H. (2002) *The Collapse of the Fact/Value Dichotomy and Other Essays*, Harvard University Press, Cambridge, Mass.; and Vivian Walsh (2004) 'Sen after Putnam', *Review of Political Economy*, 16, pp. 315–394.

3 This relates to the central focus of the work of the Human Development and Capability Association. Indeed, I would imagine they are getting much attention in the wonderful conference of the Human Development and Capability Association, imaginatively arranged by Sakiko Fukuda Parr, working with Martha Nussbaum, President of the Human Development and Capability Association, and others (including the dynamic Sabina Alkire).

4 I have discussed this issue in my essay 'Elements of a theory of human rights', *Philosophy and Public Affairs*, 32 (2004), pp. 315–356.

5 I tried to go into these issues in my 1984 Dewey Lectures at the Columbia University, which were published in the form of three papers, under the general title of 'Well-being, agency and freedom', *Journal of Philosophy*, 82 (1985), pp. 169–221. The connections are more fully explored in *The Idea of Justice*.

6 On this see my article 'What do we want from a theory of justice?', *The Journal of Philosophy*, 103 (2006), pp. 215–238.
7 On this see my essays 'Maximization and the act of choice', *Econometrica*, 65 (1997), pp. 745–779; and 'Consequential evaluation and practical reason', *Journal of Philosophy*, 97 (2000), pp. 477–502.
8 Nagel, T. (2005) 'The problem of global justice', *Philosophy and Public Affairs*, 33, p. 115.

The Concept of *Nyaya* (Justice) in Indian Philosophical Tradition and Contemporary Theories (John Rawls & Amartya Sen)

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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

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

Mohan Parasain[*]

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 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

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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 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

[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.

[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.

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 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

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[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).
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[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).
[7] *Supra* note 4 at 7.
[8] J.N. Mohanty, *Essays on Indian Philosophy*, 261 (ed. by Purushottama Bilimoria, Oxford University Press, Delhi, 1993).

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*. 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

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[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).

[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.

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 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 13th century successful venture of relocating the European mind in its classical Greek roots is lauded and expounded in the Indian*

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[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.

[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).

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 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

[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).
[24] S.N. Dasgupta, vol. 1, *A History of Indian Philosophy,* 302 (Motilal Banarsidass, New Delhi, 2022).

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 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

[25] M R Dasti, "Nyaya", *Internet Encyclopaedia of Philosophy*, available at: https://iep.utm.edu/nyaya/ (last visited on November 17, 2024).

[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).

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.

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

[28] If something conflicts in practice (*vyaghatavadhirasamkha*), the cognition has not overcome the sceptic challenge.
[29] *Supra* note 24 at 333.
[30] *Id* at 343.

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. (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 defined as the testimony of reliable authority (*apta*). *Shabda,* as a *Pramana* is applied not only to the Vedas, but to the

[31] Jonardon Ganeri, *Philosophy in Classical India: The Proper Work on Reason,* 14 (Routledge, London, NY, 2006).

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 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.

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[32] *Supra* note 24 at 304

[33] J. N. Mohanty, *Reason and Tradition in Indian Thought*, 248 (Clarendon Press, Oxford, 1992).

[34] *Supra* note 3 at 96.

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] 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

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[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 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)

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 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.

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[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

[41] *Id* at 13.

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.
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.

[42] *Ibid*.
[43] *Id* at 17.

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 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

[44] *Supra* note 12 at 87.

[45] *Supra* note 15 at 55.

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.

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]

[46] *Supra* note 35 at 39.

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), 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

[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.

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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NYAYASHASTRA

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समस्त भारतीय दर्शनों में न्याय दर्शन अत्यन्त तार्किक दर्शन है। इसे ही तर्कविद्या, तर्कशास्त्र, हेतुविद्या, हेतुशास्त्र, वादविद्या, न्यायशास्त्र, आन्वीक्षिकी आदि नामों से भी सम्बोधित किया जाता है। इस दर्शन में तर्क का स्थान अत्यन्त महत्त्वपूर्ण है, इसलिये इसे तर्कशास्त्र या तर्कविद्या कहा जाता है। **तर्क्यन्ते प्रतिपाद्यन्ते इति तर्काः पदार्थाः।** पदार्थों को तर्क भी कहा जाता है। इनका विवेचन करने वाला शास्त्र तर्कशास्त्र कहलाता है। अनुमान प्रमाण का विवेचन इस शास्त्र में अधिक मात्रा में है। अनुमान प्रयोग का एक घटक है हेतु। हेतु विषयक विचार न्यायशास्त्र का महत्त्वपूर्ण हिस्सा है। इसलिये न्यायशास्त्र को हेतुविद्या या हेतुशास्त्र भी कहा जाता है। प्रमाणों से विषय के परीक्षण को न्याय कहते हैं। **प्रमाणैः अर्थपरीक्षणं न्यायः।** इस कारण न्याय का विशेष विचार होने के कारण इस शास्त्र को न्यायशास्त्र भी कहते हैं। कौटिल्य अर्थशास्त्र में इस शास्त्र को आन्वीक्षिकी कहा गया है। वे कहते हैं कि जो शास्त्र अन्य सभी शास्त्रों के लिये दीपक के समान उपकारक है, सभी कार्यों का उपाय है तथा सभी धर्मों का आश्रय है, वह न्यायशास्त्र है। उसे ही आन्वीक्षिकी कहा गया है।

प्रदीपः सर्वविद्यानामुपायः सर्वकर्मणाम्।

आश्रयः सर्वधर्माणां शश्वदान्वीक्षिकी मता।। कौटिल्य अर्थशास्त्र, विद्योद्देश प्रकरण

इसी बात को न्यायभाष्य में प्रथम सूत्र की व्याख्या में भी कहा गया है। वहां कहते हैं कि

प्रत्यक्षागमाभ्यामीक्षितस्यार्थस्यान्वीक्षणमन्वीक्षा। तया प्रवर्तत इत्यान्वीक्षिकी न्यायविद्या न्यायशास्त्रम्। न्यायभाष्य, प्रथम सूत्र

अर्थात् प्रत्यक्ष तथा शास्त्रश्रुत विषयों के तात्त्विक रूप को अवगत कराने वाली विद्या ही न्यायविद्या या न्यायशास्त्र है। यह अन्य विद्याओं में श्रेष्ठ कही जाती है तथा सभी अन्य विद्याओं की उपकारक है। कहा गया है –

काणादं पाणिनीयं च सर्वशास्त्रोपकारकम्।

काणाद का अर्थ है न्यायविद्या। न्याय शास्त्र में 16 पदार्थ स्वीकार किये गये हैं। इनमें एक पदार्थ है वाद। वाद के विषय में अधिक विचार होने के कारण न्यायशास्त्र को वादविद्या के नाम से भी संबोधित किया जाता है।

न्याय दर्शन में स्वीकृत 16 पदार्थ इस प्रकार हैं –

1. प्रमाण
2. प्रमेय
3. संशय
4. प्रयोजन
5. दृष्टान्त
6. सिद्धान्त
7. अवयव
8. तर्क
9. निर्णय
10. वाद
11. जल्प
12. वितण्डा
13. हेत्वाभास
14. छल
15. जाति
16. निग्रह स्थान

1. प्रमाण – प्रमा के करण को प्रमाण कहा जाता है। प्रश्न होता है कि प्रमा क्या है ? यथार्थ ज्ञान को प्रमा कहते हैं। **प्रमाकरणं प्रमाणम्। यथार्थानुभवः प्रमा।**
   जो वस्तु जैसी है, उसमें उसी प्रकार के ज्ञान को यथार्थ ज्ञान कहा जाता है। **तद्वति तत्प्रकारकं ज्ञानं यथार्थम्।** जैसे – रज्जु में रज्जु का ज्ञान होना यथार्थ ज्ञान है। वहीं रज्जु में सर्प का भ्रम अयथार्थ ज्ञान है। इसीलिये अयथार्थ ज्ञान की परिभाषा बतलायी है – **तदभाववति तत्प्रकारकं ज्ञानम् अयथार्थम्।** जिस वस्तु में जो धर्म नहीं है, फिर भी यदि उसमें उस धर्मवाले का बोध होने लगे, तो उसे अयथार्थ ज्ञान कहा जाता है। जैसे पहले ही कहा गया कि रज्जु में सर्पत्व नहीं है, सर्पत्व तो सर्प में रहता है। फिर भी यदि रज्जु में सर्पत्व भासने लगे, तो उसे अयथार्थ ज्ञान की श्रेणी में रखा जाता है।

   न्याय दर्शन में चार प्रकार के प्रमाण स्वीकृत किये गये हैं – प्रत्यक्ष, अनुमान, उपमान तथा शब्द। कहा गया है –
   प्रत्यक्षानुमानोपमानशब्दाः प्रमाणानि। – न्याय सूत्र

1– प्रत्यक्ष – इन्द्रिय तथा विषय के सन्निकर्ष से जो ज्ञान उत्पन्न होता है, उसे प्रत्यक्ष ज्ञान कहा जाता है तथा इस ज्ञान के करण को प्रत्यक्ष प्रमाण कहते हैं।

इन्द्रियार्थसन्निकर्षजन्यं ज्ञानं प्रत्यक्षम्।

तर्कभाषा में प्रत्यक्ष प्रमाण के अन्तर्गत पांच क्रम बतलाये गये हैं।

इन्द्रिय – सन्निकर्ष – निर्विकल्पक ज्ञान – सविकल्पक ज्ञान – हानोपादानोपेक्षा बुद्धि

प्रमाण अवान्तर व्यापार प्रमा

प्रमाण अवान्तर व्यापार प्रमा

प्रमाण अवान्तर व्यापार प्रमा

सबसे पहले चक्षु आदि इन्द्रियों से विषयों का सन्निकर्ष होता है। सन्निकर्ष का अर्थ है सम्बन्ध। इसके बाद हमें विषय का निर्विकल्पक ज्ञान उत्पन्न होता है। उसके बाद सविकल्पक ज्ञान उत्पन्न होता है और उसके बाद हानोपादानोपेक्षा बुद्धि उत्पन्न होती है। विषय को लेने या छोड़ने की बुद्धि को हानोपादानोपेक्षा बुद्धि कहा जाता है।

यदि हम चक्षु को करण या प्रत्यक्ष प्रमाण मानते हैं, तो सन्निकर्ष को अवान्तर व्यापार कहा जाता है और निर्विकल्पक ज्ञान को प्रत्यक्ष प्रमा कहते हैं। यदि हम सन्निकर्ष को प्रत्यक्ष प्रमाण कहें, तो निर्विकल्पक ज्ञान को अवान्तर व्यापार कहा जाता है और सविकल्पक ज्ञान को प्रत्यक्ष प्रमा कहते हैं। यदि निर्विकल्पक ज्ञान को प्रत्यक्ष प्रमाण कहा जाये, तो सविकल्पक ज्ञान को अवान्तर व्यापार कहते हैं और हानोपादानोपेक्षा बुद्धि को प्रत्यक्ष प्रमा कहा जायेगा।

2– अनुमान – व्याप्ति से विशिष्ट हेतु का पक्षधर्मता ज्ञान अनुमान कहलाता है। इसे ही लिंग परामर्श भी कहा जाता है। तर्कभाषा के अनुसार – लिंगपरामर्शः अनुमानम्। अनुमान से अनुमिति नामक प्रमा होती है। इसे एक उदाहरण से समझा जा सकता है। कोई आदमी जंगल से जा रहा है। वहां उसे आग की जरूरत महसूस होती है। तभी उस आदमी को दूर किसी पहाड़ से धुआं निकलता हुआ दिखलाई पड़ता है। इस राहगीर आदमी ने इससे पहले अनेकों बार रसोई आदि कई जगहों पर धुआं और आग साथ–साथ में देखा हुआ है। इसे यह पहले से ही पता है कि जहां जहां धुआं होता है, वहां वहां आग होती है। इसलिये वह आदमी दूर पहाड़ पर धुआं देखकर झट से यह समझ जाता है कि यहां पर आग जरूर होगी। यहां पर अनुमान प्रमाण के द्वारा आग का

पहाड़ पर ज्ञान हो रहा है। इस सम्पूर्ण प्रक्रिया को न्याय दर्शन की भाषा में इस प्रकार समझा जा सकता है।

जहां जहां धुआं है, वहां वहां आग है – इस ज्ञान को व्याप्ति ज्ञान कहा जाता है। कहा गया है – साहचर्यसम्बन्धो व्याप्तिः। इस व्याप्ति ज्ञान को जानने के बाद जब कोई व्यक्ति अग्नि की व्याप्ति से विशिष्ट धुएं को पहाड़ पर देखता है, तो इस ज्ञान को व्याप्ति विशिष्ट पक्षधर्मता ज्ञान कहा जाता है। यही लिंगपरामर्श भी कहलाता है। इस ज्ञान से यह अनुमिति होती है कि पहाड़ पर आग है। इस अनुमान में पहाड़ पक्ष है, धुआं हेतु है और आग साध्य है।

जहां पर साध्य का सन्देह होता है, उसे पक्ष कहा जाता है। जैसे – पर्वत। जिस कारण से हम साध्य को सिद्ध करते हैं, उसे साधन कहते हैं। इसे ही हेतु, लिंग या निमित्त भी कहा जाता है। जैसे – धुआं। पक्ष मे हेतु के द्वारा जिसे सिद्ध किया जाता है, वह साध्य कहलाता है। जैसे – आग। जहां जहां धुआं है, वहां वहां आग है, यह ज्ञान व्याप्ति ज्ञान कहलाता है। व्याप्ति बनाते समय हेतु को पहले रखा जाता है तथा साध्य को बाद में रखा जाता है। अर्थात् जहां जहां हेतु है, वहां वहां साध्य होगा – ऐसी व्याप्ति बनती है। व्याप्ति ज्ञान तभी निश्चित होता है, जब कई बार धुआं और आग साथ साथ दिखाई दिये हों और बिना आग के कभी भी धुआं दिखलाई न दिया हो। व्याप्ति में उपाधि नहीं होनी चाहिये। उपाधि से युक्त होने पर व्याप्ति ठीक नहीं बनती। उपाधि का लक्षण तर्कभाषा, मानमेयोदय आदि ग्रन्थों में दिया गया है। जो साधन का अव्यापक हो और साध्य के साथ जिसकी समव्याप्ति हो, उसे उपाधि कहा जाता है। मानमेयोदय के अनुसार – साधनाव्यापकत्वे सति साध्यसमव्याप्तः उपाधिः। प्रस्तुत उदाहरण में धुआं व्याप्य है और अग्नि व्यापक है। जो अधिक जगह पर रहता है, उसे व्यापक कहा जाता है। जो कम जगह पर रहता है, उसे व्याप्य कहा जाता है। अनुमान प्रमाण के दो भेद माने गये हैं – स्वार्थानुमान और परार्थानुमान।

जो अनुमान केवल अपने लिये किया जाता है, उसे स्वार्थानुमान कहते हैं। जो अनुमान दूसरे को ज्ञान कराने के लिये किया जाता है, उसे परार्थानुमान कहा जाता है। नैयायिकों के अनुसार परार्थानुमान के अनुमान वाक्य में पांच अवयव होते हैं – प्रतिज्ञा, हेतु, उदाहरण, उपनय और निगमन। जैसे पूर्वोक्त अग्निसाध्यक अनुमान में प्रतिज्ञा आदि इस प्रकार से हैं –

प्रतिज्ञा – पर्वत पर अग्नि है।

हेतु – क्योंकि वहां धुआं है।

उदाहरण – जहां जहां धुआं है, वहां वहां आग है। जैसे रसोईघर में।

उपनय – इसी व्याप्ति से युक्त धुआं पर्वत पर है।

निगमन – इसलिये पर्वत पर अग्नि है।

व्याप्ति के दो भेद बतलाये गये हैं – अन्वय व्याप्ति, व्यतिरेक व्याप्ति। जैसे पूर्वोक्त उदाहरण में 'जहां जहां धुआं है, वहां वहां आग है' यह अन्वय व्याप्ति है। इसे सकारात्मक व्याप्ति भी कहा जा सकता है। तत्सत्त्वे तत्सत्त्वम् – एक के होने पर दूसरे का होना, यह अन्वय व्याप्ति का लक्षण है। व्यतिरेक व्याप्ति को निषेधात्मक व्याप्ति कहा जाता है। तदभावे तदभावः। एक के न होने पर दूसरे का न होना। जैसे – जहां जहां आग नहीं है, वहां वहां धुआं नहीं है। यह व्यतिरेक व्याप्ति है। अन्वय तथा व्यतिरेक व्याप्ति के आधार पर अनुमान के भी तीन भेद किये जाते हैं – केवलान्वयी, केवलव्यतिरेकी, अन्वयव्यतिरेकी। जिस अनुमान में केवल अन्वय व्याप्ति ही सम्भव हो सके, उस अनुमान को केवलान्वयी अनुमान कहा जाता है। जिस अनुमान में केवल व्यतिरेक व्याप्ति ही सम्भव हो, उस अनुमान को केवलव्यतिरेकी अनुमान कहते हैं। जिस अनुमान में अन्वय व्याप्ति और व्यतिरेक व्याप्ति दोनों सम्भव हो, उस अनुमान को अन्वयव्यतिरेकी अनुमान कहा जाता है। अन्वयव्यतिरेकी अनुमान में पांच धर्मों का होना परम आवश्यक है – हेतु का पक्ष में रहना, हेतु का सपक्ष में भी रहना, हेतु का विपक्ष में न रहना, साध्य का विषय बाधित न होना, साध्याभाव साधक हेतु का विद्यमान न रहना।

अन्य दृष्टि से व्याप्ति के दो और भेद हैं – सम व्याप्ति तथा विषम व्याप्ति। पूर्वोक्त व्याप्ति विषम व्याप्ति है। क्योंकि इस व्याप्ति को उलट करके नहीं बोल सकते। जहां जहां धुआं है, वहां वहां आग है – ये तो कहा जा सकता है। लेकिन जहां जहां आग है, वहां वहां धुआं है – यह नहीं कहा जा सकता। क्योंकि बहुत से जगहों पर आग तो होती है, लेकिन धुआं नहीं होता। जैसे गर्म किया हुआ लोहे का पिण्ड। इसलिये ऐसी व्याप्ति को विषम व्याप्ति कहा जाता है। सम व्याप्ति वह होती है, जिसे दोनों प्रकार से पलट कर भी बोला जा सके। जैसे – जहां जहां अभिधेयत्व है, वहां वहां प्रमेयत्व है। और जहां जहां प्रमेयत्व है, वहां वहां अभिधेयत्व है। यह सम व्याप्ति है। इसे दोनों प्रकार से उलट पलट कर बोला जा सकता है। प्रमेयत्व का अर्थ है यथार्थ ज्ञान का विषय और अभिधेयत्व का अर्थ है जिसका कोई नाम हो। संसार में जिन जिन वस्तुओं का हमें यथार्थ ज्ञान होता है, उनका कुछ न कुछ नाम होता ही है और जिनका कुछ न कुछ

नाम है, उनका हमें यथार्थ ज्ञान होता है। इसलिये यह समव्याप्ति है। इसी तरह जो जो अनित्य है, वह वह कृत्रिम है। जो जो कृत्रिम है, वह वह अनित्य है। यह भी सम व्याप्ति है।

3– उपमान – सादृश्य ज्ञान को उपमान प्रमाण कहा जाता है और इस उपमान प्रमाण से जो संज्ञा संज्ञि सम्बन्ध ज्ञान होता है, उसे उपमिति कहते हैं। जैस – किसी शहरी आदमी ने नीलगाय नामक पशु को कभी भी जीवन में देखा नहीं है। वह शहरी आदमी जंगल में रहने वाले किसी आदमी से पूछता है कि नीलगाय कैसी होती है ? जंगली आदमी बताता है कि नीलगाय गाय की तरह ही होती है। कुछ दिन बाद वह शहरी आदमी जंगल जाता है, तो उसे गाय की तरह का ही एक जानवर दिखलाई पड़ता है। उस जानवर को देखकर शहरी आदमी को उसमें गाय का सादृश्य दिखलाई पड़ता है। जिससे शहरी आदमी समझ जाता है कि यह नीलगाय है। यहां पर जंगली आदमी का 'नीलगाय गाय की तरह होती है' यह अतिदेश वचन सुनकर जंगल में गये शहरी आदमी को नीलगाय में जो गाय का सादृश्य दिखलाई पड़ता है। वह उपमान प्रमाण है। इससे जो यह ज्ञान उत्पन्न होता है कि यही नीलगाय है। इसे संज्ञा संज्ञि सम्बन्ध ज्ञान कहते हैं। यही उपमिति प्रमा है।

अतिदेशवाक्यार्थस्मरणसहकृतं गोसादृश्यविशिष्टपिण्डज्ञानमुपमानम्।

4– शब्द – आप्त पुरुष के वचन को शब्द प्रमाण कहा जाता है। कहा गया है – आप्तवाक्यं शब्दः। जो सदा सत्य ही बोलता है, उसे आप्त कहते हैं। शब्द प्रमाण से होने वाले ज्ञान को शाब्दबोध या शाब्द प्रमा कहा जाता है। किसी वाक्य का अर्थ समझने के लिये तीन आवश्यक कारण हैं – आकांक्षा, योग्यता तथा सन्निधि। इन तीनों के होने पर ही हम किसी वाक्य का अर्थ समझ पाते हैं। जैसे 'गाय हाथी पुरुष घोड़ा' यह कोई वाक्य नहीं है, क्योंकि यहां पदार्थों की आपस में आकांक्षा नहीं है। इस वाक्य के चारों पद बिल्कुल अलग–थलग हैं। इनका आपस में कोई सम्बन्ध नहीं है। इसी तरह 'आग से सींचो' इस वाक्य में आग और सींचो – इन दोनों पदार्थों का आपस में सम्बन्ध होने की योग्यता नहीं है, क्योंकि आग से सींचने का कार्य सम्भव नहीं है। इसलिये 'आग से सींचो' को वाक्य नहीं कहा जा सकता है। इसी तरह 'राम पुस्तक पढ़ता है' इस वाक्य के प्रत्येक पद यदि तीन–तीन घंटे बाद बोले जांये, तो उन पदों की आपस किसी प्रकार की सन्निधि नहीं बनती है। इसलिये उनको भी वाक्य नहीं कहा जा सकता है।

न्याय मत में अर्थापत्ति और अभाव प्रमाण को अलग स्वीकार नहीं किया गया है। अर्थापत्ति प्रमाण का अन्तर्भाव अनुमान में हो जाता है तथा अभाव प्रमाण का अन्तर्भाव प्रत्यक्ष में हो जाता है।

2. प्रमेय – प्रमेय बारह हैं। आत्मा, शरीर, इन्द्रिय, अर्थ, बुद्धि, मन, प्रवृत्ति, दोष, प्रेत्यभाव, फल, दुःख, अपवर्ग।
3. संशय – एक धर्मी में विरुद्ध अनेक धर्मों का ज्ञान संशय कहलाता है। जैसे दूर से किसी वस्तु को देखकर यह संशय होता है कि यह खम्भा है या आदमी। यह तीन प्रकार का है। विशेष न दिखलाई पड़ने पर समान धर्म से उत्पन्न, विप्रतिपत्ति से उत्पन्न, असाधारण धर्म के दर्शन से उत्पन्न। जब दो पदार्थों में कुछ विशेष धर्म दिखलाई नहीं पड़ता है, उस समय उन पदार्थों के केवल सामान्य धर्म को देखने से संशय उत्पन्न होता है। जैसे – दूर से किसी लम्बी वस्तु को देखने पर उसमें टेढ़ा – मेढ़ा, कोटर आदि का दर्शन नहीं होता और न ही उसमें किसी आदमी के हाथ, पैर आदि अवयव दिखलाई पड़ते हैं। केवल दूर से देखने पर खम्भे और आदमी के साधारण धर्म लम्बाई आदि को देखने पर यह संशय उत्पन्न होता है कि यह स्थाणु अर्थात् खम्भा है या पुरुष ? यह संशय का पहला प्रकार है।

   जब विशेष का दर्शन न होने पर केवल विप्रतिपत्ति यानि संदेह मात्र होता है, तो यह दूसरे प्रकार का संशय है। जैसे शब्द नित्य है या अनित्य, यह केवल विप्रतिपत्ति है। तीसरा संशय असाधारण धर्म के दर्शन से उत्पन्न होता है। जब दो पदार्थों के विशेष धर्म दिखलाई नहीं पड़ते, उस समय केवल असाधारण धर्म के दिखलाई पड़ने से संशय होता है। जैसे पृथ्वी के असाधारण धर्म गन्धवत्त्व को जानने पर पृथ्वी के विषय में सन्देह उत्पन्न होता है कि पृथ्वी नित्य है या अनित्य ?

4. प्रयोजन – जिससे प्रयुक्त होकर मनुष्य किसी कार्य में प्रवृत्त होता है, उसे प्रयोजन कहा जाता है।
5. दृष्टान्त – वादी और प्रतिवादी, दोनों का जिस विषय में मतभेद न हो, उसे दृष्टान्त कहा जाता है। अर्थात् अपने मत के सिद्धान्त को जिस उदाहरण के द्वारा प्रस्तुत किया जाता है, उसे दृष्टान्त कहते हैं। यह दो प्रकार का है – साधर्म्य तथा वैधर्म्य।
6. सिद्धान्त – प्रामाणिकता के साथ स्वीकार किया जाने वाला अर्थ सिद्धान्त कहलाता है। यह चार प्रकार का है – सर्वतन्त्र, प्रतितन्त्र, अधिकरण, अभ्युपगम। जो सिद्धान्त सभी सम्प्रदायों में स्वीकार किया जाता है, उसे सर्वतन्त्र कहते हैं। जो केवल समानतन्त्र में माने जाने वाले सिद्धान्त हैं, वे प्रतितन्त्र कहे जाते हैं। जब किसी एक

सिद्धान्त को मानने के लिये दूसरा कोई सिद्धान्त मानना पड़ता है, तो उसे अधिकरण कहते हैं। जब कोई सिद्धान्त अपना अभीष्ट न होने पर भी उसे थोड़ी देर के लिये मान लिया जाता है, तो उसे अभ्युपगम कहा जाता है।

7. अवयव – पूर्व में प्रमाण पदार्थ के निरूपण के प्रसंग में अनुमान का निरूपण किया गया है। उसके अन्तर्गत परार्थानुमान में पांच अवयवों वाले अनुमान वाक्य की चर्चा की गयी है। प्रतिज्ञा, हेतु, उदाहरण, उपनय तथा निगमन।
8. तर्क – अनिष्ट प्रसंग को तर्क कहा जाता है। यह अनुमान का सहयोगी होता है। जैसे – पर्वत पर धूम को देखकर अग्नि का अनुमान किया जाता है। इसको सिद्ध करने के लिये यह तर्क दिया जाता है कि यदि यहां आग नहीं होगी, तो यहां धूम भी नहीं होगा। लेकिन पर्वत पर धूम है, इसलिये वहां आग भी अवश्य होगी। यहां धूम का न होना अनिष्ट है। फिर भी उसकी प्राप्ति हो रही है। यह तर्क अनुमान का सहायक है।
9. निर्णय – निर्णयात्मक ज्ञान को निर्णय कहा जाता है। यह प्रमाणों के आधार पर होता है।
10. वाद – वादी और प्रतिवादी में जो कथा चलती है, अर्थात् वादी और प्रतिवादी में जो शास्त्रार्थ चलता है, उसे वाद कहा जाता है।
11. जल्प – वादी तथा प्रतिवादी, दोनों के साधन से युक्त कथा, जिसमें वादी तथा प्रतिवादी दोनों विजयाभिलाषी होते हैं, उस कथा को जल्प कहा जाता है।
12. वितण्डा – अपने पक्ष की स्थापना से रहित कथा को वितण्डा कहा जाता है। अर्थात् जिसमें केवल दूसरे के पक्ष पर दोष लगाया जाता है, लेकिन अपने पक्ष की स्थापना नहीं की जाती, उसे वितण्डा कहते हैं। इसका उद्‌देश्य केवल दूसरे के मत का खण्डन करना ही है।
13. हेत्वाभास – जो हेतु न होकर भी हेतु के समान प्रतीत हो, उसे हेत्वाभास कहा जाता है। अर्थात् आभासित हेतु हेत्वाभास कहलाता है। पूर्व में जहां अनुमान प्रमाण का निरूपण किया गया था, वहां पर अग्नि को सिद्ध करने के लिये धूम हेतु उपस्थापित किया गया था। यदि अग्नि को सिद्ध करने के लिये धूम के स्थान पर कोई अन्य असत् हेतु उपस्थापित किया जाता है, तो उसे हेत्वाभास कहते हैं। जैसे – पर्वतो वह्‌िमान् प्रमेयत्वात्। यहां पर्वत पर अग्नि को सिद्ध करने के लिये प्रमेयत्व हेतु उपस्थापित किया गया है। यह प्रमेयत्व वास्तव में हेतु नहीं है, हेत्वाभास है। क्योंकि जहां जहां प्रमेयत्व है, वहां वहां वह्‌िन है, यह व्याप्ति बन नहीं सकती है। प्रमेयत्व तो जलाशय में भी रहता है, लेकिन वहां अग्नि नहीं होता। इसलिये यह प्रमेयत्व

हेत्वाभास है। यह हेत्वाभास पांच प्रकार का है – सव्यभिचार (अनैकान्तिक), विरुद्ध, सत्प्रतिपक्ष (प्रकरणसम), असिद्ध तथा बाधित (कालात्ययापदिष्ट)।

1– सव्यभिचार को अनैकान्तिक हेत्वाभास कहा जाता है। यह दो प्रकार का है – साधारण अनैकान्तिक तथा असाधारण अनैकान्तिक। इनमें पहला साधारण अनैकान्तिक पक्ष, सपक्ष और विपक्ष तीनों में रहता है। जैसे – शब्द नित्य है, प्रमेय होने के कारण। यहां प्रमेयत्व हेतु पक्ष शब्द में, सपक्ष नित्य आकाश आदि में तथा विपक्ष अनित्य जल आदि में विद्यमान है। क्योंकि यहां पर पक्ष शब्द, सपक्ष आकाश तथा विपक्ष जल – ये सभी प्रमेय हैं। जो हेतु सपक्ष और विपक्ष, इन दोनों से व्यावृत्त होकर केवल पक्ष में रहता है, उसे असाधारण अनैकान्तिक कहा जाता है। जैसे पृथ्वी नित्य है, गन्धवती होने के कारण। गन्धवत्त्व हेतु न तो सपक्ष में रहता है, न ही विपक्ष में। केवल पक्ष पृथ्वी में ही रहता है। इसलिये यहां असाधारण अनैकान्तिक हेत्वाभास है।

2– विरुद्ध हेत्वाभास उसे कहते हैं, जो साध्य के अभाव में व्याप्त रहता है। जैसे – शब्द नित्य है, कृतक होने के कारण। यहां कृतकत्व अर्थात् जन्यत्व हेतु देकर नित्यत्व को सिद्ध किया जा रहा हैं, जबकि जन्यत्व हेतु तो नित्यत्वाभाव अनित्यत्व में व्याप्त है। जो जो कृतक है, वह वह अनित्य है। संसार में जितनी भी वस्तुयें कृतक या जन्य हैं, वे सभी अनित्य हैं। इन दोनों में सम व्याप्ति पहले से निश्चित है। सभी कृतक अनित्य हैं तथा सभी अनित्य कृतक हैं। इसलिये कृतकत्व हेतु देकर नित्यत्व को सिद्ध नहीं किया जा सकता। यदि कृतकत्व हेतु से नित्यत्व सिद्ध करेंगे, तो इसे हेत्वाभास कहना पड़ेगा।

3– सत्प्रतिपक्ष – जिस हेतु का प्रतिपक्ष रूप दूसरा हेतु विद्यमान रहता है, उसे प्रकरणसम या सत्प्रतिपक्ष हेत्वाभास कहा जाता है। शब्द को अनित्य सिद्ध करने के लिये हेतु दिया जाता है – नित्यधर्म की प्राप्ति न होना। उसी समय शब्द को नित्य सिद्ध करने के लिये भी दूसरा हेतु उपस्थित होता है – अनित्य धर्म की प्राप्ति न होना। अर्थात् साध्य के अभाव को सिद्ध करने के लिये दूसरा हेतु उपस्थित हो जाता है। इसलिये साध्य साधक प्रथम हेतु हेत्वाभास बन जाता है। इसके भी तीन भेद हैं – उपजीव्य, उपजीवक और अनुभय। इनका विस्तार तर्कभाषा में किया गया है।

4– असिद्ध – असिद्ध हेत्वाभास तीन प्रकार का है – आश्रयासिद्ध, स्वरूपासिद्ध तथा व्याप्यत्वासिद्ध। जिस हेतु का आश्रय अर्थात् पक्ष ही असिद्ध हो, उसे आश्रयासिद्ध हेत्वाभास कहा जाता है। जैसे – आकाशपुष्प सुगन्धित है, पुष्प होने के कारण। यहां आकाशपुष्प आश्रय है, जिसमें सुगन्ध को साध्य के रूप में सिद्ध किया जा रहा है।

जबकि आकाशपुष्प नामकी कोई वस्तु उपलब्ध ही नहीं है। अतः यह आश्रयासिद्ध हेत्वाभास है।

जब हेतु अपने आश्रय में रहता ही नहीं है, तो उसे स्वरूपासिद्ध हेत्वाभास कहा जाता है। क्योंकि हेतु का स्वरूप अपने आश्रय में असिद्ध है। जैसे सामान्य अनित्य है, कृतक होने के कारण। यहां कृतकत्व हेतु अपने आश्रय सामान्य में कभी रहता ही नहीं हैं, क्योंकि सामान्य कभी कृतक होता ही नहीं। इसलिये सामान्य में हेतु का स्वरूप असिद्ध है। स्वरूपासिद्ध के अन्य भी अनेक भेद हैं। जैसे – विशेषणासिद्ध, विशेष्यासिद्ध, असमर्थविशेषणासिद्ध, असमर्थविशेष्यासिद्ध आदि। इन सभी भेदों का विशेष वर्णन तर्कभाषा में उपलब्ध है।

व्याप्यत्वासिद्ध हेत्वाभास वह है, जिस हेतु की साध्य के साथ व्याप्ति बन नहीं पाती है। जैसे – पर्वतो धूमवान् वह्नेः। पर्वत पर धुआं है, क्योंकि वहां आग है। यहां पर्वत पक्ष, धूम साध्य तथा अग्नि हेतु है। यहां धूम को तब सद्हेतु माना जाता, जब अग्नि की धूम के साथ व्याप्ति होती। लेकिन अग्नि की धूम के साथ व्याप्ति नहीं है। जहां जहां अग्नि है, वहां वहां धुआं है – यह व्याप्ति बनती ही नहीं। अयोगोलक में अग्नि है, लेकिन वहां धूम नहीं है। इसलिये यह व्याप्यत्वासिद्ध हेत्वाभास है।

5– बाधित – प्रत्यक्षादि प्रमाण से जिस हेतु का विषय अर्थात् साध्य बाधित हो, उसे बाधित हेत्वाभास कहा जाता है। अग्नि ठंडा है, कृतक होने से, जल की तरह। इस अनुमान में हेतु कृतकत्व है तथा विषय या साध्य है शीतत्व। लेकिन यह शीतत्व बाधित है। क्योंकि प्रत्यक्षादि प्रमाणों से यह बात पहले से ही सिद्ध है कि अग्नि गरम होता है, शीत नहीं।

14. छल – अन्य अभिप्राय से प्रयुक्त शब्द का अन्य अर्थ कल्पना करके दोष देना छल कहलाता है। जैसे किसी ने कहा – नवकम्बलोऽयं देवदत्तः। यहां कहने वाले का तात्पर्य है कि देवदत्त के पास नया कम्बल है, क्योंकि नव का अर्थ है नया। लेकिन सुनने वाले ने अपने तरीके से नव का अर्थ नौ संख्या करके वाक्य का यह अर्थ निकाल लिया कि देवदत्त के नौ कम्बल हैं। फिर वह सुनने वाला व्यक्ति छल करते हुए यह कहता है कि देवदत्त तो बहुत गरीब है। उसके पास एक कम्बल भी नहीं हो सकता है, तो नौ कम्बल कहां से आ पायेंगे।
15. जाति – असत् उत्तर को जाति कहा जाता है। अर्थात् गलत उत्तर जाति है। इसके अनेक भेद हैं। जैसे – उत्कर्षसम, अपकर्षसम आदि।
16. निग्रहस्थान – पराजय का हेतु निग्रह स्थान कहा जाता है। इसके भी अनेक भेद हैं। जैसे – न्यून, अधिक, अपसिद्धान्त, अर्थान्तर, अप्रतिभा, मतानुज्ञा, विरोध आदि।

Logical Fallacies in the Nyāya System of Logic and Debate

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Vocabulary

Anumana - Inference
Sādhya – what is to be proved/ established
Hetu – Reason – employed to prove a claim
Pakṣa – the locus where the claim is to be established
Vyāpti – Invariable and unconditional relation between hetu and Sādhya
Hetvabhasa – false hetu which does not bear vyapti with the sadhya
Sapksha – locus of the Sādhya (where the Sādhya is certainly present)
Vipakṣa - Locus of the absence of the Sādhya (where the Sādhya is certainly absent)

In Bharatiya philosophy logical fallacies are largely discussed by Nyaya darshana and have been suitably adapted and adopted by other schools of Indian philosophy. Nyaya has discussed many kinds of fallacies which need to be pointed out at various stages in the process of a debate. Some of them are more formal logical fallacies which show a disconnect between the sadhya and the hetu in different ways. These are called hetvabhasas. Other fallacies of argument are Chhala (deliberate distortion), Jati (false analogy), Tarka (absurd argument) and Nigraha sthana (point of defeat.)

Hetvabhasa: At the beginning of a debate, when a party presents its claim and supports it with a reason, it's argument can be shown to be fallacious by showing that the reason (hetu) does not bear an invariable and unconditional relation (vyapti) with what needs to be proved (sadhya). These are the first stage fallacies to be pointed out when a party first establishes its claim through a reason.

Formal fallacies or Hetvabhasa:

In the Bharatiya theory of debate and logic as propounded by the Nyāya school and adopted with suitable modifications by other schools of Indian philosophy, a logical argument is structured around four major concepts –

a) Sādhya - a claim or something that is to be proved,
b) Pakṣa - the locus where the existence of the Sādhya is to be proved

c) Hetu - reason and
d) Vyāpti i.e the invariable relationship between hetu and Sadhya.

A Hetu can prove the occurrence of the Sadhya in a given pakṣa only if there exist the vyāpti relation between the hetu and the Sādhya. A very popular illustration can make this clear.
Claim - there is fire on the hill because there is smoke on the hill.
Here fire is the Sādhya that is something whose existence on the hill is doubtful and has to be proved by reason.
Hill is the pakṣa where the existence of fire is doubtful and hence needs to be established.
Smoke is the hetu given to prove the existence of fire.
But it has to be examined whether smoke and fire stand in a vyāpti relationship by which smoke can logically be said to be the reason for the existence of fire on the hill.

Vyāpti relationship between Sādhya and hetu is analysed in two forms: Co-occurrence and Co- absence. It is sufficient to show that wherever there is the hetu, there is Sādhya. It is not necessary to show that wherever there is there sādhya there is hetu as well. In terms of absence, it is necessary to show that where there is absence of the Sadhya, the hetu is also absent. It is not necessary to show that where there is absence of the hetu, the sādhya is also absent.

The vyāpti relationship - both in terms of co-occurrence and Co absence, between a given hetu and a given sādhya, must be unconditional and natural. It should be invariable and not accidental or occasional.

Applying this principle to smoke and fire one can legitimately say where there is smoke, there is fire and wherever there is absence of fire there is absence of smoke. Thus, according to the Nyāya school, there is a valid vyāpti between smoke and fire. Therefore, smoke can be a valid hetu to prove the existence of fire.

Validity of a hetu is further examined on the basis of five features of a valid hetu (hetu rupa). These are:

a) Occurence on the pakṣa - i.e. a valid hatu must always exists on the pakṣa
b) Occurrence in Sapakṣa - i.e. a valid hetu must occur in all locii of the given Sādhya It must be found in all locii of the Sādhya. Because if it is absent from any locus of the Sādhya, the invariable co-occurence between the two is compromised.
c) Absence from the Vipakṣa - i.e a valid hetu must never occur in any locus of the absence of the sādhya. It must never be found in a locus where the sādhya does not exist. Because if it is found in the locus of the absence of the sādhya, then the rule of co-absence is compromised.
d) It's presence in the given pakṣa should not be refuted by any other valid hetu.

e) It's presence in the given pakṣa should not be refuted by any other means of knowledge like perception etc.

A hetu which satisfies all these conditions can be taken as a valid hetu and can prove the existence of the sādhya on the given pakṣa. On the other hand, if a given hetu lacks in any of these essential features, it becomes an invalid hetu and the argument becomes fallacious.

In the Indian system of logic and debate, a hetu which lacks in any of these features becomes an invalid hetu and leads to various kinds of logical fallacies.

Fallacy of Fact – an argument becomes fallacious if the hetu does not occur in the pakṣa at all. This can happen in three ways -

First, when in the very nature of things, the pakṣa itself is unreal and non-existent;

Traditional Nyāya Illustration - It is fallacious to argue that the sky lotus is very fragrant because there is no such thing as a sky lotus. So, the occurrence or non-occurrence of fragrance in it cannot be shown.

Contemporary Illustration - It cannot be argued in a court of law that a ghost is guilty of murder because the murder is too weird. Here the ghost is the pakṣa, its guilt the Sādhya and weirdness of the murder, the hetu. However, this logic is fallacious as the pakṣa i.e. the ghost, is non-existent (in the contemporary legal world.)

Second, while the pakṣa might exist in reality, but in the very nature of things, the hetu cannot occur in the given pakṣa.

Traditional Nyāya Illustration - Sound is a substance because it can be seen like other substances. Here, sound is the pakṣa, that ‘it is a substance’ is the sādhya and that ‘it can be seen’ is the hetu. Now, in the very nature of things, sound can be heard but not seen. Thus, the hetu does not occur in the pakṣa at all. Therefore, this argument is a fallacious one.

Contemporary illustration - In a murder case, the argument is that the accused is guilty of murder because he pulled the trigger with his hand. Here the accused is the pakṣa, his guilt is the sādhya and ‘that he pulled the trigger with his hand’ is the hetu. However, if it turns out that the accused’s hands were amputated long ago, then the entire case falls. Because the hetu ‘that he pulled the trigger with his own hand’ cannot be attributed to the accused, i.e. the hetu does not exist in the pakṣa, the accused.

Third, an argument becomes fallacious if it based on a conditional vyapti between sadhya and hetu i.e. vyapti brought about with the intervention of an external condition.

Traditional Nyaya Illustration: The statement where there is fire, there is smoke, is by itself invalid. But this can be made right by saying - where there is fire along with wet fuel, there is smoke. Here, the vyapti between fire and smoke has been artificially created by adding the element of wet fuel. Hence, the claim that there is smoke on the hill because there is fire, cannot be logically sustained. Here smoke is the sadhya and fire is the hetu. In this scenario, there is no unconditional vyapti between the hetu and the sadhya.

Contemporary Illustration –

In a matter regarding sale of a plot of land by A to Mr B, the latter's counsel argues as follows -

A has defrauded my client by taking an amount of 10 lakh from him, misrepresenting to him that he is the owner of the plot of land, my client wanted to purchase.

Now it turns out that A is not the absolute owner of the said plot and co-owns it with his two other brothers. Therefore, he has cheated my client.

A's counsel – Mr. A has committed no fraud because he will become the full owner once his brothers sell their share to him.

Here A's counsel's argument is a case of conditional hetu to prove A's innocence.

A's full ownership, including his right to sell the plot to Mr B, is conditional upon his brothers selling their shares to him at some point in future.

Fourth fallacy of fact is where the hetu seeks to prove something which is easily refuted by perception or other means of proof.

Traditional Nyaya Illustration – Fire is cold because it a dravya like water. The fact of fire being cold can be easily refuted by touching it. No reasoning can prove that fire is cold.

Contemporary Illustration –

Defence Counsel - Mr. A has not taken any loan from Mr. B.

Plaintiff's Counsel – Here is a loan deed duly executed by Mr. A which clearly establishes that he has taken Rs. 10,000/- from Mr. B.

Such clear evidence rebuts any claim made by the defendant.

Fifth fallacy is when an argument seeks to prove a fact which can be disproved by an equally strong argument.

Traditional Nyaya Illustration – Sound is eternal because it is perceived through the ear like soundness (the universal property of all sounds). This argument is advanced on behalf of the

Mimasa school which believes in the eternality of sound. Nyaya refutes it by giving an equally strong hetu to prove that sound is not eternal – Sound is not eternal because it is produced (whatever needs to be created is not eternal). Hence, according to Nyaya, Mimamasa claim is fallacious as it can be controverted with a strong argument.

Contemporary Illustration –
Prosecution – A is the murderer because he was identified by an eye witness at the test identification parade.
Defence – That argument does not prove A's guilt because the same eye witness has now failed to recognize A in the court.
A's guilt sought to be proved by the prosecution's hetu is sufficiently countered by the hetu given by defence.

Fallacy of Contrary Reason – According to the rule of vyāpti, a hetu must have invariable and unconditional co-occurence with the sādhya, only then can it prove the sādhya. Therefore, an argument will be fallacious, if a party forwards a hetu which has vyāpti with the absence of the sādhya. Such a hetu can only prove the opposite of the sādhya because it will show where ever there is hetu, the sādhya does not exist.

Traditional Nyāya Illustration - Sound is eternal because it is produced. Now, whatever is produced can only be non – eternal. Hence, the given hetu has vyāpti with the opposite of eternality, hence the argument is fallacious.

Contemporary Illustration – The accused is guilty because he is insane. Now, insanity (hetu) has an invariable relationship with absence of guilt. Hence, the given hetu proves the opposite of what is sought to be proved.

Fallacy of Uncertain Reason – The vyāpti between the hetu and the sādhya must be absolutely certain and beyond all doubt. However, a hetu whose vyāpti with the sādhya is uncertain, makes an argument fallacious. This is possible in three ways –

i. Where the hetu is found to be absent from the locii of the sādhya (sapakṣa) (where as it must always occur there or else their co-occurrence stands disproved);

   Illustration – The accused is guilty because he has very peculiar facial features.
   This is a false argument because only the accused possesses facial features peculiar to him; no other person whether guilty or innocent can have his features. Thus, the hetu, (peculiar facial features) is absent from other guilty persons (sapakṣa) as well.

ii. Where the hetu is present in the locus of the absence of the Sādhya (Vipakṣa) (where as it must always be absent from it or else their co-absence stands disproved);

Illustration – The accused is guilty because he is screaming.
Now screaming is not necessarily and invariably associated with guilt. An innocent person can also scream to announce his innocence.

iii. Where the invariable relation between the hetu and the sādhya cannot be proved because there are no illustrations to prove their co-occurrence and co-absence.

Illustration – All migrants are anti American because they are taking away jobs from Americans.
Here ALL migrants have been given as the pakṣa; hence no migrant can be cited as an illustration of either co-occurrence or co-absence between the hetu and the sādhya. The Nyāya system of debate considers such absolute statements as unprovable.

Other fallacies:

A. Tarka: Absurd argument: An argument can also be termed fallacious if it can be shown to lead to absurd consequences which cannot be acceptable to the party forwarding it. These fallacies have to be set up to tie down an opponent if he is not willing to concede. It has to be shown that if the opponent's view were to be accepted, it would lead to consequences which even the opponent would not be able to accept. In the Nyaya tradition there are eleven kinds of absurdities. Here only one simple example is being given.
Defending Counsel – My client could not have committed this murder because he wasn't in town that day.
Prosecution – If he were not in town, how was he caught on the camera outside the building where the murder occurred?
The absurdity in the defending counsel's argument is that he is trying to say that a person can be caught on camera even when he is not present. So, he has conceded that the accused was very much in town on the day of murder.

B. Jati (Fraudulent reply based on False Analogy): An argument can be said to be a jati and hence not valid, if it is based on misplaced analogies. Jati or arguments based on false analogies are of several types. But here only one simple example is being given.
In a matter regarding a bounced cheque, the prosecution claims that the accused is guilty because signatures on the cheque tally with bank records.
Against this, the defending counsel argues as under:
If you claim that the accused is guilty because his signatures on the cheque match the signatures in bank records,

Then, I can claim that he is innocent because his photograph in bank records does not match his real face.

This is a false argument because matching signatures are a proof of guilt but mismatching faces are no proof of innocence; in Nyaya terminology, the opposite party is making a false analogy between signatures and photograph; there is vyapti between matching signatures and guilt but there is no vyapti between not-matching faces and innocence.

C. Chhala or Deliberate Distortion: An argument becomes a distortion when it deliberately plays on words to twists a statement to mean something else and then criticizes it for being wrong. In Nyaya there are several kinds of Chhala but only a simple example is being given here:

In a case of cheating in exams the invigilator complains that the concerned student used unfair means several times.

The students reply – I looked at my friend's answer book only twice and that does not mean several times.

The student's reply is a deliberate distortion of the intended meaning of the word 'several'. The invigilator means to say he caught the student cheating on more than one occasion. The student is trying to put a more rigid interpretation on the word 'several' to mean 'many' which is certainly more than two.

D. Nigraha-sthana i.e. Points of Defeat: During a heated contest, parties might make statements which are either contrary to their original stand or they shift positions or sometimes deny their own stated position. These and many such possibilities are called points of defeat in the Nyaya system. Parties are expected to remain alert and watchful of the statements made by their opponents and point out these pitfalls to the jurors immediately.

For instance - In a murder case, the defense counsel starts by saying his client has not committed the murder but when confronted with some evidence he says that the client killed the deceased in self-defense. This statement is fatal to the case. The counsel has resiled from his very categorical assertion of his client's innocence but then accepts that he killed the deceased.

Further Readings –

1. Chatterji Satish Chandra: Nyaya Theory of Knowledge
2. Vidyabhushan Satish Chadra: A History of Indian Logic

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संसार के सभी प्राणियों की स्वाभाविक प्रवृत्ति सुख प्राप्ति में होती है। यह सुख दो प्रकार का है – लौकिक तथा पारमार्थिक। सामान्य व्यक्ति तो केवल लौकिक सुख की ही अपेक्षा रखते हैं, किन्तु हमारे समस्त भारतीय शास्त्र पारलौकिक सुख तक मनुष्य को पहुंचाने का उपाय बतलाते हैं। भारतीय शास्त्रों के अन्तर्गत ही भारतीय दर्शन भी आते हैं। दृश्यते अनेन इति दर्शनम् – इस व्युत्पत्ति के अनुसार समस्त दर्शनों का उद्देश्य परमतत्त्व का साक्षात्कार है। भारतीय दर्शन की दो धारायें हैं – आस्तिक तथा नास्तिक।

भारतीय दर्शन के आस्तिक वर्ग में छह शाखायें हैं – सांख्य, योग, न्याय, वैशेषिक, मीमांसा, वेदान्त। इन छह शाखाओं में मीमांसा दर्शन को ही पूर्वमीमांसा दर्शन या धर्ममीमांसा दर्शन कहा जाता है।

मीमांसा शब्द का अर्थ –

मीमांसा शब्द मान् पूजायाम् धातु से सन् तथा अ एवं टाप् प्रत्यय करके निष्पन्न हुआ है। मीमांसा शब्द का अर्थ विचार है। प्रकृत में मीमांसा से 'वेद विचार' यह अर्थ किया जाता है, क्योंकि वेदविचार के लिये ही मीमांसा की प्रवृत्ति होती है। वेद का सामान्य अर्थ तो व्याकरण आदि के द्वारा समझा जा सकता है, किन्तु जब अर्थबोध में संशय होता है, तब मीमांसा के न्यायों के माध्यम से ही अर्थबोध हो सकता है। वेदार्थ को ही धर्म कहा जाता है, इसलिये मीमांसा का एक नाम धर्ममीमांसा भी है। मीमांसा दर्शन के अन्य नाम हैं – धर्ममीमांसा, पूर्वमीमांसा, वाक्यशास्त्र, धर्मविचारशास्त्र, विचारशास्त्र, धर्मशास्त्र, कर्म मीमांसा, यज्ञ मीमांसा, अध्वर मीमांसा इत्यादि।

मीमांसा दर्शन में वेदों का तात्पर्यबोध होने के लिये 1000 न्याय या अधिकरणों का प्रयोग किया गया है। इन न्यायों का जिस तरह यज्ञीय पद्धति में उपयोग होता है, उसी तरह वर्तमान न्यायिक प्रक्रिया तथा अन्य शास्त्रों में संशयच्छेदन के लिये भी ये न्याय अत्यन्त उपयोगी हैं। इसीलिये श्लोकवार्तिक के प्रारम्भ में ही कहा गया है कि मीमांसा को समुचित रूप से न जानने पर मीमांसा के न्याय मार्ग को समझना कठिन हो जाता है।

मीमांसायां त्विहाज्ञाते दुर्ज्ञाते वाविवेकतः।

न्यायमार्गे महान् दोष इति यत्नोपचर्यता।।[1]

मीमांसा दर्शन के 12 अध्यायों के प्रतिपाद्य विषय – जैमिनीय सूत्र में 12 अध्याय हैं। इन बारह अध्यायों के विषय इस प्रकार हैं।

1. प्रथम अध्याय का विषय धर्म के प्रमाणों का निरूपण है। विधि, मन्त्र, नामधेय, अर्थवाद, स्मृति, वाक्यशेष, आचार और सामर्थ्य – ये धर्म में आठ प्रमाण कहे गये हैं। इन सभी का तात्पर्य धर्म में है। श्रुति सर्वप्रबल प्रमाण है, फिर श्रुतिमूलिका स्मृति धर्म में प्रमाण है। तदनुमूलक आचार आदि भी धर्म में प्रमाण हैं।
2. द्वितीय अध्याय में कर्मभेद तथा उसके छह प्रमाणों का निरूपण किया गया है। कर्म भेद के छह प्रमाण हैं – शब्दान्तर, अभ्यास, संख्या, नामधेय, गुण तथा प्रकरणान्तर।
3. तृतीय अध्याय में अंग अंगी भाव का निरूपण किया गया है। अंगत्वं नाम शेषत्वम् परार्थत्वम् वा यह अंग का लक्षण बतलाया गया है। अंग अंगी भाव के बोधक 6 प्रमाण हैं – श्रुति, लिंग, वाक्य, प्रकरण, स्थान, समाख्या। इन छह प्रमाणों में पूर्व पूर्व प्रबल हैं तथा उत्तरोत्तर दुर्बल।
4. चतुर्थ अध्याय में प्रयोज्य प्रयोजक भाव का विचार हुआ है। तप्ते पयसि दध्यानयति, सा वैश्वदेवी आमिक्षा, वाजिभ्यो वाजिनम्। यहां दध्यानयन की प्रयोजिका आमिक्षा है – यह विचार किया गया है।
5. पंचम अध्याय में क्रमबोधक विधि अर्थात् प्रयोगविधि तथा उसके बोधक छह प्रमाणों का निरूपण किया गया है। ये छह प्रमाण हैं – श्रुति, अर्थ, पाठ, स्थान, मुख्य, प्रवृत्ति। इन छह प्रमाणों में पूर्व पूर्व प्रबल हैं तथा उत्तरोत्तर दुर्बल।
6. अधिकार का निरूपण षष्ठ अध्याय में किया गया है। किस कर्म में कौन अधिकारी है तथा किसमें कौन अधिकारी नहीं है। अधिकारी में कौन कौन से धर्म होने चाहिये। इसी तरह प्रतिनिधि का विचार भी किया गया है।

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1. श्लोक वार्तिक 1.1.15

7. सप्तम तथा अष्टम अध्याय में अतिदेश का निरूपण है। सप्तम में सामान्य अतिदेश तथा अष्टम में विशेष अतिदेश का निरूपण किया गया है। अतिदेश का लक्षण है – येन प्रमाणेन प्रकृतौ पठितानाम् अंगानां प्रकृतिसदृशविकृतिषु प्राप्तिः भवति, तत् प्रमाणम्। जिस प्रकार प्रकृति याग किया जाता है, उसी प्रकार विकृति याग का भी अनुष्ठान करना चाहिये। प्रकृतिवद् विकृतिः कर्तव्या – यह अतिदेश है। जहां सम्पूर्ण अंगों के सहित प्रधान का निरूपण है, वह प्रकृति कहलाती है। जहां सम्पूर्ण अंगों का निरूपण नहीं होता, वह विकृति है। विकृति में जो अंग नहीं होते, उनका प्रकृति से अतिदेश होता है। अतिदेश तीन प्रकार का है – प्रत्यक्षवचनातिदेश, नामातिदेश, अनुमितवचनातिदेश।
8. अष्टम अध्याय में विशेषातिदेश का निरूपण है। जैसे – आग्नेय याग से सौर्य याग में अतिदेश आता है। वहां निर्वाप, औषधद्रव्यकत्व, एकदेवतात्व, तद्धितेन देवतानिर्देश – इन लिंगों से अतिदेश आता है। इस अध्याय में स्पष्ट लिंग, अस्पष्ट लिंग, प्रबल लिंग आदि का निरूपण है।
9. नवम अध्याय में ऊह का निरूपण है। ऊह का लक्षण है – अतिदिष्टस्य पदार्थस्य कार्यवशात् रूपान्तरकरणम् ऊहः। जैसे 'अग्नये जुष्टं निर्वपामि' के स्थान पर सौर्ययाग में 'सूर्याय जुष्टं निर्वपामि' यह प्रयोग होता है। इसके तीन भेद हैं – मन्त्रोह, सामोह तथा संस्कारोह।
10. दशम अध्याय में बाध का निरूपण है। बाध का लक्षण है – प्रयोजनाभावादिना अंगानामननुष्ठानम्। प्रयोजन न होने पर अंगों का अनुष्ठान न होना ही बाध है। जैसे कृष्णल चरु में तुषविमोक रूपी प्रयोजन न होने के कारण अवघात का बाध होता है। बाध के तीन भेद हैं – अर्थलोप से, प्रतिषेध से तथा प्रत्याम्नान से।
11. एकादश अध्याय में तन्त्र का निरूपण है। तन्त्र का लक्षण है – एकेनैव सकृत् प्रवर्तितेन बहूनां प्रधानानामुपकारः। एक बार ही अंग का अनुष्ठान करने से यदि उस अंग का उपकार अनेक प्रधानों में चला जाता है, तो उसे तन्त्र कहा जाता है। जैसे पूर्णमास के तीन प्रधानों में प्रयाजादि अंगों का अनुष्ठान एक बार ही किया जाता है।

12. बारहवें अध्याय में प्रसंग का निरूपण है। अन्यतः उपकारलाभात् अंगानामननुष्ठानं प्रसंगः। अन्य प्रकार से यदि उपकार मिल जाता है, तो अंगों का अनुष्ठान नहीं किया जाता। जैसे पशु याग के अंगों का प्रसंग से पशु पुरोडाश में भी उपकार होता है।

संकर्षण काण्ड – कुछ विद्वान् संकर्षण काण्ड को भी जैमिनि की रचना मानते हैं। इसे देवता काण्ड भी कहा जाता है। इसमें उपासना का विवेचन प्राप्त होता है। रामानुजाचार्य ने ब्रह्मसूत्र के श्रीभाष्य में मीमांसा दर्शन को षोडशाध्यायी कहा है।

मीमांसा दर्शन में प्रमाण–प्रमेय विचार

प्रमाण विचार –

मीमांसा दर्शन के अनुसार प्रमा का लक्षण है – अज्ञाततत्त्वार्थज्ञानम् प्रमा। अर्थात् अज्ञात तत्त्वार्थ का जो ज्ञान है, वह प्रमा है।

प्रमा चाज्ञाततत्त्वार्थज्ञानमेवात्र भिद्यते।[2]

प्रमाण का लक्षण है – प्रमाकरणमेवात्र प्रमाणम्।[3] प्रमा का जो करण है, वही प्रमाण है। प्रभाकर के मतानुसार प्रमाण का लक्षण है – अनुभूतिः प्रमाणम्।[4]

मीमांसा दर्शन में भाट्ट मीमांसकों के अनुसार 6 प्रमाण स्वीकार किये गये हैं –

1. प्रत्यक्ष 2. अनुमान 3. शब्द 4. उपमान 5. अर्थापत्ति 6. अभाव

प्रभाकर मत में इन प्रमाणों में से अभाव को हटाकर 5 ही प्रमाण स्वीकार किये गये हैं।

1. **प्रत्यक्ष प्रमाण**–

   प्रत्यक्ष का लक्षण है – इन्द्रियार्थसम्प्रयोगजन्यं ज्ञानं प्रत्यक्षम्।[5] मीमांसा सूत्र के अनुसार – सत्सम्प्रयोगे पुरुषस्य इन्द्रियाणां बुद्धिजन्म तत्प्रत्यक्षम् अनिमित्तं विद्यमानोपलम्भनत्वात्।[6]

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2. मानमेयोदय श्लोक 3
3. मानमेयोदय श्लोक 3
4. मानमेयोदय पृष्ठ 9
5. भाट्टसार पृष्ठ 2
6. मीमांसा सूत्र 1.1.4

तात्पर्य है कि इन्द्रियों का विषयों के सन्निकर्ष से होने वालो जो ज्ञान है, वह प्रत्यक्ष प्रमाण कहलाता है। भाट्मतानुसार सन्निकर्ष दो या तीन प्रकार के हैं – संयोग, संयुक्त तादात्म्य, संयुक्ततदात्मतादात्म्य।

प्रभाकरमतानुसार सन्निकर्ष के दो ही प्रकार हैं – संयोग, संयुक्त समवाय, समवाय।

प्रत्यक्ष प्रमाण के दो भेद हैं – सविकल्पक तथा निर्विकल्पक।

कल्पनारहित ज्ञान निर्विकल्पक है। जबकि पांच प्रकार की कल्पनाओं से युक्त ज्ञान सविकल्पक है। ये पांच कल्पनायें हैं – द्रव्य कल्पना, जाति कल्पना, गुण कल्पना, कर्म कल्पना, नाम कल्पना।

2. अनुमान प्रमाण –

अनुमान का लक्षण है – व्याप्यदर्शनादसन्निकृष्टार्थज्ञानमनुमानम्।[7]

अर्थात् व्याप्य का दर्शन होने पर, उससे सम्बन्धित जो असन्निकृष्ट पदार्थ है, उसका ज्ञान अनुमान प्रमाण है।

न्यूनदेशवृत्ति को व्याप्य कहते हैं तथा अधिकदेशवृत्ति व्यापक कहलाता है। इन दोनों के बीच जो स्वाभाविक अर्थात् उपाधि रहित सम्बन्ध है, उसे व्याप्ति कहा जाता है।

स्वाभाविकः सम्बन्धो व्याप्तिः। स्वाभाविकत्वं च उपाधिराहित्यम्।[8]

जैसे धूम तथा अग्नि के बीच स्वाभाविक सम्बन्ध है। यही व्याप्ति है। इसी कारण पर्वत पर धूम को देखकर असन्निकृष्ट अग्नि का अनुमान हो जाता है।

यत्र यत्र धूमः तत्र तत्र अग्निः – अन्वय व्याप्ति

यत्र यत्र अग्निः नास्ति, तत्र तत्र धूमोऽपि नास्ति – व्यतिरेक व्याप्ति

उपाधि का लक्षण आगे मानमेयोदय में बतलाया गया है कि जो साधन का अव्यापक होते हुए जो साध्य के साथ समव्याप्त हो, वह उपाधि है। जैसे प्रकृत उदाहरण में आर्द्रेन्धनसंयोग उपाधि है। इस उपाधि से रहित सम्बन्ध ही व्याप्ति होती है।

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7. मानमेयोदय पृ. 31
8. मानमेयोदय पृ 41

तर्क का लक्षण – अनुमान में तर्क का अत्यधिक महत्त्व है। प्रमाण के द्वारा साध्यमान जो पदार्थ है, उसमें अन्यथात्व की शंका होने पर उसके निरास के लिये उस अन्यथात्व में दोषकथन ही तर्क है।

प्रमाणेन साध्यमानस्य अर्थस्य अन्यथात्वशंकायां तन्निरासार्थं अन्यथात्वे दोषकथनं तर्कः।[9]

तर्क के पांच अंग हैं – व्याप्तिस्तर्काप्रतिहतिरवसानं विपर्यये।
अनिष्टाननुकूलत्वे इति तर्कांगपंचकम्।।[10]

अर्थात् तर्क के पांच अंग हैं – व्याप्ति, तर्काप्रतिहति, विपर्ययपर्यवसान, अनिष्टत्व, अननुकूलत्व।

अनुमान के भेद–

अनुमान के तीन भेद हैं – अन्वयव्यतिरेकि, केवलान्वयि, केवलव्यतिरेकि।

1. अन्वयव्यतिरेकि – जिस अनुमान में अन्वय व्याप्ति और व्यतिरेक व्याप्ति दोनों सम्भव होती है, वह अन्वयव्यतिरेकि अनुमान है। जैसे पूर्वोक्त धूम से अग्नि का अनुमान। वहां दोनों व्याप्तियां सम्भव हैं।
2. केवलान्वयि – जहां केवल अन्वय व्याप्ति ही सम्भव है, वह केवलान्वयि अनुमान है। जैसे – ज्ञान ज्ञानान्तरप्रकाश्य है, वस्तु होने के कारण, घट की तरह। यहां अन्वय व्याप्ति ही सम्भव है।
3. केवलव्यतिरेकि – जिस अनुमान में केवल व्यतिरेक व्याप्ति ही सम्भव है, वह केवल व्यतिरेकि अनुमान है। जैसे समस्त ज्ञान स्वप्रकाश है, ज्ञान होने क कारण। यहां केवल व्यतिरेक व्याप्ति ही सम्भव है।

अनुमान के दो भेद और हैं – स्वार्थानुमान और परार्थानुमान। अपनी अनुमिति के लिये होने वाला अनुमान स्वार्थानुमान है। दूसरे की अनुमिति के लिये होने वाला अनुमान परार्थानुमान है। परार्थानुमान में नैयायिकों के अनुसार पांच अवयव होते हैं – प्रतिज्ञा, हेतु, उदाहरण, उपनय तथा निगमन। इसमें मीमांसकों के अनुसार प्रारम्भ के तीन या अन्त के तीन ही ग्राह्य हैं।

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9. मानमेयोदय पृ 42
10. मानमेयोदय, अनुमान खण्ड

मीमांसकों के अनुसार प्रतिज्ञा में निगमन और हेतु में उपनय गतार्थ है। अतः प्रतिज्ञा, हेतु, उदाहरण या उदाहरण, उपनय, निगमन – ये तीन अवयव ही मीमांसकों ने स्वीकार किये हैं।

आभास –

मीमांसा में तीन प्रकार के आभास माने गये हैं – प्रतिज्ञाभास, हेत्वाभास और दृष्टान्ताभास।

1. प्रतिज्ञाभास – परप्रतिपादन के लिये साध्य का पक्षवृत्तित्वरूप जो वचन है, उसे प्रतिज्ञा कहा जाता है। जैसे – पर्वतो अग्निमान्, यह प्रतिज्ञा वचन है। प्रतिज्ञाभास दो प्रकार का है – सिद्ध विशेषण, बाधित विशेषण और अप्रसिद्ध विशेषण। इसमें बाधित विशेषण के 6 भेद हैं – प्रत्यक्ष बाध, अनुमान बाध, उपमान बाध, शब्द बाध, अर्थापत्तिबाध और अभाव बाध।
2. हेत्वाभास – हेतु का आभास हेत्वाभास कहलाता है। यह चार प्रकार का है।
   असिद्ध, विरुद्ध, अनैकान्तिक, साधारण।
   1. असिद्ध के चार प्रकार हैं – स्वरूपासिद्ध, व्याप्यत्वासिद्ध, आश्रयासिद्ध, सम्बन्धासिद्ध।
   2. विरुद्ध – जैसे शब्दो नित्यः कृतकत्वात्। यहां कृतकत्व हेतु अनित्यत्व में व्याप्त है।
   3. अनैकान्तिक – ये दो प्रकार का है – साधारण तथा सन्दिग्ध।
   4. असाधारण – जैसे पृथ्वी नित्या गन्धवत्वात्।
3. दृष्टान्ताभास – दृष्टान्त का आभास दृष्टान्ताभास कहलाता है। दृष्टान्त के दो प्रकार हैं – साधर्म्य दृष्टान्त तथा वैधर्म्य दृष्टान्त। इसके कारण दृष्टान्ताभास के भी दो प्रकार हो जाते हैं – साधर्म्यदृष्टान्ताभास और वैधर्म्यदृष्टान्ताभास।
   साधर्म्यदृष्टान्ताभास के चार प्रकार हैं – साध्यहीन, साधन हीन, उभयहीन, आश्रयहीन।
   वैधर्म्यदृष्टान्ताभास के भी चार प्रकार हैं – साध्याव्यावृत्त, साधनाव्यावृत्त, उभयाव्यावृत्त, आश्रयहीन।

3. शब्द प्रमाण –

शब्दप्रमा का जो करण है, वह शब्द प्रमाण है। मानमेयोदय के अनुसार पदों का ज्ञान होने पर पदार्थ का स्मरण होता है तथा तदनन्तर असन्निकृष्ट वाक्यार्थज्ञान को शाब्द प्रमा कहा जाता है। इस शाब्द प्रमा में करण शब्द है।

तत्र तावत् पदैर्ज्ञातैः पदार्थस्मरणे कृते।

असन्निकृष्टवाक्यार्थज्ञानं शाब्दमितीर्यते।।[11]

शब्द प्रमाण दो प्रकार का है – लौकिक तथा वैदिक। शाब्दबोध के सम्बन्ध में मीमांसकों में दो मत प्रचलित हैं –

1. अभिहितान्वयवाद – कुमारिल भट्ट
2. अन्विताभिधानवाद – प्रभाकर मिश्र

शाब्द बोध में सहकारी रूप में चार कारण माने गये हैं – 1. आकांक्षा 2. योग्यता 3. आसत्ति और 4. तात्पर्यज्ञान।

4. उपमान प्रमाण –

दृश्यमान पदार्थ के सादृश्य के आधार पर स्मर्यमाण असन्निकृष्ट गोगत जो सादृश्य का ज्ञान है, वह उपमिति है। उसका करण उपमान प्रमाण है।

दृष्यमानार्थसादृष्यात् स्मर्यमाणार्थगोचरम्।

असन्निकृष्टसादृष्यज्ञानं ह्युपमितिर्मता।।[12]

तात्पर्य यह है कि जिस व्यक्ति को यह मालूम नहीं कि गवय कैसा है, वह केवल गाय को जानता है। उसे किसी ने बताया कि गवय गाय की तरह होता है। यह सुनकर वह व्यक्ति जंगल गया और वहां गवय में गोसादृश्य देखकर उसे यह पता चला कि गो में भी इसी प्रकार का गवयसादृश्य है। यहां गवयगत गोसादृश्य का ज्ञान उपमान प्रमाण तथा गोगत गवयसादृश्य का ज्ञान उपमिति है।

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11. मानमेयोदय, शब्द प्रमाण, श्लोक सं 89
12. मानमेयोदय, उपमान खण्ड, 108

5. अर्थापत्ति प्रमाण –

उपपाद्य ज्ञान से उपपादक ज्ञान होता है। यहां उपपाद्य ज्ञान अर्थापत्ति प्रमाण तथा उपपादक ज्ञान अर्थापत्ति प्रमा है।

अन्यथानुपपत्त्या यदुपपादककल्पनम्।

तदर्थापत्तिरित्येवं लक्षणं भाष्यभाषितम्।।[13]

जैसे पीनो देवदत्तो दिवा न भुंक्ते – यहां दिवाभोजनाभावविशिष्ट पीनत्व यह उपपाद्य ज्ञान है। इससे रात्रिभोजन की कल्पना यह उपपादक ज्ञान अर्थात् प्रमा है। इसके दो भेद हैं – दृष्टार्थापत्ति तथा श्रुतार्थापत्ति।

6. अभाव प्रमाण–

इसी का अपर नाम अनुपलब्धि भी है। प्रभाकर मत में यह प्रमाण स्वीकार नहीं किया गया। वे अभाव को अधिकरणरूप मानते हैं। भाट्टमतानुसार अभाव का ज्ञान अनुपलब्धि प्रमाण से होता है।

प्रामाण्य विचार–

पूर्व मीमांसा दर्शन में स्वतः प्रामाण्य वाद स्वीकार किया गया है। ज्ञान और तत्गत प्रामाण्य दोनों का ग्राहक एक होने पर स्वतःप्रामाण्यवाद तथा दोनों का ग्राहक अलग–अलग होने पर परतः प्रामाण्य माना जाता है। इस सम्बन्ध में चार दार्शनिकों के अलग – अलग मत हैं।

न्याय मत – प्रामाण्य और अप्रामाण्य दोनों परतः

सांख्य मत – दोनों स्वतः

मीमांसा मत – प्रामाण्य स्वतः अप्रामाण्य परतः

बौद्धमत – अप्रामाण्य स्वतः प्रामाण्य परतः

प्रमेय विचार–

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13. मानमेयोदय, पृ 116

कुमारिल भट्ट के मतानुसार 5 प्रमेय स्वीकार किये गये हैं।

1. द्रव्य – द्रव्य 11 हैं – पृथ्वी, जल, तेज, वायु, तम, आकाश, काल, दिक्, आत्मा, मन, शब्द।
2. गुण – गुण 24 हैं – रूप, रस, गन्ध, स्पर्श, संख्या, परिमाण, पृथक्त्व, संयोग, विभाग, परत्व, अपरत्व, गुरुत्व, द्रवत्व, स्नेह, बुद्धि, सुख, दुःख, इच्छा, द्वेष, प्रयत्न, संस्कार, ध्वनि, प्राकट्य, शक्ति।
3. कर्म – कर्म अर्थात् क्रिया। इसके पांच प्रकार हैं – उत्क्षेपण, अपक्षेपण, आकुंचन, प्रसारण, गमन।
4. जाति – यही सामान्य है।
5. अभाव – अभाव के दो भेद हैं – संसर्गाभाव तथा अन्योन्याभाव। संसर्गाभाव तीन प्रकार का है – प्रागभाव, प्रध्वंस तथा अत्यन्ताभाव।

प्रभाकर मिश्र के अनुसार 8 प्रमेय हैं –

1. द्रव्य – द्रव्य 09 हैं – पृथ्वी, जल, तेज, वायु, आकाश, काल, दिक्, आत्मा, मन।
2. गुण – गुण 23 हैं – रूप, रस, गन्ध, स्पर्श, शब्द, परिमाण, पृथक्त्व, संयोग, विभाग, परत्व, अपरत्व, गुरुत्व, द्रवत्व, स्नेह, संस्कार, बुद्धि, सुख, दुःख, इच्छा, द्वेष, प्रयत्न, धर्म, अधर्म।
3. कर्म – कर्म अर्थात् क्रिया। यह एक ही है। उपाधि भेद से इसके अनेक प्रकार होते हैं।
4. सामान्य – यह दो प्रकार का है – पर तथा अपर
5. शक्ति – यह अनेक प्रकार की है।
6. संख्या – गणितव्यवहार की हेतु संख्या है, जो एकत्व से लेकर परार्ध पर्यन्त है।
7. सादृश्य – यह अनेकविध है

   समवाय – यह एक प्रकार का है।

मीमांसा दर्शन के अनुसार वेद के पांच भाग किये गये हैं – विधि, मन्त्र, नामधेय, निषेध, अर्थवाद।

आधुनिक न्याय व्यवस्था में मीमांसा दर्शन के अधोलिखित सिद्धान्तों की भी उपयोगिता दिखलाई पड़ती है।

1. **तात्पर्य बोधक लिंग**– तात्पर्य का निर्णय करने के लिये मीमांसा दर्शन में छह लिंग बतलाये गये हैं।

उपक्रमोपसंहारावभ्यासोऽपूर्वता फलम्।

अर्थवादोपपत्ती च लिंग तात्पर्यनिर्णये।।

1. उपक्रमोपसंहार 2. अभ्यास 3. अपूर्वता 4. फल 5. अर्थवाद 6. उपपत्ति

1– इनमें पहला है उपक्रमोपसंहार। यह नियम है कि जिस प्रकार का उपक्रम रहता है, उसी के अनुसार उपसंहार भी होना चाहिये। मीमांसा दर्शन का यह न्याय है कि उपक्रम के अनुसार उपसंहार की कल्पना की जाती है, उपसंहार के अनुसार उपक्रम के अर्थ को नहीं बदला जाता। उदाहरणार्थ उपक्रम में अग्नेर्ऋग्वेदः, वायोर्यजुर्वेदः, आदित्यात् सामवेदः। यह वाक्य आता है। यहां वेद शब्द का उच्चारण है। वेद का अर्थ होता है मन्त्रब्राह्मणात्मक वेदभाग। दूसरी तरफ उपसंहार में उच्चैर्ऋचा क्रियते, उपांशु यजुषा, उच्चैः साम्ना, ऐसा वाक्य मिलता है। उपसंहार में ऋक् शब्द का प्रयोग है। ऋक् का अर्थ है ऋग्वेद का मन्त्र। अब यहां यह प्रश्न उठता है कि क्या उपसंहार के ऋक्, यजुष् तथा साम पद के अनुसार उपक्रमस्थ ऋग्वेद, यजुर्वेद तथा सामवेद पद का अर्थ केवल ऋक्, यजुष् तथा साम कर दिया जाये या फिर उपक्रमस्थ वेद पद के अनुसार उपसंहारस्थ ऋक्, यजुष्, साम का अर्थ क्रमशः ऋग्वेद, यजुर्वेद तथा सामवेद किया जाये। उपक्रम प्रबल होगा या उपसंहार। यहां पूर्वपक्षी कहते हैं कि इस प्रसंग में उपक्रम में अर्थवाद वाक्य आता है तथा उपसंहार में विधिवाक्य आता है। अर्थवाद तथा विधि में विधि प्रबल होती है तथा अर्थवाद दुर्बल। इसलिये पूर्वपक्ष के अनुसार उपसंहार प्रबल होगा तथा उपक्रम दुर्बल।

इस पर सिद्धान्ती का कथन है कि असंजातविरोधि न्याय से उपक्रम प्रबल होगा तथा उपसंहार दुर्बल। उपक्रम का उल्लेख पहले आने के कारण उपक्रम असंजातविरोधि है। अर्थात् उपक्रम के समय उसका विरोधी उपसंहार उत्पन्न नहीं हुआ था। जबकि उपसंहार के समय उसका विरोधी उपक्रम उत्पन्न हो गया था, इसलिये उपसंहार संजातविरोधी है। इसलिये उपक्रमस्थ वेद शब्द के अनुसार उपसंहारस्थ ऋक् का अर्थ ऋग्वेद किया जायेगा। इसी तरह यजष् का अर्थ यजुर्वेद और साम का अर्थ सामवेद किया जायेगा।

2– अभ्यास– अभ्यास का अर्थ है – बार बार कथन। समिधो यजति, इडो यजति, बहिर्यजति, तनूनपातं यजति, स्वाहाकारं यजति – इन पांचों वाक्यों में पांच बार यजति का प्रयोग आया है। इससे यह सिद्ध होता है कि ये पांच अलग अलग याग हैं। कर्मभेद के सहकारी छह प्रमाणों में अभ्यास भी एक प्रमाण है।

3– अपूर्वता – अन्य प्रमाण से अज्ञात पदार्थ को अपूर्व कहा जाता है। अपूर्व भी तात्पर्य ग्राहक लिंग है।

4– फल – फल से भी तात्पर्य का ग्रहण होता है। मीमांसकों को फलप्रमाणवादी कहा जाता है।

5– अर्थवाद – अक्ताः शर्कराः उपदधाति – इस विधि में अक्ताः का अर्थ स्पष्ट नहीं हो पाता है कि किस द्रव पदार्थ से शर्करा (पाषाण खण्ड) अक्त (गीले) हों। इसके आगे अर्थवाद आता है – तेजो वै घृतम्। यहां घृत की प्रशंसा की गयी है। इसलिये यह निर्णय हो जाता है कि शर्करा घृत से ही अक्त होगी।

6– उपपत्ति – उपपत्ति का अर्थ है युक्ति। मीमांसा में बतलाये गये 1000 न्यायों को युक्ति कहा जाता है। इन न्यायों से तात्पर्य का ज्ञान होता है।

2. **अंगांगिबोधक प्रमाण**– मीमांसा दर्शन में अंगांगिभाव का बोध करने के लिये छह सहकारी प्रमाण माने गये हैं। अंग तथा प्रधान के सम्बन्ध का बोध कराने वाली विधि विनियोग विधि है। **विनियोग विधि** का लक्षण है – **अंगप्रधानसम्बन्धबोधको विधिः विनियोगविधिः।** जैसे – दध्ना जुहोति – यह विनियोग विधि है। विनियोग विधि के सहकारी छह प्रमाण हैंये छह प्रमाण हैं – श्रुति, लिंग, वाक्य, प्रकरण, स्थान, समाख्या। इन छह प्रमाणों में पूर्व पूर्व प्रमाण प्रबल हैं तथा उत्तर उत्तर दुर्बल। इस छह प्रमाणों में पूर्व पूर्व प्रबल है तथा उत्तरोत्तर दुर्बल।

(क) श्रुति– निरपेक्ष शब्द को श्रुति कहा जाता है।

निरपेक्षो रवः श्रुतिः।

यह तीन प्रकार की होती है। विधात्री, अभिधात्री तथा विनियोक्त्री। विनियोक्त्री श्रुति के तीन भेद हैं – विभक्तिरूपा, समानाभिधानरूपा तथा एकपदरूपा। व्रीहिभिर्यजेत, व्रीहीन् प्रोक्षति, व्रीहीन् अवहन्ति, आहवनीये जुहोति, अरुणया पिंगाक्ष्या एकहायन्या गवा सोमं क्रीणाति। ये सभी विभक्तिरूपा श्रुति के उदाहरण हैं। पशुना यजेत में एकत्व तथा पुंस्त्व समानाभिधान श्रुति के द्वारा करण कारक के अंग बनते हैं। यजेत यहां एकपदरूपा श्रुति के द्वारा आख्यात से अभिहित होने वाली संख्या याग का अंग बनती है।

(ख) लिंग –शब्दसामर्थ्यं लिंगम्। शब्द में रहने वाले अभिधारूपी सामर्थ्य को लिंग कहा जाता है। सामर्थ्यं सर्वशब्दानां लिंगमित्यभिधीयते।

जैसे –**बर्हिर्देवसदनं दामि**– यहां पर दामि इस शब्द के सामर्थ्य से यह मन्त्र कुश काटने का अंग बनता है। लिंग प्रमाण दो प्रकार का है – सामान्यसम्बन्ध बोधक प्रमाण की अपेक्षा रखने वाला तथा सामान्य सम्बन्ध बोधक प्रमाण की अपेक्षा न रखने वाला।

(ग) वाक्य – अंग और अंगी का समभिव्याहार वाक्य कहलाता है।

समभिव्याहारो वाक्यम्।

जैसे – यस्य पर्णमयी जूहूर्भवति, न स पापं श्लोकं शृणोति। जिसकी जूहू पलाश की बनी होती है, वह यजमान कभी अपकीर्ति नहीं सुनता। यहां समभिव्याहार के कारण पर्णता जूहू का अंग बनती है।

(घ) प्रकरण– अंग को अंगी की आकांक्षा तथा अंगी को अंग की आकांक्षा, इस प्रकार उभयाकांक्षा प्रकरण कहलाता है। इसका लक्षण है –

उभयाकांक्षा प्रकरणम्।

यह दो प्रकार का है – महाप्रकरण तथा अवान्तर प्रकरण। प्रयाज आदि महाप्रकरण से दर्शपूर्णमास के अंग बनते हैं। अंग के भी जो अंग हैं, वे अवान्तर प्रकरण से अंग बनते हैं। अवान्तर प्रकरण में संदंश के माध्यम से अंगांगिभाव बनता है।

(ङ) स्थान –देशसामान्यं स्थानम्। यह दो प्रकार का है – पाठसादेश्य तथा अनुष्ठानसादेश्य।

पाठसादेश्य दो प्रकार का है – यथासंख्य पाठ तथा सन्निधि पाठ। इन्द्राग्नी रोचना दिवः इत्यादि मन्त्र का यथासंख्य पाठ से अंगत्व होता है। अपूर्व अंगों का विकृत्यंगत्व सन्निधि पाठ से होता है। पशुधर्मों का अग्नीषोमीय यागांगत्व अनुष्ठान सादेश्य के कारण होता है।

(च) समाख्या– यौगिक शब्द को समाख्या कहा जाता है।

समाख्या यौगिकः शब्दः।

यह दो प्रकार की है – लौकिक तथा वैदिक। होतृचमस यह वैदिकी समाख्या है। आध्वर्यवम् यह लौकिक समाख्या है।

3. **क्रमबोधक प्रमाण**– क्रमबोधक विधि को प्रयोग विधि कहा जाता है या फिर प्रयोग प्राशुभाव बोधक विधि प्रयोग विधि कहलाती है।

   प्रयोगप्राशुभावबोधको विधिः प्रयोगविधिः।

किसी भी अनुष्ठान को करते समय सभी अंगों को एक के बाद एक अनुष्ठान करना चाहिये। विलम्ब से अंगों का अनुष्ठान करने में कोई प्रमाण नहीं है। अतः प्रयोग प्राशुभाव अर्थात् अविलम्ब का विधान भी पदार्थ के विशेषण के रूप में प्रयोग विधि के द्वारा किया जाता है। विततिविशेष या पौर्वापर्य को क्रम कहा जाता है। इसके सहकारी छह प्रमाण हैं – श्रुति, अर्थ, पाठ, स्थान, मुख्य तथा प्रवृत्ति। इन छह प्रमाणों में पूर्व पूर्व प्रमाण प्रबल हैं तथा उत्तर उत्तर दुर्बल।

(क) श्रुति – क्रमबोधक वचन को श्रुति कहा जाता है।

क्रमपरवचनं श्रुतिः।

यह दो प्रकार की है। केवल क्रम बोधक तथा क्रम विशिष्ट पदार्थ बोधक। जैसे – वेदं कृत्वा वेदिं करोति यह केवल क्रम बोधक श्रुति है। वषट्कर्तुः प्रथमभक्षः – यह क्रम विशिष्ट पदार्थ बोधक श्रुति है।

(ख) अर्थ– जहां प्रयोजन के अनुसार पदार्थों के क्रम का निर्णय किया जाता है, उसे अर्थ क्रम कहा जाता है।

यत्र प्रयोजनवशेन अर्थनिर्णयः स अर्थक्रमः।

जैसे – अग्निहोत्रं जुहोति तथा यवागूं पचति – यहां पर पाठ क्रम को मानें, तो पहले अग्निहोत्र होम होगा, बाद में यवागू पाक होगा। किन्तु प्रयोजन के अनुसार जब क्रम का निर्णय करते हैं, तो पहले यवागू का पाक होता है, बाद में उसी यवागू से अग्निहोत्र होम होता है।

(ग) पाठ– पदार्थबोधक वाक्यों का जो क्रम है, वह पाठ क्रम कहलाता है।

पदार्थबोधकवाक्यानां यः क्रमः स पाठक्रमः।

यह दो प्रकार का है – मन्त्र पाठ और ब्राह्मण पाठ। मन्त्रों के पाठ का जो क्रम है, वह मन्त्र क्रम कहलाता है। जैसे आग्नेय और अग्नीषोमीय याग में जो क्रम होता है, वह मन्त्र पाठ से होता है। इसी प्रकार ब्राह्मण ग्रन्थों के पाठ का जो क्रम है, वह ब्राह्मण पाठ कहलाता है। जैसे पंच प्रयाजों का जो क्रम है, वह ब्राह्मण पाठ से होता है।

(घ) स्थान –स्थानं नाम उपस्थितिः। प्रकृतौ नानादेशानां पदार्थानां विकृतौ वचनादेकस्मिन् देशे अनुष्ठाने कर्तव्ये यस्य देशे अनुष्ठीयन्ते, तस्य प्रथमम् अनुष्ठानम् इतरयोः पश्चात्।

प्रकृति याग ज्योतिष्टोम में तीन याग होते हैं – अग्नीषोमीय, सवनीय और आनुबन्ध्य। जब वहां से विकृति में याग प्राप्त होते हैं, तो इन तीनों का अनुष्ठान एक ही स्थान पर करना प्राप्त होता है, उस स्थिति में जिस स्थान पर इनका अनुष्ठान होता है, उससे सम्बन्धित याग पहले होता है। जैसे इन तीनों का विकृति में सवनीय देश में अनुष्ठान होता है, तो सवनीय याग पहले होगा और अन्य दोनों याग बाद में। यही स्थान क्रम है।

(ङ) मुख्यक्रम– प्रधान के क्रम से अंगों का जब क्रम निर्धारण होता है, उसे मुख्यक्रम कहा जाता है।

प्रधानक्रमेण अंगानां यः क्रमः स मुख्यक्रमः।

जैसे ऐन्द्र याग और आग्नेय याग में जो प्रधान का क्रम है, उसी क्रम से उनके अंग अर्थात् आग्नेय हवि का अभिघारण और ऐन्द्र हवि का अभिघारण किया जाता है। यह मुख्यक्रम है।

(च) प्रवृत्ति क्रम– जब अनेक पदार्थों पर अनेक धर्मों का अनुष्ठान करना होता है, उस समय प्रथम अनुष्ठित धर्म के अनुसार ही द्वितीयादि धर्मों का अनुष्ठान होता है, तो उसे प्रवृत्ति क्रम कहा जाता है।

सह प्रयुज्यमानेषु प्रधानेषु सन्निपातिनामंगानाम् आवृत्यानुष्ठाने कर्तव्ये द्वितीयादिपदार्थानां प्रथमानुष्ठितपदार्थक्रमात् यः क्रमः स प्रवृत्तिक्रमः।

जैसे प्राजापत्य पशु याग में 17 पशुओं में क्रमशः उपाकरण, नियोजन आदि अंगों का अनुष्ठान होता है, उस स्थिति में प्रवृत्ति क्रम के अनुसार प्रथम अंग उपाकरण जिस पशु से प्रारम्भ करके जिस क्रम से होता है, उसी पशु से प्रारम्भ करके उसी क्रम से द्वितीय नियोजन आदि अंगों का भी अनुष्ठान होता है।

4. **अर्थापत्ति प्रमाण**– मीमांसा दर्शन में अर्थापत्ति प्रमाण को अत्यन्त महत्त्वपूर्ण प्रमाण माना गया है। अपूर्व की सिद्धि इसी प्रमाण से होती है। इस प्रमाण का विशेष निरूपण पूर्व में किया गया है।
5. **ऊह**–ऊह का लक्षण है – अतिदिष्टस्य पदार्थस्य कार्यवशात् रूपान्तरकरणम् ऊहः। इसके तीन भेद हैं – मन्त्रोह, सामोह तथा संस्कारोह। जैसे – जैसे 'अग्नये जुष्टं निर्वपामि' के स्थान पर सौर्ययाग में 'सूर्याय जुष्टं निर्वपामि' यह प्रयोग होता है। यह मन्त्रोह है। साम में होने वाला ऊह सामोह कहलाता है। विकृति में व्रीहि के स्थान पर नीवार नामक धान्य रहता है। वहां विकृति में नीवार का भी संस्कार उसी तरह से किया जाता है, जैसा कि प्रकृति में व्रीहि का संस्कार हुआ था। यह संस्कारोह है।
6. **बाध**–बाध का लक्षण है – प्रयोजनाभावादिना अंगानामननुष्ठानम्। प्रयोजन न होने पर अंगों का अनुष्ठान न होना ही बाध है। जैसे कृष्णल चरु में तुषविमोक रूपी प्रयोजन न होने के कारण अवघात का बाध होता है। बाध के तीन भेद हैं – अर्थलोप से, प्रतिषेध से तथा प्रत्याम्नान से। कृष्णल चरु में अवघात का जो बाध है, वह अर्थलोप के कारण होने वाला बाध है। 'महापितृयज्ञे न होतारं वृणीते' इस वाक्य में वरण का निषेध होने के कारण बाध होता है। इसे प्रतिषेध कृत बाध कहा जाता है। सामान्यतया विकृति याग में प्रकृति

से कुश का अतिदेश आता है। लेकिन सोमारौद्र नामक विकृति में कुशा के स्थान पर शर का विधान है। अतः यहां प्रत्याम्नान से कुशा का बाध होता है।

7. **तन्त्र**–तन्त्र का लक्षण है – एकेनैव सकृत् प्रवर्तितेन बहूनां प्रधानानामुपकारः। एक बार ही अंग का अनुष्ठान करने से यदि उस अंग का उपकार अनेक प्रधानों में चला जाता है, तो उसे तन्त्र कहा जाता है। जैसे पूर्णमास के तीन प्रधानों में प्रयाजादि अंगों का अनुष्ठान एक बार ही किया जाता है। एक बार अनुष्ठित पंच प्रयाजों से तीनों प्रधानों में उपकार चला जाता है।

8. **प्रसंग** –अन्यतः उपकारलाभात् अंगानामननुष्ठानं प्रसंगः। अन्य प्रकार से यदि उपकार मिल जाता है, तो अंगों का अनुष्ठान नहीं किया जाता। जैसे पशु याग के अंगों का प्रसंग से पशु पुरोडाश में भी उपकार होता है।

9. अतिदेश –अतिदेश का लक्षण है – येन प्रमाणेन प्रकृतौ पठितानाम् अंगानां प्रकृतिसदृशविकृतिषु प्राप्तिः भवति, तत् प्रमाणम्। जिस प्रकार प्रकृति याग किया जाता है, उसी प्रकार विकृति याग का भी अनुष्ठान करना चाहिये। प्रकृतिवद् विकृतिः कर्तव्या – यह अतिदेश है। जहां सम्पूर्ण अंगों के सहित प्रधान का निरूपण है, वह प्रकृति कहलाती है। जहां सम्पूर्ण अंगों का निरूपण नहीं होता, वह विकृति है। विकृति में जो अंग नहीं होते, उनका प्रकृति से अतिदेश होता है। अतिदेश तीन प्रकार का है – प्रत्यक्षवचनातिदेश, नामातिदेश, अनुमितवचनातिदेश। 'समानम् इतरत् श्येनेन' यह प्रत्यक्षवचनातिदेश है। अग्निहोत्रं जुहोति से विहित नित्य अग्निहोत्र से मासम् अग्निहोत्रं जुहोति इस वाक्य से विहित होम में अतिदेश जाता है। यह नामातिदेश है। अनुमितवचनातिदेश को ही विशेषातिदेश कहा जाता है। जैसे – आग्नेय याग से सौर्य याग में अतिदेश आता है। वहां निर्वाप, औषधद्रव्यकत्व, एकदेवतात्व, तद्धितेन देवतानिर्देश – इन लिंगों से अतिदेश आता है। यह विशेषातिदेश है। इस प्रसंग में स्पष्ट लिंग, अस्पष्ट लिंग, प्रबल लिंग आदि का निरूपण है।

10. निषेध एवं पर्युदास –– अनर्थ कारक पदार्थों से निवृत्ति कराना ही निषेध का प्रयोजन है। जैसे – मा हिंस्यात् सर्वाणि भूतानि, न कलंजं भक्षयेत्। विधि का यह स्वभाव है कि वह श्रेयस्कर पदार्थ में ही प्रवृत्ति कराती है, अनिष्ट में नहीं। अनिष्ट पदार्थ से निवर्तना

करने वाले वाक्यों को निषेध वाक्य कहा जा सकता है। निषेध वाक्यों में सामान्यतया नञर्थ का अन्वय क्रिया के साथ होता है। इसे प्रसज्य प्रतिषेध कहा जाता है। लेकिन जब क्रिया के साथ अन्वय में कोई बाधा होती है, तो तद्भिन्न पदार्थ के साथ नञर्थ का अन्वय होता है। इसे पर्युदास कहते हैं।

प्रतिषेधः स विज्ञेयः क्रियया सह यत्र नञ्।

पर्युदासः स विज्ञेयः यत्रोत्तरपदेन नञ्।।

क्रिया के साथ नञर्थ के अन्वय में दो प्रकार से बाधक हो सकते हैं –

(1) **उपक्रम**– तस्य व्रतम् इस उपक्रम को आरम्भ करके 'नेक्षेतोद्यन्तमादित्यम्' ऐसा वाक्य आता है। इस वाक्य में यदि प्रसज्य प्रतिषेध मानें, तो उपक्रम 'तस्य व्रतम्' के साथ विरोध होगा। क्योंकि उपक्रम में तो स्नातक के व्रतों का विधान किया जा रहा है और आगे निषेध वाक्य आने से उपक्रम के साथ विरोध होगा। इसलिये नेक्षेत वाक्य में पर्युदास माना जाता है। पर्युदास मानकर नेक्षेत वाक्य का अर्थ होगा – आदित्यविषयकम् अनीक्षणसंकल्पं कुर्यात्।

(2) **विकल्पप्रसक्ति** – कभी कभी विकल्प की प्राप्ति होने पर भी पर्युदास मानना पड़ता है। जैसे – यजतिषु ये यजामहं करोति, नानुयाजेषु – यहां पर यजति में ये यजामहे वाक्य प्राप्त होता है और अनुयाज में निषेध है। इस तरह अनुयाज में ये यजामहे की प्राप्ति और निषेध – दोनों होने से 'तुल्यबलविरोधे विकल्पः' नियम के अनुसार अनुयाज में ये यजामहे का विकल्प प्राप्त होता है। विकल्प मानने पर आठ दोष आते हैं। अतः यहां पर्युदास मानकर यह अर्थ किया जाता है – अनुयाजव्यतिरिक्तेषु यजतिषु ये यजामहं करोति।

11. लक्षणा – साक्षात् संकेतित अर्थ का बोध अभिधा के द्वारा होता है। अभिधा मानने में जब कोई बाधा आती है, तो लक्षणा वृत्ति से अर्थ बोध होता है। अभिधा से मुख्यार्थ का बाध होने पर लक्षणा वृत्ति लगती है। लक्षणा मानने के दो कारण हैं – अन्वयानुपपत्ति तथा तात्पर्यानुपपत्ति। जैसे 'काकेभ्यो दधि रक्ष्यताम्' इस उदाहरण में तात्पर्यानुपपत्ति के कारण लक्षणा मानी जाती है। इसी प्रकार 'गंगायां घोषः इस उदाहरण में अन्वयानुपपत्ति के कारण लक्षणा मानते हैं।

12. सामर्थ्य – धर्म में आठ प्रमाण माने गये हैं – विधि, मन्त्र, नामधेय, अर्थवाद, स्मृति, आचार, वाक्यशेष, सामर्थ्य। इन आठ प्रमाणों में सामर्थ्य भी एक प्रमाण है। जैसे – स्रुवेण अवद्यति, स्वधितिना अवद्यति – इत्यादि स्थलों पर सामर्थ्य के आधार पर यह निर्णय होता है कि जो द्रव पदार्थ हैं, उनको स्रुवा आदि से उठाया जा सकता है। इसी तरह जो ठोस पदार्थ हैं, उनके लिये स्वधिति का प्रयोग होता है। यह निर्णय सामर्थ्य के आधार पर किया जा सकता है।

13. अनुषंग – इसे अनुवृत्ति भी कहा जा सकता है। वेद में मन्त्र आता है – या ते अग्ने अयाशया तनूर्वर्षिष्ठा गह्वरेष्ठा। उग्रं वचो अपावधीत्स्वाहा। या ते अग्ने रजाशया। या ते अग्ने हराशया। इस मन्त्र में 'या ते अग्ने रजाशया' और 'या ते अग्ने हराशया' में 'तनुर्वर्षिष्ठा...' आदि की अनुवृत्ति या अनुषंग आता है।

14. अध्याहार – एक शब्द के श्रुत होने पर अन्य शब्द की कल्पना अध्याहार कहलाता है। जैसे – 'द्वारम्' यह सुनने पर 'पिधेहि' इसकी कल्पना अध्याहार है।

‘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., "(t)he 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'bleKatju, 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.

MIMANSA*

It is necessary that the body of experts from the field of Sanskrit, philosophy and law should be setup by the institutions and including law institutes and other organizations to start work on Bhartiya Vidhisasra and make an endeavor covering various perspective, dimension, usability and applicability of Bharitya literaturein, the field of law and legal practice.

We need textbooks, academic field books, expertization, research and synthesis of our Bhartiya traditions including Vadic traditions – based system for progressive construction to rejuvenate the social cultural and legal metrics on Bharat.

This is a practical age. We must make our Sanskrit literature (or at least that part of it which is rational and logical) connected with practical life, otherwise it will remain sterile. One way to do this is to start using Mimansa principles in our law Courts.

Our culture is very rich. However, it must be also pointed out that part of our old culture and our Sanskrit Literature needs (Parishkar), though of course there is also a part which is rational and very great.

We must therefore use our intelligence to Parishad the outmoded, while encouraging and promoting the useful and rational part.

However, the Mimansa system contains principles of interpretation, which are very rational and logical, and this part should be promoted and used in our law Courts.

मीमांसा

यज्ञों में आने वाली व्यावहारिक कठिनाइयों के समाधान के लिए मीमांसा सिद्धांतों की रचना की गई।

यज्ञ करने के नियम शतपथ, ऐतरेय, तैतरेय आदि द्वारा लिखित ''ब्राह्मण'' पुस्तकों में संकलित हैं।

इन ग्रंथों में बहुत सारी उलझनें थीं, इसलिए धार्मिक कठिनाइयों को हल करने के लिए मीमांसा सिद्धांतों का विकास किया गया।

मीमांसा के ये सिद्धांत तर्कसंगत और तार्किक हैं, इसलिए इन्हें विधि, व्याकरण, तर्क और दर्शन में प्रयोग किया जाता रहा है।

हमारी मीमांसा व्याख्या ''मैक्सवेल'' से कहीं अधिक गहरी है।

पश्चिमी लोग यह काम 200 वर्षों से कर रहे हैं, हम लोग लगभग 2500 वर्षों से इसको काम कर रहे हैं।

मीमांसा व्याख्या के सिद्धांतों को सबसे पहले जैमिनी ने अपने सूत्रों में स्थापित किया था। 500 ईसा पूर्व में जैमिनी सूत्र वर्णित व संग्रहित है।

''शभ्र भाष्य'' को छोड़कर अन्य कई टीकाएँ लिखी गईं लेकिन लुप्त हो गईं।

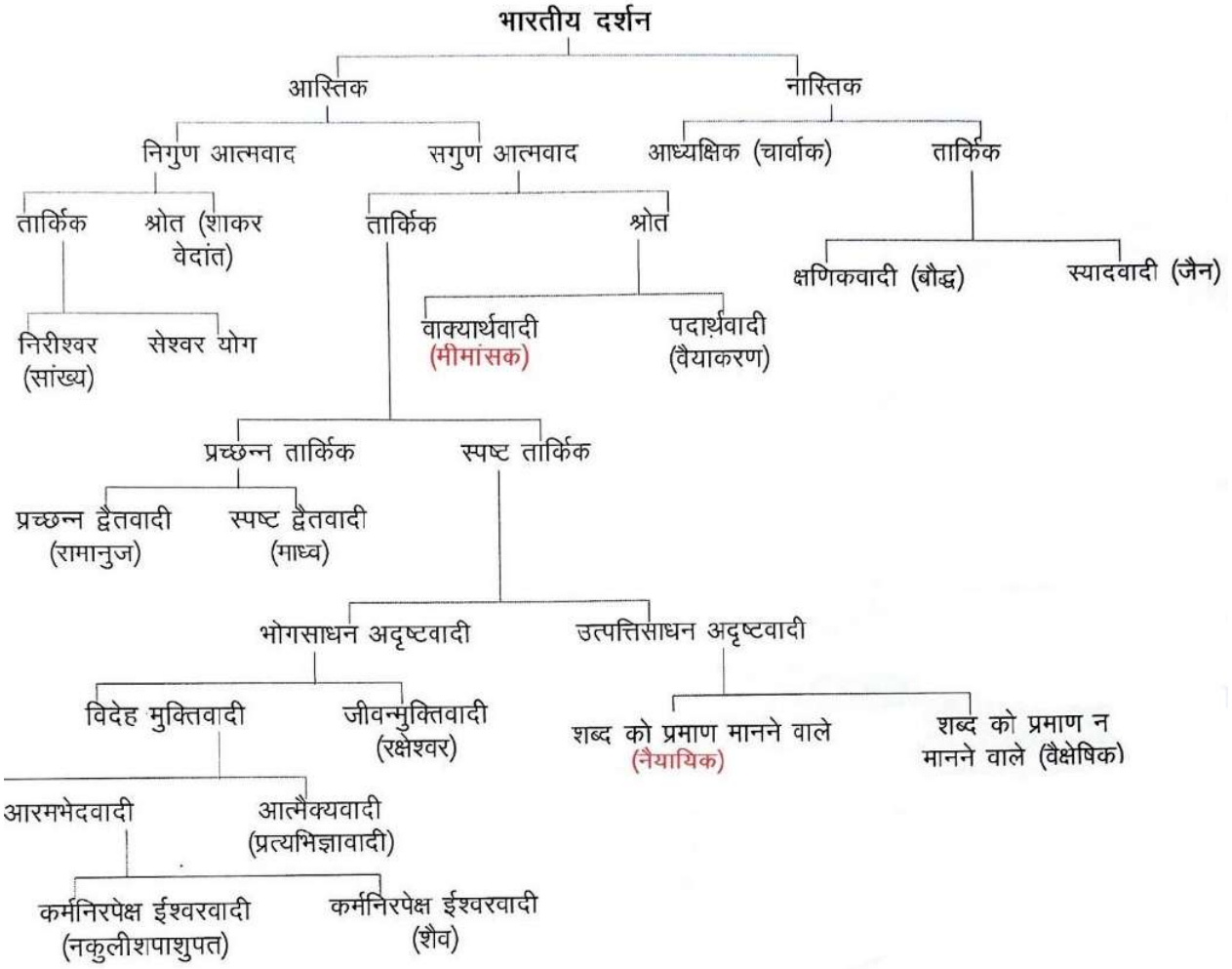
''कुमारिल भट्ट'' का विस्तार ''शभ्र'' में है।

तत्पश्चात् पार्थसार्ती मिश्रा ''कुमारिल'' पर टिप्पणी करते हैं

जामिनी ने स्वयं इस मीमांसा पर 8 आचार्य को ''पूर्व पक्ष'' कहा है।

As for as **Bhartiya School's of Philosophy** are concerned it can be explained by following chart prepared by Madhwacharya:-

सर्वदर्शन संग्रह



Mimansa is one of the six orthodox schools of Hindu philosophy, primarily concerned with the interpretation of the Vedas, especially the Brahmanas, which contain detailed instructions for performing rituals.

The principles of Mimansa are rational, logical, and systematic, and they have been used for over 2500 years to interpret religious and legal texts.

The Mimansa system was systematized by Jaimini in his Mimansa Sutras around 500 B.C. These sutras are concise and require extensive commentary, which was provided by scholars like Shabara Swami, Kumarila Bhatta, and Prabhakar Mishra.

The principles were later used by renowned jurists like Vijnaneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), and others to interpret Hindu legal texts, particularly when there were conflicts or ambiguities in the Smritis (ancient legal texts).

The Mimansa principles were also used to resolve practical difficulties in performing yagyas, as the rules for these rituals were often ambiguous or conflicting.

> The Mimansa Principles of Interpretation, as laid down by Jaimini around the 5th century B.C. in his sutras and as explained by Sabar, Kumarila Bhatta, Prabhakar, Mandan Mishra, Shalignath, Parthasarathy Mishra, Apadeva, Shree Bhat Shankar, etc. were regularly used by our renowned jurists like Vijneshwara (author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit (author of Dattaka Mimansa), etc. whenever there they found any conflict between the various Smritis, e.g., Manusmriti and Yajnavalkya Smriti, or ambiguity, ellipse or absurdity in any Smriti. Thus, the Mimansa principles were our traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), they were so rational and logical that gradually they came to be utilized in law, philosophy, grammar, etc., that is, they became of universal application. Thus, Shankaracharya has used the Mimansa Adhikaranas (principles) in his bhashya on the Vedanta sutras. *Rajbir Singh Dalal (Dr.) V. Chaudhari Devi Lal University, Sirsa and Another* ***{(2008) 9 SCC 284}, Para-19.***
>
> The Mimansa principles were regularly used by our great jurists for interpreting legal texts (see also in this connection P.V. Kane's' History of the Dharmashastra', Vol. V, Pt. II, Ch. XXIX and Ch. XXX, pp. 1282-1351).

The Rule of Interpretation of Hindu Law with special reference to the Mimansa Aphorisms as applied to Hindu Law. This subject cannot be better introduced than in the language of **Sir John Edge, C.J.**, who with reference to a question of Hindu Law arising before him, observed as follows:-

> *"The question is how is the text of Vasistha to be construed. 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 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."* ***(ILR 14 All. P-70)***

Mr. Colebrooke treats of the Mimansa Aphorisms in one of his Miscellanceous Essays, Vol. 1, P-342. The following short extract from this Essay will show the high importance he attaches to the Mimansa Aphorisms as regards the interpretation of the Hindu Law:-

> *"A case is proposed either specified in Jaimini's text or supplied by his scholiasts. Upon this a doubt or question is raised, and a solution of it is suggested, which is refuted and a right conclusion established in its stead. The disquisitions of the Mimânsă bear, therefore, a certain resemblance to judicial questions; and, in fact, the Hindu Law being blended with the*

religion of the people the same modes of reasoning are applicable and are applied to the one as to the other. The logic of the Mimânsâ is the logic of the law-the rule of interpretation of civil and religious ordinances. 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 Mimansa."

(Colebrooke's Misc. Essays Vol 1 Page-342)

Prof. Max Muller in his book on the Six Systems of Indian Philosophy Page-275, speaks of the Mimansa Shastras in the same strain as follows:-

"We may wonder why Purva-Mimânsâ should ever have been raised to the rank of a philosophical system by the side of the Uttar-Mimânsă or the Vedanta, but it is its method rather than the Prof. Max Muller matter to which it applied, that seems to have invested it on Mimansa. with a certain importance. This Mimansa method of discussing questions has been adopted in other branches of learning also, for instance, by the highest legal authorities in trying to settle contested questions of law. We meet with it in other systems of philosophy also as the recognized method of discussing various opinions before arriving at a final conclusion."

(The Six system of Indian Philosophy Page-275)

In England, books on Interpretation of law deal with the interpretation of Statute Law. One of the earliest works of this kind was the work of Sir Fortunatus Dwarris, which was published about the middle of the nineteenth century, this work with that of the American Jurist Mr. Sedgwick, and the book written by Henry Hardcastle, were for some time the leading works on the subject of interpretation. Mr. Wilberforce's work on the interpretation of statutes is a valuable addition to the literature on the subject. But the work which is mostly resorted to at the present day as an authority on interpretation is that by Sir Peter Benson Maxwell, the 3rd edition of which is by Mr. A.B. Kempe.

MIMAMSA SASTRA

The importance of the Mimamsa Sastra in the study of the works on Dharma Sastra has been accepted from very early times. "In fact the principles of Mimamsa form the very background of our Dharma Sastra. All the rules of our Dharma Sastra have to be interpreted with the help of the Mimamsa Nyayas. So, a Dharma Sastrin has necessarily to become a Mimamsaka first. Thus, almost all the writers on Dharma Sastra from Manu down to the present day have been good Mimamsakas also." (Pages Critical Bibliography of Mimamsa by Mm. Dr. Umesha Mishra-appended to Mm. Dr. Sir Ganganatha Jha's Purva Mimamsa in its sources, 1942. University).

In the matter of Mahaveer Prasad Dwivedi **(AIR 1992 All. 351)**, High Court strongly observed.

"It is deeply regrettable that in our Courts of law lawyers quote Maxwell and Craies but nobody refers to the Mimansa Principles of Interpretation. Most lawyers would not have even heard of their existence. 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 us. The Mimansa Principles of Interpretation is part of that great intellectual treasury, but it is distressing to note that apart from the reference to these principles in the judgment of Sir John Edge, the then Chief Justice of Allahabad High Court, in Beni Prasad v. Hardai Bibi, 1892 ILR 14 All 67 (FB), a hundred years ago there has been almost no utilization of these principles even in our own country. Many of the Mimansa Principles are rational and scientific and can be utilized in the legal field (see in this connection K.L. Sarkar's 'Mimansa Rules of Interpretation' which is a collection of Tagore Law Lectures delivered in 1905 (Part II of this book) and which contains the best exposition of these principles).

The Mimansa Principles of Interpretation, as laid down by Jaimini in his sutras and as explained by Sabar, Kumarila Bhatta, Prabhakar, Mandan Mishra, etc. were regularly used by our renowned jurists like Vijnaneshwara (author of Mitakshara). Jimutvahana (author of Dayabhaga), Nanda Pandit (author of Dattaka Mimansa), etc. Whenever there was any conflict between two Smritis, e.g.. Manusmriti and Yajnavalkya Smriti, or ambiguity or absurdity in any Smriti these principles were utilized. Thus, the Mimansa principles were our Traditional system of interpretation of legal texts. Although originally they were created for interpreting religious texts pertaining to the Yagya (sacrifice), gradually they came to be utilized for interpreting legal texts also ***(see also in this connection P.V. Kane's History of the Dharmashastra, Vol. V. Pt. II, Ch. XXIX and Ch. XXX, pp. 1282-13511.***

TREATMENT BY MAXWELL (2 CARDINAL QUESTIONS)

The subject of the interpretation of a statute seems thus to fall under two general heads: what are the principles which govern the construction of the language of an act of parliament; and next, what are those which guide the interpreter in gathering the intention on those incidental points on which the legislature is necessarily presumed to have entertained one, but on which it has not expressed any."

The two questions summed up as above may be as well put in the following language:

(1) what is the meaning and intention of a particular word, sentence or passage?

(2) whether it constitutes an obligatory rule of any kind or a quasi-obligatory rule or a non-obligatory matter in cases where the intention and meaning is not sufficiently explicit on these points?

Mr. maxwell first of all treats of what is called the literal construction. he broaches this topic as follows:

The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences

are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart where the language admits of no other meaning: nor where it is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature. If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

you will find from the above:

First-that the words and sentences of a statute must be construed in their natural and ordinary meaning, unless there be something to modify, to alter or qualify that meaning.

Secondly. that the natural and ordinary meaning is the popular meaning, unless the word or phrase has acquired a technical meaning well understood by those conversant with the subject.

Thirdly. that phrases and sentences which require to be combined according to rules of grammar.

Fourthly. that when adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal construction, for concluding that the ordinary and natural meaning does not give the real intention of the legislature, that meaning may be departed from.

NOW THESE FOUR PRINCIPLES HAVE THEIR COUNTERPARTS IN MIMANSA SHASTRA

These four general rules have their counterparts in our ancient Sanskrit works on interpretation in what are called the Principle of the Sruti, that of Linga, that of Vakya and that of Prakarana.

1. **Shruti Principle** (Literal Rule): The literal meaning of a text is preferred unless it leads to absurdity. This principle is similar to the modern literal rule of interpretation. For example, in the Vedic verse "Aindra garhapatyam upatishthate" (one should worship Garhapatya with the Indra verse), the literal interpretation is that one should worship Garhapatya (the household fire) with a verse addressed to Indra.
2. **Linga Principle** (Suggestive Power): Words or expressions can have suggestive meanings beyond their literal sense. This principle allows for contextual interpretation. For example, in the case of U.P. Bhoodan Yagna Samiti v. Brij Kishore, the term "landless persons" was interpreted to mean "landless peasants" rather than landless businessmen.
3. **Vakya Principle** (Syntactical Arrangement): The meaning of a sentence is derived from its syntactical structure. This principle emphasizes the importance of sentence construction in interpretation. It is illustrated by the Aruni Nyaya, which deals with the arrangement of words in a sentence.
4. **Prakarana Principle** (Contextual Interpretation): The meaning of a text can be clarified by referring to other related texts. This principle allows for a broader contextual understanding. For example, in the case of Mahabir Prasad Dwivedi v. State of U.P., the Anushanga Principle was

used to extend the requirement of a hearing from one proviso to another in a statute. (Mimansa Principles of Interpretation – Prof. K.L. Sarkar, Page-35).

THERE ARE CERTAIN SPECIFIC KEY MIMAMSA PRINCIPLES A FEW OF THEM ARE EXPLAINED HERE AS FOLLOWED BY APEX COURT AS WELL AS HIGH COURT.

The Mimansa system is based on several **axioms (self-evident principles)** that guide interpretation. These axioms are fundamental to understanding the Mimansa approach:

1. **Sarthakya Axiom**: Every word and sentence must have meaning and purpose. This axiom emphasizes that no part of a text is superfluous. It is based on the belief that every word in the Vedas has a purpose and must be interpreted accordingly.
2. **Laghava Axiom (Gauravah Doshah)**: Simpler interpretations are preferred over complex ones. This principle discourages unnecessary complexity in interpretation. It is based on the idea that the simplest explanation is usually the correct one.
3. **Arthaikatva Axiom**: A word or sentence should not be given a double meaning. This axiom prevents ambiguity by ensuring that a single, clear meaning is assigned to each word or sentence.
4. **Gunapradhana Axiom**: Subordinate ideas must align with the principal idea. If a subordinate idea clashes with the principal idea, it must be adjusted or disregarded. This principle is often illustrated by the maxim "the bigger fish eats the smaller fish" (matsya nyaya).
5. **Samanjasya Axiom**: Contradictions should be reconciled where possible. This principle encourages harmonious construction of texts. It is used to resolve conflicts between different texts or interpretations.
6. **Vikalpa Axiom**: In cases of irreconcilable contradictions, one may choose the more reasonable option. This principle is applied only when all other means of reconciliation fail.

1. ADHYAHARA AVAM ANUSANGH PRINCIPLE
अध्याहार एवं अनुसंग

In Mimansa, casus omissus is known as adhyahara. The adhyahara principle permits us to add words to a legal text. However, the superiority of the Mimansa Principles over Maxwell's Principles in this respect is shown by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus. In the Mimansa system, on the other hand, the general category of adhyahara has under it several sub-categories, e.g.. anusanga, anukarsha, etc. Since in this case we are concerned with the anusanga principle, I may explain it in some detail.

*The anusanga principle (or **elliptical extension**) states that an expression occurring in one clause is often meant also for a neighboring 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 a case of Tadutkarsha. Jaimini I deprecates Tadapakarsha (Le. transference backwards) and permits it only in exceptional cases. However, there is no deprecation of Tadutakarsha.

The principle of Mimansa was used by Jimutvahana in Dayabhaga. Jimutvaharia found that there is a text of Manu which states:

> *"Of a woman married according to the Brahma, Daiva, Arsha, Gandharva and Prajapatya form, the property shall go to her husband if she dies without issue. But her property, given to her on her marriage in the form called Asura, Rakshasa and Paisacha, on her death without issue shall become the property of her parents."*

It can be seen that in the second sentence the word 'property' is qualified by the words 'given to her on her marriage, whereas in the first sentence there is no such qualification. Jimutvahana, using the anusanga principle of Mimansa, said that the words "given to her on her marriage should also be inserted in the first sentence after the word property, and hence there also the word 'property must be interpreted In a qualified sense.

In the Mitakshara also the anusanga principle of Mimansa has been used. Yajnavalkya II. 135-136 lays down the order of succession to the wealth of a person dying sonless. Yajnavalkya II. 137 deals with succession to property of a forest hermit, an ascetic, or a perpetual Vedic student. The Mitakshara then holds that Yajnavalkya II. 138 samaristinastu samaristi is to be construed as an exception to Yajnavalkya II. 135, 136 and understands that the words 'of one dying without having a son' (grand son or great grand son) are to be supplied before Yajnavalkya II. 138 from II. 136, Le., there is to be anusanga of the word 'svaryatesya-putrasya'. In the matter of Mahaveer Prasad Dwivedi (AIR 1992 All. 351), High Court strongly observed.

> ***In Mimansa, casus omissus is known as adhyahara****. The adhyahara principle permits us to add words to a legal text. However, the superiority of the Mimansa Principles over Maxwell's Principles in this respect is shown by the fact that Maxwell does not go into further detail and does not mention the sub-categories coming under the general category of casus omissus. In the Mimansa system, on the other hand, the general category of adhyahara has under it several sub-categories, e.g., anusanga, anukarsha, vakyashesha, etc. Since in this case we are concerned with the anusanga principle, we may explain it in some detail.*
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> *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- categorization. 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 a case of Tadutkarsha.*
>
> *The Anusanga principle of Mimansa was used by Jimutvahana in the Dayabhaga. Jimutvahana found that there is a text of Manu which states:*

"Of a woman married according to the Brahma, Daiva, Arsha, Gandharva and Prajapartya form, the property shall go to her husband if she dies without issue. But her property, given to her on her marriage in the form called Asura, Rakshasa and Paisacha, on her death without issue shall become the property of her parents."

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In our opinion, in the present case, the Anusanga principle of Mimansa should be utilized and the expression `relevant subject' should also be inserted in the qualification for the post of Reader after the words "at the Master's degree level". Hence, we cannot accept the submission of Mr. Patwalia in this respect. However, we agree with Mr.Patwalia that since academic experts have regarded Political Science and Public Administration to be one discipline, it is not right for this Court to sit in appeal over the opinion of the experts.

Rajbir Singh Dalal (Dr.) V. Chaudhari Devi Lal University, Sirsa and Another {(2008) 9 SCC 284}, Para-21, 22, 23, 24 and 25.

2. GUNAPRADHAN AXIOM

In Sutra 3:3:9 Jaimini states:

गुणमुख्यव्यतिक्रमे तदर्थत्वान्मुख्येन वेदसंयोगः

"It may be mentioned that the Mimansa Rules of Interpretation were Your traditional principles principles of interpretation laid down by Jaimini whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These Mimansa Principles were regularly used by our great jurists like Vijnaneshwara (Author of Mitakshara), Jimutvahana (author of Dayabhaga). Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity or incongruity therein. There is no reason why we cannot use these principles on appropriate occasions. However, it is a matter of deep regret that these principles have rarely been used in our law Courts. It is nowhere mentioned in our Constitution or any other law that only Maxwell's Principles of Interpretation can be used by the Court. We can use any system of interpretation which

helps us (to) solve a difficulty. In certain situations Maxwell's principles would be more appropriate, while in other situations the Mimansa principles may be more suitable. One of the Mimansa principles is the Gunapradhan Axiom, and since we are utilizing it in this Jud Judgment we may describe it in some detail Guna means subordinate or accessory, while 'Pradhan' means principal. The Gunapradhan Axiom states:

"If 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."

See p. 82-83 of this book. This principle is also expressed by the popular maxim known as matsya nyaya, ie, 'the bigger fish eats the smaller fish'.

According to Jaimini, acts are of two kind, principal and subordinate (see Jaimini, 2:1:6)

Kumarila Bhatta, in his Tantravartika (See Ganganath Jha's English Translation Vol. 3, p. 1141) explains this Sutra as follows:

"When the Primary and the Accessory belong to two different Vedas, the Vedic characteristic of the Accessory is determined by the Primary, as the Accessory is subservient to the purpose of the primary."

It is necessary to explain this Sutra in some detail. The peculiar quality of the Rigveda and Samaveda is that the mantras belonging to them are read aloud, whereas the mantras in the Yajurveda are read in a low voice. Now the difficulty arose about certain ceremonies, e.g.. Agnyadhana, which belong to the Yajurveda but in which verses of the Samveda are to be recited. Are these Samaveda verses to be recited in a low voice or loud voice? The answer, as given in the above Sutra, is that they are to be recited in low voice, for although they are Samavedi verses, yet since they are being recited in a Yajurveda ceremony their attribute must be altered to make it in accordance with the Yajurveda.

In the Sabhar Bhashya Translated into English by Dr. Ganga Nath Jha, and published in the Gaekwad Oriental Series, the Sutra is read as follows:

"Where there is a conflict between the use and the substance greater regard should be paid to the use."

Commenting on Jaimini 3:3: 9 Kumarila Bhatta says:

"The Siddhanta laid down by this Sutra is that in a case where there is one qualification pertaining to the Accessory by itself and another pertaining to it through the Primary, the former qualification is always to be taken as set aside by the latter. This is because the proper fulfilment of the Primary is the business of the Accessory also as the latter operates solely for the sake of the former. Consequently if, in consideration of its own qualification it were to deprive the Primary of its natural accomplishment then there would be a disruption of that action (the Primary) for the sake of which it was meant to operate. Though in such a case the proper fulfilment of the Primary with all its accompaniments would mean the deprival of the Accessory of its own natural accompaniment, yet, as the fact of the Accessory being equipped with all its accompaniments is not so very necessary (as that of the primary), there would be nothing Incongruous in the said deprival". See Ganganath Jha's English translation of the Tantravartika, Vol. 3 p. 1141.

The Gunapradhan Axiom can also be deduced from Jaimini 6:3:9 which states:

"When there is a conflict between the purpose and the material, the purpose is to prevail, because in the absence of the prescribed material a substitute can be used, for the material is subordinate to the purpose."

To give an example, the prescribed Yupa (sacrificial post for tying the sacrificial animal) must be made of Khadir Wood. However, Khadir wood Is weak while the animal tied may be restive. Hence, the Yupa can be made of Kadar Wood which is strong. Now this substitution is being made despite the fact that the prescribed wood is Khadir, but this prescription is only subordinate or Accessory to the performance of the ceremony. which is the main object. Hence if it comes in the way of the ceremony being performed, it can be modified or substituted.

The Gunapradhan axiom is fully applicable to the interpretation of Section 4A. Since the main aim of Section 4A of the U.P. Sales Tax Act is to encourage setting up of new industries we must interpret all the conditions and clauses in the said provision to make them in accordance with this main object. It may be that in isolation some clause or condition in Section 4A may have another meaning, but when they are read as part of Section 4A they must be given a meaning which subserves the object of Section 4A. The object of Section 4A is the Primary, whereas the conditions mentioned in Section 4A are the Accessories.

The conditions mentioned in the Explanation to Section 4A (registration, etc.) are merely intended to ensure that there is a genuine new unit for which the exemption is claimed, and not a farzi one. These conditions must therefore not be construed strictly or literally, but in a manner which subserves the object of Section 4A. In this connection reference may be made to Bajaj Tempo Ltd. v. C.IT., AIR 1992 SC 1622, where it was held that a provision for encouraging new industries should be construed liberally.

In this connection we may also refer to the Wooden Sword Maxim (Sphadi Nyaya), which is a well-known Maxim in the Mimansa system. This Maxim states "what is prescribed as a means to an action, is to be taken in a sense suited to the performance of the action" (Vide Jatmini 3: 1: 2. quoted in this book at p. 185). The word 'Spha' in Sanskrit means a sword, which is normally a metallic object. However, 'Spha' in connection with a Yagya has to be interpreted as a wooden sword, which is a pushing instrument (as a Yagya requires no cutting instrument, but only a pushing instrument).

Jaimini 3:1:3 states:

That is: "The Accessory (Shesha) is that which serves the purpose of another."

In Section 4A the conditions mentioned in the Explanation are the Accessories, while the object of encouraging setting up of new industries is the Primary. The Accessory must, therefore, serve the Primary. (In the case of Amit Plastic Industries).

3. PURPOSIVE LING LAKSHANA AVAM VAKYA PRINCIPLES

We may also consider the matter from the point of view of our traditional principles of interpretation. The great Sanskrit grammarian Nagesh Bhatt in his book 'Param Laghu Manjusha' has said that a word or phrase can have three meanings:

*"**(i)** Abhidha i.e. literal meaning;*

***(ii)** Lakshana i.e. the indicative or suggestive meaning; (iii) Vyanjana i.e. the figurative meaning.*

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 'गंगायाम् घोष': 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 'गतो अस्तमक' 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).

In our opinion, in the present case, we have to adopt the Lakshana (or Linga) rule of interpretation rather than the Shruti or Abidha (the literal) rule. In other words, Rule 443 of the Indian Telegraph Rule has to be interpreted in a purposive sense. Hence the telephone line in the name of the person who is really paying the bills in connection with the telephone line in the name of another person who is economically dependent on the former can be disconnected for non-payment of bills in connection with the telephone line in the name of the latter. Such an interpretation would effectuate the intention of Rule 443, which is that telephone bills should be paid promptly."

Jaimini in Sutra 6: 3: 9 states: "When there is a conflict between the purpose and the material, the purpose is to prevail, because in the absence of the prescribed material a substitute can be used, for the material is subordinate to the purpose".

To explain this it may be mentioned that the Brahmanas state that the prescribed Yupa (sacsrificial post for tying the sacrificial animal) must be made of Khadir Wood. However, Khadir wood is weak while the animal tied may be restive. Hence, the Mimansa principle (stated above) permits that the Yupa can be made of Khadar wood which is strong. Now this substitution is being made despite the fact that the prescribed wood is Khadir, but this prescription is only subordinate or accessory to the performance of the yagya, which is the main object. Hence, if it comes in the way of the yagya being performed, it can be modified or substituted.

In this connection we may also refer to the Wooden Sword Maxim (Sphadi Nyaya), which is a well-known Maxim in the Mimansa system. This Maxim states "what is prescribed as a means to an action, is to be taken in a sense suited to the performance of the action" (vide Jaimini 3:1:2, quoted in the book 'Mimansa Rules of Interpretation' by K.L. Sarkar at p. 185). The word ' Spha' in Sanskrit means a sword, which is normally a metallic object for cutting. However, 'Spha' in connection with a Yagya has to be interpreted as a wooden sword, because in a Yagya a small wooden sword called 'Spha' is used which is a pushing instrument (as a Yagya requires no cutting instrument, but only a pushing instrument). Thus, 'Sphadi Nyaya' implies that we have to see the object of the text to correctly interpret it.

In the Mimansa system, the literal rule of interpretation is called the Shruti (or Abhida) principle, and ordinarily it is this principle which is to be applied when interpreting a text. However, there are exceptional situations when we have to depart from the literal rule and then certain other principles have to be resorted to e.g. (1) the Linga (also called Lakshana) principle or the suggestive power of words or expressions, (2) the Vakya principle or syntactical arrngement, (3) the Prakarana principle, which permits construction by referring to other texts in order to make the meaning clear, (4) the Sthana (position) principle which means the relative position of one text with reference to another, (5) the Samakhya (name) principle which means the connection between different passages by the indication accorded by the derivative words of a compound name.

In the present case we are of the opinion that the Linga (Lakshana) principle will apply.

Linga really means interpretation by understanding the context, and it is a departure from the literal rule of interpretation. The Linga principle can be illustrated by the decision of this Court in U.P. Bhoodan Yagna Samiti vs. Brij Kishore AIR 1988 SC 2239 where the words `landless person' were held to mean 'landless peasant' and not landless businessmen. Here we see that the Court has departed from the literal rule of interpretation, because by the literal rule even a very rich businessman who owns no land will be regarded as a landless person. Since the object of the U.P. Bhoodan Act was to give some land to the landless peasants, the expression 'landless person' was interpreted to mean 'landless peasant' only. This interpretation was necessary otherwise the entire object of the U.P. Bhoodan Act would be frustrated and land donated for distribution to landless peasants could be grabbed by rich businessmen on the ground that they owned no land, although they may have huge amount of wealth in the form of shares in their companies, securities, crores of rupees in banks etc..

We may also like to point out that there is a difference between Linga (Lakshana) principle and the Vakya principle. In the former no violence is done to the wording of the text, but the words or expressions are construed differently from the literal sense, and hence Linga is really construction by context. In Vakya, however, some violence is done to the text, e.g. by connecting two separate sentences, or by adding words or expressions, or by transferring words or expressions up or down a sentence. This violence may sometimes become necessary to save the text from becoming meaningless or absurd, just as the surgeon may have to do violence to the body (by operation) to save the patient's life. For this purpose the Uha principle is utilized (The Uha principle or use of reason, is generally applied for construction of texts).

In this connection it may be mentioned that Maxwell also permits doing violence to the statute in exceptional situations. He says

"Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what the words signify, and that the modifications thus made are mere corrections of careless language and really give the true intention".

*Thus, in S.S. Kalra vs. Union of India 1991(2) SCC 87 this Court observed that sometimes courts can supply words which have been accidentally omitted. (See also the rulings mentioned in G.P. Singh's book "Principles of Statutory Interpretation" 9th Edition, 2004 pages 70 to 77). (*Surjit Singh Vs. Mahanagar Telephone Nigam Limited {(2009) 16 SCC 722, Para-25 to 40).

4. PRANABHRIT AUR AGYANORETA

The principle of Linga is illustrated by Jaimini in numerous Sutras and Adhikarnas. Thus the Pranabhrit Adhikarana which is based on Jaimini's Sutra 28, Chapter IV, Book 1 shows how words acquired a wider meaning by the Linga or Lakshana process.

In the Taittiriya Samhita (5.3.1.2) there is a passage :
"He disposes the Pranabhrit – प्राणभृत उपदद्याति"
Again in the same Samhita (5.7.2.5) there is a similar passage :
"He disposes the Ajyani - आज्यानोरेता उपदद्याति"

Now what is the meaning of Pranabhrit in the one case and of Ajyani in the other? The words Pranabhrit and Ajyani are respectively the names of two Mantras or verses which begin with those words. These verses are used in consecrating bricks required for a certain purpose in a yagya. From this fact the bricks consecrated by the Pranabhrit Mantra acquired the name of Pranabhrit. Similarly the bricks consecrated by the Ajyani Mantra acquired the name of Ajyani. But in course of time the whole heap of bricks of a particular kind came to be called Pranabhrit, because one or two bricks of that heap were consecrated as Pranabhrit bricks. Thus the instance of Pranabhrit becomes a maxim for extending the scope of a name in the above manner. In fact, the meaning of the words Pranabhrit and Ajyani in these cases is determined by the peculiar association of the words and by the context of the passages in which they are used. Such a use is called Lingasamabaya (embodiment of the Linga).

Nanda Pandit, in his work 'Dattaka Mimansa', refers to the Pranabhrit maxim to show that although the word `substitute' was at first applied in express term only to six descriptions of sons, later the word by general use became applicable to all the twelve descriptions. The Pranabhrit maxim (प्राणभृत न्याय) states.

"The peculiar feature of one leading object belonging to a class may give name to the whole class."

Pranabhrit literally means filling with life or inspiring life; but the expression forms the commencement of a Mantra which is used in consecrating certain bricks. Hence the word has come to mean a kind of bricks (प्राणभृदादिषब्दानाँ स्तुत्यर्थत्वमद्विकरणम). This is the way in which the word Ajyani also has come to mean another class of bricks.

The Pranabhrit maxim applies in the present case also because we have to fill life (i.e. given an appropriate interpretation) to the word `subscriber' in Rule 443 of the Indian Telegraph Rules.

The Pranabhrit maxim is often used in the interpretation of a text by treating it as illustrative and not exhaustive. The illustrative rule of interpretation is a departure from the literal rule which normally has to be adopted while construing a text. However, sometimes departures from the literal rule are permissible, and one of such departures is the illustrative rule. To give an example, in Sanskrit there is an oft-quoted statement "Kakebhyo Dadhi Rakshitam" which means "protect the curd from the crows". Now in this sentence the word 'crow' is merely illustrative and not exhaustive. The statement does not mean that one should protect the curd only from crows but allow it to be eaten up by cats, dogs or to get damaged by dirt or filth etc. It really means that one should protect the curd from all dangers. Hence the word 'crow' in the above statement is only illustrative and not exhaustive.

We can take another example. In the U.S. Constitution, Article 1 Section 8 states that Congress (the American Parliament) can raise Armies and Navies. There is no mention of an Air Force there, obviously because there were no aircraft in 1791 when the U.S. Constitution was promulgated. The first aircraft was invented by the Wright brothers in 1903. However, today's reality is that a modern Army cannot fight without air cover. Amendment to the U.S. Constitution is a very ardous and lengthy procedure because it requires two-third majority of both Houses of Congress and ratification by three-fourth of the States. By the time this is done, the enemy may invade and occupy the country. Hence the words `Armies and Navies' have to be interpreted as illustrative and not exhaustive, and they really mean all armed forces necessary for the security of the country (which would include an Air Force, also). Thus Article 1 Section 8 of the U.S. Constitution has to be interpreted not by applying the Shruti rule (literal

rule), but by applying the Linga rule. The words 'Armies and Navies' in Article 1 Section 8 are to be construed not literally but as suggestive. In other words, they are only illustrative, and they really mean all Armed Forces necessary for the security of the country.

We may also refer to Maxwell's 'Interpretation of Statutes' where it is stated:

"But it is another elementary rule, that a thing which is within the letter of a statute is not within the statute unless it be also within the real intention of the Legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony within that intention. Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to "lay hands" on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person to save his life, would have been liable to punishment. On a literal construction of his promise, Mohammed II.'s sawing the Venetian Governor's body in two, was no breach of his engagement to spare his head; nor Tamerlane's burying alive a garrison, a violation of his pledge to shed no blood."

Maxwell also states:

"The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used and the object to be attained." (emphasis supplied)

Thus, in both systems of interpretation, the Mimansa system as well as Maxwell's system, it is emphasized that the intention of a statute has often to be seen to properly interpret it, and it is not that the Court can never depart from the literal rule of interpretation. It all depends on the context, the subject-matter, the purpose for which the provision was made, etc." (Surjit Singh Vs. Mahanagar Telephone Nigam Limited {(2009) 16 SCC 722}, Para-41 to 51).

5. NASHTASHVADAGHDA NYAYA

In the next judgment of **Gujrat Urja Vikas Nigam vs S.R. Power Limited {2008 (IV) SCC 755/AIR 2008 SC 1921}**, Supreme Court resolved the controversy and inconsistency between Section-175 and Section-174 of Electricity Act and applicability of Arbitration and Conciliation Act 1996 especially Section-11.

This is the judgement which fully explained and elaborates the Mimansa principles and its applicability. The relevant portion of the judgement with regards to Mimansa is as follows:-

At first glance there is an apparent inconsistency between Section 175 and Section 174 of the Electricity Act, 2003. While Section 174 says that the said Act will prevail over other laws, Section 175 says that the said Act is in addition and not in derogation of any other law (which would include Section 11 of the Arbitration and Conciliation Act, 1996.) **Gujrat Urja Vikas Nigam vs S.R. Power Limited {2008 (IV) SCC 755/AIR 2008 SC 1921}, Para-35.**

In our opinion to resolve this conflict the Mimansa principles of Interpretation would of great utility. **(Supra Para-36)**

The Mimansa principles of interpretation were created for resolving the practical difficulties in performing the yagyas. The rules for performing the various yagyas were given in books called the Brahmanas (all in Sanskrit) e.g. Shatapath Brahmana, Aitareya Brahmana, Taitareya Brahmana, etc. There were many ambiguities, obscurities, conflicts etc. in the Brahmana texts, and hence the Mimansa Principles of Interpretation were created for resolving these difficulties. **(Supra Para-39)**

Although the Mimansa principles were created for religious purpose, they were so rational and logical that they subsequently began to be used in law, grammar, logic, philosophy, etc. i.e. they became of universal application. The books on Mimansa are all in Sanskrit, but there is a good book in English by Prof. Kishori Lal Sarkar called `The Mimansa Rules of Interpretation' published in the Tagore Law Lecture Series, which may be seen by anyone who wishes to go deeper into the subject. **(Supra Para-40)**

In the Mimansa system there are three ways of dealing with conflicts which have been fully discussed by Shabar Swami in his commentary on Sutra 14, Chapter III, Book III of Jaimini. (1) Where two texts which are apparently conflicting are capable of being reconciled, then by the Principle of Harmonious Construction (which is called the Samanjasya Principle in Mimansa) they should be reconciled. The Samanjasya Principle has been laid down by Jaimini in Chapter II, Sutra 9 which states:

"The inconsistencies asserted are not actually found. The conflicts consist in difference of application. The real intention is not affected by application. Therefore, there is consistency." **(Supra Para-41)**

The Samanjasya axiom is illustrated in the Dayabhag. Jimutvahana found that there were two apparently conflicting texts of Manu and Yajnavalkya. The first stated "a son born after a division shall alone take the paternal wealth". The second text stated "sons, with whom the father has made a partition, should give a share to the son born after the distribution". Jimutvahana, utilizing the Samanjasya principle of Mimansa, reconciled these two texts by holding that the former applies to the case of property which is the self-acquired property of the father, and the latter applies to the property descended from the grand-father. **(Supra Para-42)**

One of the illustrations of the Samanjasya principle is the maxim of lost horses and burnt chariot (Nashtashvadaghda Ratha Nyaya). This is based on the story of two men traveling in their respective chariots and one of them losing his horses and the other having his chariot burnt through the outbreak of fire in the village in which they were putting up for the night. The horses that were left were harnessed to the remaining chariot and the two men pursued their journey together. Its teaching is union for mutual advantage, which has been quoted in the 16th Vartika to Panini, and is explained by Patanjali. It is referred to in Kumarila Bhatta's Tantra Vartika.

The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation the Vikalpa principle applies, which says that whichever law is more in consonance with reason and justice should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is only when all efforts of reconciliation fail that the Vikalpa principle is to be resorted to.

(2) *There is a third situation of a conflict and this is where there are two conflicting irreconcilable texts but one overrides the other because of its greater force. This is called a Badha in the Mimansa system (similar to the doctrine of ultra vires). The great Mimansa scholar Sree Bhatta Sankara in his book `Mimansa Valaprakasha' has given several illustrations of Badha as follows:*

"A Shruti of a doubtful character is barred by a Shruti which is free from doubt. A Linga which is more cogent bars that which is less cogent. Similarly a Shruti bars a Smriti. A Shruti bars Achara (custom) also. An absolute Smriti without reference to any popular reason bars one that is based upon a popular reason. An approved Achara bars an unapproved Achara. An unobjectionable Achara bars an objectionable Achara. A Smriti of the character of a Vidhi bars one of the character of an Arthavada. A Smriti of a doubtful character is barred by one free from doubts. That which serves a purpose immediately bars that which is of a remote service. That which is multifarious in meaning is barred by that which has a single meaning. The application of a general text is barred by a special text. A rule of procedure is barred by a mandatory rule. A manifest sense bars a sense by context. A primary sense bars a secondary sense. That which has a single indication is preferable to what has many indications. An indication of an inherent nature bars one which is not so. That which indicates an action is to be preferred to what merely indicates a capacity. If you can fill up an ellipse by an expression which occurs in a passage, you cannot go beyond it." (emphasis supplied) 44. The principle of Badha is discussed by Jaimini in the tenth chapter of his work. Badha primarily means barring a thing owing to inconsistency. Jaimini uses the principle of Badha mainly with reference to cases where Angas or sub-ceremonies are to be introduced from the Prakriti Yagya (i.e. a yagya whose rules for performance are given in detail in the Brahmanas) into a Vikriti (i.e. a yagya whose rules of performance are not mentioned anywhere, or are incompletely mentioned). In such a case, though the Angas or the sub-ceremonies are to be borrowed from the Prakriti Yagya, those of the sub-ceremonies which prove themselves to be inconsistent with or out of place in the Vikriti Yagya, are to be omitted. **(Supra Para-43)**

For example, in the Rajsuya Yagya, certain homas are prescribed, for the proper performance of which one must borrow details from the Darshapaurnamasi Yagya. In the Rajsuya Yagya, plain ground is directed to be selected as the Vedi for the homas, while in the case of the Darshapaurnamasi, the Vedi should be erected by digging the ground with spade etc. Such an act would be out of place in constructing the Vedi for the homas in the Rajsuya Yagya. Here, there is a Badha (bar) of the particular rule regarding the erection of the Vedi in the Darshapaurnamasi Yagya, being extended to the Rajsuya Yagya. This is the case of Badha by reason of express text. **(Supra Para-45)**

6. PRATISHEDHA AND PARYUDASA

To give an example the Mimansakas examine the subject of negative Vidhis (negative injunctions such as the one in the proviso to Section 6) very searchingly and exhaustively. First of all, they distinguish between what may be called prohibitions against the whole world, and those against particular persons only. This distinction resembles that between judgments or rights in rem and judgments or rights in personam. The former prohibitions are called Pratishedha and the latter Paryudasa. For example, the prohibitory clause `Do not eat fermented (stale) food (na kalanjam bhakshayet) is a Pratishedha; while the prohibition `those who have taken the Prajapati vow must not see the rising sun' is a Paryudasa. **{(2009) 9 SCC 92} (Vijay Narayan Thatte and Others Vs. State of Maharashtra and Others, Para-11).**

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. **(Supra Para-12)**

Then Paryudasa is also of two kinds. In one case, it relates to a person performing some special act which is not enjoined by a Vidhi, as in the case of the Prajapati vow. In the other, it relates to a person engaged in performing a Vidhi; as for instance, when one is to do Shradh during the full moon by virtue of a Vidhi but not in the night of the full moon. In this case, the prohibition of doing Shradh in the night is a Paryudasa, which is the same as an exception or proviso as we understand these terms. For, the clause `not in the night' is an exception to the rule `Perform the Shradh during the full moon'. **(Supra Para-13)**

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. **(Supra Para-14)**

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. **(Supra Para-15)**

In the Mimansa system illustrations of many principles of interpretation are given in the form of maxims (nyayas). The negative injunction is illustrated by the Kalanja nyaya or Kalanja maxim. The Kalanja maxim (na kalanjam bhakshayet) states that `a general condemnatory text is to be understood not only as prohibiting an act, but also the tendency, including the intention and attempt to do it.' It is thus mandatory. **(Supra Para-16)**

A plain reading of the proviso to Section 6 of the Land Acquisition Act shows that it is a general prohibition against the whole world and not against a particular person. Hence the Kalanja maxim of the Mimansa system will in our opinion apply to the proviso to Section 6. **(Supra Para-17)**

Laughakshi Bhaskara, one of the great Mimansa writers, taking the prohibitory text 'one is not to eat Kalanja or fermented/stale food' (na kalanjam bhakshayet), explains the idiomatic force of the phrase (na bhakshayet). He explains that the suffix 'yat' means 'shall', and that the negative particle 'not' is to be taken as attached to the suffix 'yat' (shall), and not to the idea of Kalanja eating. For if it be taken as attached to the latter idea, then the sentence might mean 'you shall eat but not Kalanja'. In this case strictly there would be no prohibition. So he labours to demonstrate that the gist of the sentence is 'shall not' and therefore the object of it is to turn off from eating Kalanja (fermented/stale food). This may appear to be making a hair-splitting distinction, but it is of great importance from the Mimansa point of view because it indicates the mandatory nature of the negative injunction (nishedha). **(Supra Para-18)**

The explanation of a Nishedha Vidhi appears more clearly from Jaimini's Sutras on the Kalanja maxim. The objector says :

In a case of prohibition, mentally you entertain the idea of the action prohibited; for you have to discriminate between the prohibited act and the negation of that act.

The objector means to say 'what is the good of a prohibition when it invites the imagination to gloat on the action prohibited'. The author answers :

'When an act is enjoined by the Shastra, it is for the purpose of the good of a person; if the good object be divorced from the meaning of the Shastra, then it becomes a case of transgressing it.'

The meaning of this is:

'In a case of prohibition you must take it that not only is the particular external act prohibited, but the very intention of it is also prohibited.' **(Supra Para-19)**

Roughly speaking, the principle laid down is this :

'In a case of prohibition one should abstain from the very idea of the act prohibited, and there ought to be no evasion of the Vidhi in any way.' Thus, this class of Nishedha Vidhis is to be interpreted most comprehensively and as mandatory. **(Supra Para-20)**

In view of the above discussion, it is evident that the proviso to Section 6 of the Land Acquisition Act is totally mandatory and bears no exceptions. In fact, a Constitution bench decision of this Court in Padma Sundara Rao (Dead) and Others Vs. State of T.N. And Others (2002) 3 SCC 533 is clearly in support of the submission of the learned counsel for the appellants that the proviso to Section 6 is mandatory, and hence the Notification under Section 6 dated 30.10.2006 is time barred. **(Supra Para-21)**

It may be mentioned that the Mimansa Rules of Interpretation were our traditional principles of interpretation used for over two and a half thousand years, laid down by Jaimini whose Sutras were explained by Shabar, Kumarila Bhatta, Prabhakar, etc. These Mimansa Principles were regularly used by our great jurists like Vijnaneshwara (Author of Mitakshara), Jimutvahana (author of Dayabhaga), Nanda Pandit, etc. whenever they found any conflict between the various Smritis or any ambiguity or incongruity therein. There is no reason why we cannot use these principles on appropriate occasions. However, it is a matter of deep regret that these principles have rarely been used in our law Courts. It is nowhere mentioned in our Constitution or any other law that only Maxwell's Principles of Interpretation can be used by the Court. We can use any system of interpretation which helps us solve a difficulty. In certain situations Maxwell's principles would be more appropriate, while in other situations the Mimansa principles may be more suitable.

CASES AND MATERIAL
ON
MIMANSA INTERPRETATION JURISDICTION

1. (1993) II SCC (Jour.) 16
2. (1994) II SCC (Jour.) 1

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3. AIR 1992 All 351 – Mahavir Prasad Dwivedi
4. AIR 1995 All 231 – Miracle Sugar Factory
5. 1995 LIC 1217 - Sardar Mohd. Ansar Khan
6. 1998 II All CJ – US Singh
7. MANU/UP/1290/1993 - Amit Plastics
8. MANU/UP/0620/1992 - Tribuwan Mishra

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9. AIR 1962 SC 351, Para-3 & 4 – Abhiraj Keor
10. AIR 1981 SC 178, Para-109 - Shyam SP Singh
11. 2006 Vol. XII SCC 205 – Craft
12. 2006 judgement today XII SC – Ispat Industries
13. 2007 Vol. XIII SCC 246 – U.P. State Agro
14. 2008 Vol. IV SCC 755 – Gujrat Urja Limited
15. 2009 Vol. XVI SCC 722 – Surjit Singh
16. 2009 Vol. IX SCC 92 – Vijay Narayan Thatte
17. 2008 Vol. IX SCC 284 – Rajvir Dalal
18. 2011 Vol. IV SCC 266, Para- 34 to 39 – B Premanand

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19. 2019 Vol. III AWC 2206 – Akhilesh Kumar
    Dated 23.04.2019, MANU/UP/1570/2019
20. Child in Conflict Vs. State of Karnataka
    Dated 07.05.2024, Para - 9.25
    Refers Rajvir Dalal

Please try to find out more/ There can be 100 of others.

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मीमांसा का लक्षण सिद्धान्त (लिंग)

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प्रस्तावना

मीमांसा प्रणाली में, व्याख्या का शाब्दिक नियम श्रुति (या अभिदा) सिद्धांत कहलाता है, और सामान्यतः यही सिद्धांत लागू होता है जब किसी पाठ की व्याख्या की जाती है। हालांकि, कुछ अपवाद स्थितियाँ ऐसी होती हैं जब हमें शाब्दिक नियम से हटकर अन्य सिद्धांतों का सहारा लेना पड़ता है, जैसे कि (1) लिंग (लक्षण) सिद्धांत, जो शब्दों या अभिव्यक्तियों के सुझावात्मक शक्ति से संबंधित है, (2) वाक्य सिद्धांत, जो वाक्य रचना से संबंधित है, (3) प्रकरण सिद्धांत, जो अर्थ को स्पष्ट करने के लिए अन्य पाठों का संदर्भ लेने की अनुमति देता है, (4) स्थान सिद्धांत, जो एक पाठ का दूसरे पाठ के सापेक्ष स्थिति को दर्शाता है, और (5) समाख्या (नाम) सिद्धांत, जो संयुक्त नाम के व्युत्पन्न शब्दों द्वारा दिए गए संकेत के माध्यम से विभिन्न अंशों के बीच संबंध स्थापित करता है |

हम यह भी बताना चाहेंगे कि लिंग (लक्षण) सिद्धांत और वाक्य सिद्धांत में अंतर है। पूर्व में पाठ के शब्दों के साथ कोई अनर्थ नहीं किया जाता, लेकिन शब्दों या अभिव्यक्तियों को शाब्दिक अर्थ से अलग तरीके से समझा जाता है, और इसलिए लिंग वास्तव में संदर्भ के आधार पर व्याख्या है। वाक्य में, हालांकि, पाठ के साथ कुछ बदलाव किया जाता है, जैसे कि दो अलग वाक्यों को जोड़कर, या शब्दों या अभिव्यक्तियों को जोड़कर, या शब्दों या अभिव्यक्तियों को वाक्य में ऊपर या नीचे स्थानांतरित करके। यह बदलाव कभी-कभी पाठ को निरर्थक या बेतुका होने से बचाने के लिए आवश्यक हो जाती है, जैसे कि एक सर्जन को रोगी की जान बचाने के लिए शरीर के साथ शल्य क्रिया (ऑपरेशन) करता है। इस उद्देश्य के लिए उहा सिद्धांत का उपयोग किया जाता है (उहा सिद्धांत या तर्क का उपयोग, आमतौर पर पाठों की व्याख्या के लिए लागू किया जाता है)।

इस संबंध में यह उल्लेख किया जा सकता है कि मैक्सवेल भी असाधारण स्थितियों में क़ानून के साथ हिंसा करने की अनुमति देता है। वह कहता है, "जहां किसी क़ानून की भाषा, उसके सामान्य अर्थ और व्याकरणिक संरचना के कारण, अधिनियम के स्पष्ट उद्देश्य के साथ एक स्पष्ट विरोधाभास, या कुछ असुविधा या बेतुकापन, कठिनाई या अन्याय, जो संभवतः इरादतन नहीं है, उत्पन्न होता है, वहां उस पर एक ऐसी व्याख्या लागू की जा सकती है जो शब्दों के अर्थ को संशोधित करती है, और यहां तक कि वाक्य की संरचना को भी। यह व्याकरण के नियमों से हटकर, विशेष शब्दों को असामान्य अर्थ देकर, उनके क्रम को बदलकर, उन्हें पूरी तरह से अस्वीकार करके, या अन्य शब्दों को जोड़कर किया जा सकता है, निस्संदेह इस विश्वास के प्रभाव में कि विधायिका का इरादा संभवतः वह नहीं हो सकता जो शब्द दर्शाते हैं, और इस प्रकार किए गए संशोधन वास्तव में लापरवाह भाषा के सुधार हैं और सही इरादे

को दर्शाते हैं।" इस प्रकार, एस.एस. कालरा बनाम भारत संघ 1991(2) एससीसी 87 में इस न्यायालय ने कहा कि कभी-कभी न्यायालय उन शब्दों को जोड़ सकते हैं जो गलती से छूट गए हों।

<u>मीमांसा सिद्धांतों का उपयोग</u>:

- अदालत ने मीमांसा सिद्धांतों का भी उपयोग किया, जो प्राचीन भारतीय ग्रंथों और कानूनों की व्याख्या करने के लिए उपयोग किए जाने वाले पारंपरिक सिद्धांत हैं। ये सिद्धांत किसी नियम या कानून के पीछे के संदर्भ, उद्देश्य और इरादे को समझने पर जोर देते हैं, न कि केवल उसके शाब्दिक अर्थ पर निर्भर रहने पर।

- अदालत ने मीमांसा के "लक्षणा सिद्धांत" (अर्थात अप्रत्यक्ष अर्थ) का उल्लेख किया, जो किसी नियम की व्यापक व्याख्या की अनुमति देता है जब शाब्दिक अर्थ अनुचित या अव्यावहारिक परिणाम देता है। इस मामले में, अदालत ने इस सिद्धांत का उपयोग करके नियम 443 की व्याख्या की, जो इसके इच्छित उद्देश्य—टेलीफोन बिलों का समय पर भुगतान सुनिश्चित करना—के अनुरूप थी।

- अदालत ने "अर्थवाद सिद्धांत" का भी उल्लेख किया, जिसमें किसी नियम की व्याख्या उसके संदर्भ और उस परिस्थिति के आधार पर की जाती है जिसमें इसे बनाया गया था। अदालत ने कहा कि नियम 443 का प्राथमिक उद्देश्य यह सुनिश्चित करना है कि टेलीफोन बिल समय पर चुकाए जाएं, और अपीलकर्ता के कनेक्शनों को बंद करना इस उद्देश्य को पूरा करता है।

<u>SURJEET SINGH VS. MTNL (2009) 16 SCC 722, PARA-25 TO 33.</u>

> ***25.*** हम इस मामले को हमारे पारंपरिक व्याख्या सिद्धांतों के दृष्टिकोण से भी विचार कर सकते हैं। महान संस्कृत व्याकरणाचार्य नागेश भट्ट ने अपनी पुस्तक 'परम लघु मंजूषा' में कहा है कि एक शब्द या वाक्यांश के तीन अर्थ हो सकते हैं:
>
> "(i) अभिधा अर्थात शाब्दिक अर्थ; (ii) लक्षणा अर्थात संकेतात्मक या सुझावात्मक अर्थ; (iii) व्यंजना अर्थात अलंकारिक अर्थ।
>
> सामान्यतः शाब्दिक अर्थ का पालन किया जाता है, लेकिन कभी-कभी संकेतात्मक या अलंकारिक अर्थ अपनाए जाते हैं। संकेतात्मक अर्थ (लक्षणा) के संदर्भ में अक्सर उद्धृत किया जाने वाला उदाहरण है 'गङ्गायां घोषः' अर्थात "मैं गंगा पर रहता हूँ।" इस वाक्य का शाब्दिक अर्थ नहीं लिया जा सकता क्योंकि कोई भी गंगा नदी की सतह पर नहीं रह सकता। इसलिए इसका अर्थ यह लिया जाना चाहिए कि "मैं गंगा नदी के किनारे रहता हूँ।"
>
> तीसरे अर्थ व्यंजना के संदर्भ में अक्सर उद्धृत किया जाने वाला उदाहरण है 'गतोऽस्तमर्कः' जिसका अर्थ है:

"सूर्य अस्त हो गया है।" यहाँ वास्तविक अर्थ का सूर्य या उसके अस्त होने से कोई संबंध नहीं है, बल्कि इसका वास्तविक अर्थ है "दीपक जलाओ" या "चलो घर चलें" (क्योंकि सूर्य अस्त हो गया है)।

26. हमारे विचार में, वर्तमान मामले में हमें श्रुति या अभिधा (शाब्दिक) नियम के बजाय लक्षणा (या लिंग) नियम को अपनाना होगा। दूसरे शब्दों में, भारतीय टेलीग्राफ नियम 443 को उद्देश्यपूर्ण अर्थ में व्याख्यायित करना होगा। इसलिए, एक व्यक्ति के नाम पर टेलीफोन लाइन, जो वास्तव में दूसरे व्यक्ति के नाम पर टेलीफोन लाइन से संबंधित बिलों का भुगतान कर रहा है, जो आर्थिक रूप से पहले व्यक्ति पर निर्भर है, को बाद वाले के नाम पर टेलीफोन लाइन के बिलों के भुगतान न करने के कारण डिस्कनेक्ट किया जा सकता है। ऐसी व्याख्या नियम 443 के उद्देश्य को प्रभावी बनाएगी, जो यह है कि टेलीफोन बिलों का तुरंत भुगतान किया जाना चाहिए।

27. साथ ही, इससे कोई फर्क नहीं पड़ता कि टेलीफोन लाइन आवास पर है या व्यावसायिक परिसर में, भले ही दोनों पूरी तरह से अलग हों। इसलिए हमारे विचार में, अपीलकर्ता के नाम पर दोनों टेलीफोन लाइनें, एक उसके आवास पर और दूसरी उसके व्यावसायिक परिसर में, उसकी आश्रित पत्नी के नाम पर टेलीफोन लाइन के बकाया भुगतान न करने के कारण डिस्कनेक्ट की जा सकती हैं।

28. हम नियम 443 की व्याख्या करने में मीमांसा के नियमों का भी उपयोग कर सकते हैं।

29. यह गहरा खेदजनक है कि हमारे न्यायालयों में वकील मैक्सवेल और क्रेज़ का हवाला देते हैं, लेकिन कोई भी मीमांसा के व्याख्या सिद्धांतों का उल्लेख नहीं करता। आज हमारे तथाकथित शिक्षित लोग हमारे पूर्वजों की महान बौद्धिक उपलब्धियों और उनके द्वारा हमें सौंपी गई बौद्धिक संपदा से लगभग अनजान हैं। मीमांसा के व्याख्या सिद्धांत उस बौद्धिक संपदा का हिस्सा हैं, लेकिन यह देखकर दुख होता है कि इलाहाबाद उच्च न्यायालय के तत्कालीन मुख्य न्यायाधीश सर जॉन एज के निर्णय, बेनी प्रसाद बनाम हरदई देवी (1892) ILR 14 All 67 (FB) में इन सिद्धांतों के उल्लेख के अलावा, हमारे अपने देश में भी इन सिद्धांतों का लगभग कोई उपयोग नहीं किया गया है (हम में से एक, न्यायमूर्ति एम. काटजू के अलावा)।

30. यह उल्लेख किया जा सकता है कि मीमांसा के व्याख्या नियम हमारे पारंपरिक व्याख्या सिद्धांत थे, जिनका उपयोग ढाई हजार वर्षों से किया जा रहा है, जो जैमिनी द्वारा प्रतिपादित किए गए थे और जिनकी व्याख्या शाबर, कुमारिल भट्ट, प्रभाकर आदि ने की थी। इन मीमांसा सिद्धांतों का नियमित रूप से हमारे महान

न्यायविदों जैसे विज्ञानेश्वर (मिताक्षरा के लेखक), जीमूतवाहन (दायभाग के लेखक), नंद पंडित आदि द्वारा उपयोग किया जाता था, जब भी उन्हें विभिन्न स्मृतियों के बीच कोई संघर्ष या अस्पष्टता या असंगति मिलती थी। कोई कारण नहीं है कि हम उचित अवसरों पर इन सिद्धांतों का उपयोग नहीं कर सकते। हालांकि, यह गहरा खेद का विषय है कि इन सिद्धांतों का हमारे न्यायालयों में शायद ही कभी उपयोग किया गया है। हमारे संविधान या किसी अन्य कानून में कहीं भी यह उल्लेख नहीं है कि न्यायालय केवल मैक्सवेल के व्याख्या सिद्धांतों का ही उपयोग कर सकता है। हम किसी भी व्याख्या प्रणाली का उपयोग कर सकते हैं जो हमें किसी कठिनाई को हल करने में मदद करती है। कुछ स्थितियों में मैक्सवेल के सिद्धांत अधिक उपयुक्त होंगे, जबकि अन्य स्थितियों में मीमांसा के सिद्धांत अधिक उपयुक्त हो सकते हैं।

31. मीमांसा पर लगभग सभी पुस्तकें संस्कृत में हैं, लेकिन एक अच्छी पुस्तक है, 'मीमांसा रूल्स ऑफ इंटरप्रिटेशन' जो प्रोफेसर के.एल. सरकार द्वारा टैगोर लॉ लेक्चर सीरीज़ में प्रकाशित की गई है, जिसे देखा जा सकता है।

32. यह उल्लेख किया जा सकता है कि मीमांसा के व्याख्या नियम वैदिक यज्ञों को करने में आने वाली व्यावहारिक कठिनाइयों को हल करने के लिए बनाए गए थे। विभिन्न यज्ञों को करने के नियम ब्राह्मण ग्रंथों में दिए गए हैं, जैसे शतपथ ब्राह्मण, ऐतरेय ब्राह्मण, तैत्तिरीय ब्राह्मण आदि। ब्राह्मण ग्रंथों में कई अस्पष्टताएं, संघर्ष, असंगतियां, लोप आदि थे, और इसलिए इस उद्देश्य के लिए व्याख्या के सिद्धांत बनाए गए। इस प्रकार मीमांसा सिद्धांत मूल रूप से धार्मिक उद्देश्यों के लिए बनाए गए थे, लेकिन वे इतने तर्कसंगत और तार्किक थे कि बाद में उनका उपयोग कानून, व्याकरण, तर्कशास्त्र, दर्शन आदि में किया जाने लगा, अर्थात वे सार्वभौमिक अनुप्रयोग के हो गए।

33. जैमिनी ने सूत्र 6:3:9 में कहा है:

"जब उद्देश्य और सामग्री के बीच संघर्ष होता है, तो उद्देश्य को प्राथमिकता दी जानी चाहिए, क्योंकि निर्धारित सामग्री की अनुपस्थिति में एक विकल्प का उपयोग किया जा सकता है, क्योंकि सामग्री उद्देश्य के अधीन है।"

सुरजीत सिंह बनाम महानगर टेलीफोन निगम लिमिटेड (MTNL) (2009) 16 SCC 722 का मामला अपीलकर्ता सुरजीत सिंह के टेलीफोन कनेक्शनों को उनकी पत्नी के नाम से बकाया बिलों के कारण डिस्कनेक्ट किए जाने के विरोध में है। यह मामला टेलीफोन सेवाओं के बकाया बिलों और परिवार के सदस्यों के बीच वित्तीय निर्भरता के संदर्भ में कानूनी व्याख्या और न्यायिक सिद्धांतों के अनुप्रयोग को

लेकर महत्वपूर्ण है। अपीलकर्ता के पास उनके नाम पर दो टेलीफोन कनेक्शन थे—एक उनके आवासीय पते पर और दूसरा उनके व्यावसायिक परिसर में। उनकी पत्नी के नाम पर भी उनके साझा आवास पर एक टेलीफोन कनेक्शन था। जब पत्नी ने अपने टेलीफोन कनेक्शन का बिल नहीं चुकाया, तो MTNL ने न केवल उसका कनेक्शन बंद कर दिया, बल्कि अपीलकर्ता के दोनों कनेक्शन भी डिस्कनेक्ट कर दिए। इसके लिए MTNL ने भारतीय टेलीग्राफ नियम, नियम 443 का हवाला दिया, जो यह अनुमति देता है कि यदि कोई ग्राहक बिल का भुगतान नहीं करता है, तो टेलीफोन सेवा प्रदाता उसका कनेक्शन बंद कर सकता है।

<u>मामले के प्रमुख तत्व</u>:

1. <u>अपीलकर्ता का तर्क</u>

- सुरजीत सिंह ने तर्क दिया कि उनके टेलीफोन कनेक्शन, जो उनके नाम पर पंजीकृत थे, उनकी पत्नी के बकाया बिलों के कारण डिस्कनेक्ट नहीं किए जाने चाहिए थे। उन्होंने कहा कि वे और उनकी पत्नी अलग-अलग कानूनी इकाइयाँ हैं, और उन्हें उनकी पत्नी के वित्तीय दायित्वों के लिए जिम्मेदार नहीं ठहराया जाना चाहिए।

- उन्होंने भारतीय टेलीग्राफ नियम, नियम 443 का हवाला दिया, जो कहता है कि यदि कोई ग्राहक टेलीफोन बिल का भुगतान नहीं करता है, तो सेवा प्रदाता टेलीफोन कनेक्शन बंद कर सकता है। हालांकि, उन्होंने तर्क दिया कि यह नियम उनके कनेक्शनों पर लागू नहीं होना चाहिए, क्योंकि वे उनके नाम पर पंजीकृत थे, न कि उनकी पत्नी के नाम पर।

2. <u>भारतीय टेलीग्राफ नियम, नियम 443</u>

- नियम 443 टेलीफोन सेवाओं को बंद करने की अनुमति देता है यदि ग्राहक बिल का भुगतान नहीं करता है। इस नियम का उद्देश्य यह सुनिश्चित करना है कि टेलीफोन बिल समय पर चुकाए जाएं, जो सेवा प्रदाता के वित्तीय स्वास्थ्य के लिए महत्वपूर्ण है।
- अदालत को यह व्याख्या करनी थी कि क्या यह नियम अपीलकर्ता के कनेक्शनों को उनकी पत्नी के बकाया बिलों के लिए डिस्कनेक्ट करने के लिए लागू किया जा सकता है, यह देखते हुए कि वे अलग-अलग कानूनी इकाइयाँ थे लेकिन एक ही घर में रहते थे।

3. <u>वित्तीय निर्भरता</u>:

- अदालत ने नोट किया कि अपीलकर्ता की पत्नी एक गृहिणी थी और वित्तीय रूप से उन पर निर्भर थी। इस बात का कोई सबूत नहीं था कि उसकी कोई स्वतंत्र आय का स्रोत था। इसलिए, यह मानना उचित था कि अपीलकर्ता ही अपनी पत्नी के टेलीफोन कनेक्शन के बिलों का भुगतान कर रहे थे।

- अदालत ने इस बात पर जोर दिया कि जब एक परिवार का सदस्य दूसरे पर वित्तीय रूप से निर्भर होता है, तो पहले के बकाया बिलों के लिए दूसरे के टेलीफोन कनेक्शन को बंद करना उचित है।

4. <u>उद्देश्यपरक व्याख्या</u> :

- अदालत ने उद्देश्यपरक व्याख्या के सिद्धांत को लागू किया, जिसमें किसी नियम या कानून की व्याख्या इस तरह से की जाती है कि वह उसके इच्छित उद्देश्य के अनुरूप हो। इस मामले में, नियम 443 का उद्देश्य यह सुनिश्चित करना है कि टेलीफोन बिल समय पर चुकाए जाएं, जो सेवा प्रदाता के वित्तीय स्थिरता के लिए आवश्यक है।
- अदालत ने नियम 443 की शाब्दिक व्याख्या को खारिज कर दिया और इसके बजाय नियम के व्यापक उद्देश्य पर ध्यान केंद्रित किया, जो बकाया बिलों के कारण सेवा प्रदाता को होने वाले वित्तीय नुकसान को रोकना है।

5. पूर्व निर्णय :

- अदालत ने कई पूर्व निर्णयों की जांच की, जिनमें बॉम्बे उच्च न्यायालय और आंध्र प्रदेश उच्च न्यायालय के मामले शामिल थे, जहां समान मुद्दों पर विचार किया गया था। इन मामलों में, अदालतों ने यह फैसला दिया था कि यदि कोई परिवार का सदस्य दूसरे पर वित्तीय रूप से निर्भर है, तो उसके बकाया बिलों के लिए ग्राहक के टेलीफोन कनेक्शन को बंद करना उचित है।
- अदालत ने इन मामलों को उन स्थितियों से अलग किया जहां परिवार के सदस्यों की स्वतंत्र आय होती है और वे एक-दूसरे पर वित्तीय रूप से निर्भर नहीं होते हैं। ऐसे मामलों में, एक सदस्य के टेलीफोन कनेक्शन को दूसरे के बकाया बिलों के लिए बंद करना उचित नहीं होगा।

6. निर्णय :

- अदालत ने अपीलकर्ता के टेलीफोन कनेक्शनों को बंद करने के निर्णय को बरकरार रखा और यह फैसला दिया कि जब एक परिवार का सदस्य दूसरे पर वित्तीय रूप से निर्भर होता है, तो पहले के बकाया बिलों के लिए दूसरे के टेलीफोन कनेक्शन को बंद करना उचित है।
- अदालत ने टेलीफोन बिलों के समय पर भुगतान के महत्व पर जोर दिया, जो सेवा प्रदाता की स्थिरता के लिए आवश्यक है, और नियम 443 की व्याख्या को इस उद्देश्य के साथ संरेखित किया।

<u>मीमांसा सिद्धांतों का विस्तृत विवरण</u>

- लक्षणा सिद्धांत: यह सिद्धांत किसी नियम या कानून के शाब्दिक अर्थ से आगे जाकर उसके अप्रत्यक्ष या संकेतित अर्थ को समझने पर जोर देता है। इस मामले में, अदालत ने इस सिद्धांत का उपयोग करके नियम 443 की व्याख्या की, जो इसके इच्छित उद्देश्य—टेलीफोन बिलों का समय पर भुगतान सुनिश्चित करना—के अनुरूप थी।

- अर्थवाद सिद्धांत: यह सिद्धांत किसी नियम या कानून की व्याख्या उसके संदर्भ और उस परिस्थिति के आधार पर करने पर जोर देता है जिसमें इसे बनाया गया था। अदालत ने कहा कि नियम 443 का प्राथमिक उद्देश्य यह सुनिश्चित करना है कि टेलीफोन बिल समय पर चुकाए जाएं, और अपीलकर्ता के कनेक्शनों को बंद करना इस उद्देश्य को पूरा करता है।

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37. वर्तमान मामले में हमारा मत है कि लिंग (लक्षण) सिद्धांत लागू होगा।

38. लिंग का अर्थ वास्तव में संदर्भ को समझकर व्याख्या करना है, और यह व्याख्या के शाब्दिक नियम से एक अलगाव है। लिंग सिद्धांत को इस न्यायालय के उत्तर प्रदेश भूदान यज्ञ समिति बनाम बृज किशोर (एआईआर 1988 एससी 2239) के निर्णय से समझाया जा सकता है, जहाँ 'भूमिहीन व्यक्ति' शब्दों का अर्थ 'भूमिहीन किसान' से लगाया गया था, न कि भूमिहीन व्यापारी से। यहाँ हम देखते हैं कि न्यायालय ने व्याख्या के शाब्दिक नियम से हटकर फैसला किया है, क्योंकि शाब्दिक नियम के अनुसार एक बहुत अमीर व्यापारी जो जमीन नहीं रखता, उसे भी भूमिहीन व्यक्ति माना जाएगा। चूंकि उत्तर प्रदेश भूदान अधिनियम का उद्देश्य भूमिहीन किसानों को कुछ जमीन देना था, इसलिए 'भूमिहीन व्यक्ति' शब्द का अर्थ केवल 'भूमिहीन किसान' से लगाया गया। यह व्याख्या आवश्यक थी, अन्यथा उत्तर प्रदेश भूदान अधिनियम का पूरा उद्देश्य विफल हो जाता और भूमिहीन किसानों को वितरित करने के लिए दान की गई जमीन अमीर व्यापारियों द्वारा हथिया ली जाती, हालांकि उनके पास अपनी कंपनियों में शेयर, प्रतिभूतियाँ, बैंकों में करोड़ों रुपये आदि के रूप में बहुत अधिक धन हो सकता है।

39. हम यह भी बताना चाहेंगे कि लिंग (लक्षण) सिद्धांत और वाक्य सिद्धांत में अंतर है। पूर्व में पाठ के शब्दों के साथ कोई हिंसा नहीं की जाती, लेकिन शब्दों या अभिव्यक्तियों को शाब्दिक अर्थ से अलग तरीके से समझा जाता है, और इसलिए लिंग वास्तव में संदर्भ के आधार पर व्याख्या है। वाक्य में, हालांकि, पाठ के साथ कुछ हिंसा की जाती है, जैसे कि दो अलग वाक्यों को जोड़कर, या शब्दों या अभिव्यक्तियों को जोड़कर, या शब्दों या अभिव्यक्तियों को वाक्य में ऊपर या नीचे स्थानांतरित करके। यह हिंसा कभी-कभी पाठ को निरर्थक या बेतुका होने से बचाने के लिए आवश्यक हो जाती है, जैसे कि एक सर्जन को रोगी की जान बचाने के लिए शरीर के साथ हिंसा (ऑपरेशन) करनी पड़ती है। इस उद्देश्य के लिए उहा सिद्धांत का उपयोग किया जाता है (उहा सिद्धांत या तर्क का उपयोग, आमतौर पर पाठों की व्याख्या के लिए लागू किया जाता है)।

40. इस संबंध में यह उल्लेख किया जा सकता है कि मैक्सवेल भी असाधारण स्थितियों में क़ानून के साथ हिंसा करने की अनुमति देता है। वह कहता है, "जहां किसी क़ानून की भाषा, उसके सामान्य अर्थ और व्याकरणिक संरचना के कारण, अधिनियम के स्पष्ट उद्देश्य के साथ एक स्पष्ट विरोधाभास, या कुछ असुविधा या बेतुकापन, कठिनाई या अन्याय, जो संभवतः इरादतन नहीं है, उत्पन्न होता है, वहां उस पर एक ऐसी व्याख्या लागू की जा सकती है जो शब्दों के अर्थ को संशोधित करती है, और यहां तक कि वाक्य की संरचना को भी। यह व्याकरण के नियमों से हटकर, विशेष शब्दों को असामान्य अर्थ देकर, उनके क्रम को बदलकर, उन्हें पूरी तरह से अस्वीकार करके, या अन्य शब्दों को जोड़कर किया जा सकता है, निस्संदेह इस विश्वास के प्रभाव में कि विधायिका का इरादा संभवतः वह नहीं हो सकता जो शब्द दर्शाते हैं, और इस प्रकार किए गए संशोधन वास्तव में लापरवाह भाषा के सुधार हैं और सही इरादे को दर्शाते हैं।" इस प्रकार, एस.एस. कालरा बनाम भारत संघ 1991(2) एससीसी 87 में इस न्यायालय ने कहा कि कभी-कभी न्यायालय उन शब्दों को जोड़ सकते हैं जो गलती से छूट गए हों। (जी.पी. सिंह की पुस्तक "प्रिंसिपल्स ऑफ स्टैट्यूटरी इंटरप्रिटेशन" 9वां संस्करण, 2004, पृष्ठ 70 से 77 में उल्लिखित निर्णय भी देखें)।

41. लिंग सिद्धांत को जैमिनी ने कई सूत्रों और अधिकरणों में दर्शाया है। इस प्रकार, प्राणभृत अधिकरण, जो जैमिनी के सूत्र 28, अध्याय IV, पुस्तक 1 पर आधारित है, यह दर्शाता है कि कैसे शब्दों ने लिंग या लक्षण प्रक्रिया के माध्यम से एक व्यापक अर्थ प्राप्त किया।

42. तैत्तिरीय संहिता (5.3.1.2) में एक अंश है:

"वह प्राणभृत का निपटान करता है - प्राणभृत उपदद्याति "

फिर से उसी संहिता (5.7.2.5) में एक समान अंश है:

"वह अज्यानी का निपटान करता है - आज्यानोरेता उपद्द्याति "

43. अब एक मामले में प्राणभृत और दूसरे में अज्यानी का क्या अर्थ है? प्राणभृत और अज्यानी शब्द क्रमशः दो मंत्रों या छंदों के नाम हैं जो उन शब्दों से शुरू होते हैं। ये छंद यज्ञ में एक निश्चित उद्देश्य के लिए आवश्यक ईंटों को समर्पित करने में उपयोग किए जाते हैं। इस तथ्य से, प्राणभृत मंत्र द्वारा समर्पित ईंटों को प्राणभृत का नाम मिल गया। इसी तरह, अज्यानी मंत्र द्वारा समर्पित ईंटों को अज्यानी का नाम मिल गया। लेकिन समय के साथ, एक विशेष प्रकार की ईंटों के पूरे ढेर को प्राणभृत कहा जाने लगा, क्योंकि उस ढेर की एक या दो ईंटों को प्राणभृत ईंटों के रूप में

समर्पित किया गया था। इस प्रकार, प्राणभृत का उदाहरण उपरोक्त तरीके से एक नाम के दायरे को बढ़ाने के लिए एक मुहावरा बन गया। वास्तव में, इन मामलों में प्राणभृत और अज्यानी शब्दों का अर्थ शब्दों की विशेष संगति और उन अंशों के संदर्भ से निर्धारित होता है जिनमें वे उपयोग किए जाते हैं। ऐसे उपयोग को लिंगसमबाय (लिंग का अवतार) कहा जाता है।

44. नंद पंडित ने अपने ग्रंथ 'दत्तक मीमांसा' में प्राणभृत सिद्धांत का उल्लेख करते हुए यह दिखाया है कि यद्यपि 'प्रतिनिधि' शब्द का प्रयोग प्रारंभ में केवल छह प्रकार के पुत्रों के लिए किया गया था, बाद में सामान्य प्रयोग के कारण यह शब्द सभी बारह प्रकार के पुत्रों पर लागू हो गया। प्राणभृत सिद्धांत कहता है:

"किसी वर्ग के एक प्रमुख वस्तु की विशेषता पूरे वर्ग को नाम दे सकती है।"

45. प्राणभृत का शाब्दिक अर्थ है जीवन से भरना या जीवन प्रदान करना; लेकिन यह अभिव्यक्ति एक मंत्र की शुरुआत है जिसका उपयोग कुछ ईंटों को समर्पित करने में किया जाता है। इसलिए यह शब्द एक प्रकार की ईंटों के लिए प्रयोग होने लगा (प्राणभृत उपदद्याति)। इसी प्रकार, अज्यानी शब्द भी एक अन्य प्रकार की ईंटों के लिए प्रयोग होने लगा।

46. प्राणभृत सिद्धांत इस मामले में भी लागू होता है क्योंकि हमें भारतीय टेलीग्राफ नियमों के नियम 443 में 'ग्राहक' शब्द को जीवंत अर्थ (यानी उचित व्याख्या) देना है।

47. प्राणभृत सिद्धांत का उपयोग अक्सर किसी पाठ की व्याख्या करते समय इसे उदाहरणात्मक मानकर किया जाता है, न कि संपूर्ण। व्याख्या का उदाहरणात्मक नियम शाब्दिक नियम से एक अलगाव है, जिसे सामान्यतः किसी पाठ की व्याख्या करते समय अपनाया जाता है। हालांकि, कभी-कभी शाब्दिक नियम से अलग होना अनुमेय होता है, और ऐसा ही एक अलगाव उदाहरणात्मक नियम है। उदाहरण के लिए, संस्कृत में एक प्रसिद्ध कथन है "काकेभ्यो दधि रक्षितम्" जिसका अर्थ है "दही को कौवों से बचाओ"। इस वाक्य में 'कौवा' शब्द केवल उदाहरणात्मक है, न कि संपूर्ण। इसका यह अर्थ नहीं है कि दही को केवल कौवों से बचाना चाहिए, लेकिन बिल्लियों, कुत्तों या गंदगी आदि से खराब होने देना चाहिए। इसका वास्तविक अर्थ यह है कि दही को सभी खतरों से बचाना चाहिए। इसलिए, उपरोक्त कथन में 'कौवा' शब्द केवल उदाहरणात्मक है, न कि संपूर्ण।

48. हम एक और उदाहरण ले सकते हैं। अमेरिकी संविधान के अनुच्छेद 1 धारा 8 में कहा गया है कि कांग्रेस (अमेरिकी संसद) सेना और नौसेना का गठन कर सकती है। इसमें वायु सेना का कोई उल्लेख नहीं है, क्योंकि 1791 में जब अमेरिकी संविधान

लागू हुआ था, तब विमान नहीं थे। पहला विमान राइट बंधुओं ने 1903 में बनाया था। हालांकि, आज की वास्तविकता यह है कि एक आधुनिक सेना वायु सहयोग के बिना नहीं लड़ सकती। अमेरिकी संविधान में संशोधन करना एक बहुत ही कठिन और लंबी प्रक्रिया है क्योंकि इसमें कांग्रेस के दोनों सदनों के दो-तिहाई बहुमत और राज्यों के तीन-चौथाई की अनुमति की आवश्यकता होती है। जब तक यह होता है, दुश्मन देश पर आक्रमण करके उसे कब्जा कर सकता है। इसलिए, 'सेना और नौसेना' शब्दों को उदाहरणात्मक माना जाना चाहिए, न कि संपूर्ण, और इनका वास्तविक अर्थ देश की सुरक्षा के लिए आवश्यक सभी सशस्त्र बल हैं (जिसमें वायु सेना भी शामिल है)। इस प्रकार, अमेरिकी संविधान के अनुच्छेद 1 धारा 8 की व्याख्या श्रुति नियम (शाब्दिक नियम) के बजाय लिंग नियम के आधार पर की जानी चाहिए। अनुच्छेद 1 धारा 8 में 'सेना और नौसेना' शब्दों को शाब्दिक रूप से नहीं, बल्कि सुझावात्मक रूप में समझा जाना चाहिए। दूसरे शब्दों में, ये केवल उदाहरणात्मक हैं, और इनका वास्तविक अर्थ देश की सुरक्षा के लिए आवश्यक सभी सशस्त्र बल हैं।

49. हम मैक्सवेल के 'कानूनों की व्याख्या' का भी उल्लेख कर सकते हैं, जिसमें कहा गया है:

"लेकिन यह एक और मूलभूत नियम है कि कोई चीज जो कानून के शब्दों के भीतर है, वह कानून के भीतर नहीं मानी जाएगी जब तक कि वह विधायिका के वास्तविक इरादे के भीतर न हो, और शब्दों को, यदि पर्याप्त लचीला हो, उस अर्थ में समझा जाना चाहिए जो व्याकरणिक रूप से कम सही हो सकता है, लेकिन उस इरादे के साथ अधिक सामंजस्य रखता हो। भाषा शायद ही कभी इतनी स्पष्ट होती है कि उसे एक से अधिक अर्थ में प्रयोग न किया जा सके; और सभी मामलों में इसके शाब्दिक और प्राथमिक अर्थ पर कठोरता से बने रहना इसके वास्तविक अर्थ को कई बार खो देगा। यदि उन कानूनों को शाब्दिक अर्थ दिया गया होता जो एक साधारण व्यक्ति को पुजारी पर 'हाथ रखने' से मना करते थे और सड़क पर खून बहाने वाले सभी को दंडित करते थे, तो एक साधारण व्यक्ति जो हथियार से पुजारी को घायल करता, वह प्रतिबंध के अंतर्गत नहीं आता, और एक सर्जन जो किसी की जान बचाने के लिए खून निकालता, वह दंड के योग्य होता। शाब्दिक व्याख्या के अनुसार, मोहम्मद ।। द्वारा वेनिस के गवर्नर के शरीर को आधा काटना उसके वादे का उल्लंघन नहीं था क्योंकि उसने सिर बचाने का वादा किया था; न ही तैमूर द्वारा एक गैरीसन को जिंदा दफनाना उसके खून न बहाने के वादे का उल्लंघन था।"

मैक्सवेल यह भी कहते हैं:

"किसी कानून के शब्दों को उस अर्थ में समझा जाना चाहिए जो उस अधिनियम के विषय और विधायिका के उद्देश्य के साथ सबसे अधिक सामंजस्य रखता हो। उनका अर्थ केवल व्याकरणिक या शब्द-साधन की दृष्टि से नहीं, बल्कि उस विषय या अवसर के संदर्भ में और प्राप्त किए जाने वाले उद्देश्य के अनुसार समझा जाना चाहिए।" (जोर दिया गया)

50. इस प्रकार, दोनों व्याख्या प्रणालियों में, मीमांसा प्रणाली और मैक्सवेल की प्रणाली, यह बल दिया गया है कि किसी कानून के इरादे को अक्सर समझना आवश्यक होता है ताकि उसकी सही व्याख्या की जा सके, और यह नहीं कि न्यायालय कभी भी शाब्दिक व्याख्या नियम से अलग नहीं हो सकता। यह सब संदर्भ, विषय-वस्तु, और उस प्रावधान के उद्देश्य पर निर्भर करता है।

51. जैसा कि पहले कहा गया है, नियम 443 की व्याख्या करते समय हमें एक ऐसी व्याख्या देनी होगी जो इस नियम के इरादे को पूरा करे, जो यह है कि टेलीफोन बिलों का तुरंत भुगतान किया जाना चाहिए, अन्यथा विभाग के पास टेलीफोन सेवाओं को वित्तपोषित करने के लिए आवश्यक धन की कमी होगी जो उपभोक्ताओं को प्रदान की जानी हैं। आखिरकार, टेलीफोन विभाग के कर्मचारियों का वेतन देना होता है, टेलीफोन उपकरणों को बनाए रखना, मरम्मत करना और आधुनिक बनाए रखना होता है। कभी-कभी नई तकनीक को शुरू करना पड़ता है। विभिन्न अन्य आवश्यकताएं हो सकती हैं जिनके लिए धन की आवश्यकता होती है, और यह सब केवल तभी संभव है जब टेलीफोन बिलों का समय पर भुगतान किया जाए। इसलिए, हमारे विचार में, नियम 2(pp) में 'ग्राहक' शब्द को एक व्यापक अर्थ दिया जाना चाहिए, जैसा कि पहले कहा गया है।

52. उपरोक्त के आधार पर, हमें इस अपील में कोई ताकत नहीं दिखती है, और इसे खारिज किया जाता है। कोई लागत का आदेश नहीं होगा।

<u>भारत का सर्वोच्च न्यायालय</u>

सुरजीत सिंह ....अपीलकर्ता

बनाम

महानगर टेलीफोन निगम लिमिटेड.... प्रतिवादी

<u>निर्णय दिनांक</u>: 21 अप्रैल, 2008

सिविल अपील संख्या 5354 वर्ष 2002

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पीठ: माननीय न्यायमूर्ति एच. के. सेमा एवं माननीय न्यायमूर्ति मार्कंडेय काटजू

1. यह विशेष अनुमति से दायर की गई अपील दिल्ली उच्च न्यायालय की डिवीजन बेंच के दिनांक 10.1.2002 के प्रभावित निर्णय के खिलाफ है, जो LPA No. 665 of 2001 में पारित किया गया था।

2. अपीलकर्ता की ओर से श्री आर.के. कपूर, वकील और प्रतिवादी की ओर से श्री अमरेंद्र सरन, अतिरिक्त सॉलिसिटर जनरल को सुना गया।

3. मामले के तथ्य यह हैं कि अपीलकर्ता और उसकी पत्नी दिल्ली के राजौरी गार्डन में अपने आवास पर साथ रहते हैं। उस आवास पर अपीलकर्ता सुरजीत सिंह के नाम से एक टेलीफोन लाइन नंबर 5121187 है और उसी आवास पर अपीलकर्ता की पत्नी के नाम से एक अन्य टेलीफोन लाइन नंबर 5416493 है। अपीलकर्ता के नाम से एक तीसरी टेलीफोन लाइन नंबर 3265301 है, जो अपीलकर्ता के व्यवसायिक परिसर 1195, चहराहट बिल्डिंग, जामा मस्जिद, दिल्ली में लगी हुई है।

4. ऐसा प्रतीत होता है कि अपीलकर्ता की पत्नी के नाम वाली लाइन नंबर 5416493 के संबंध में टेलीफोन बकाया था। इस लाइन के बकाया का भुगतान न करने के कारण, अपीलकर्ता के नाम वाली अन्य दो लाइनें, जिनमें से एक उसके आवासीय परिसर में लाइन नंबर 5121187 और दूसरी उसके व्यवसायिक परिसर में लाइन नंबर 3265301 थी, को डिस्कनेक्ट कर दिया गया।

5. अपीलकर्ता का तर्क था कि उसके अपने नाम वाली टेलीफोन लाइनें, जिनमें उसके आवास पर लाइन नंबर 5121187 और उसके व्यवसायिक परिसर पर लाइन नंबर 3265301 शामिल हैं, को उसकी पत्नी के नाम वाली लाइन नंबर 5416493 के बकाया के कारण डिस्कनेक्ट नहीं किया जाना चाहिए था। उसने तर्क दिया कि वह और उसकी पत्नी दो अलग-अलग कानूनी इकाइयाँ हैं, और उसे उसकी पत्नी की गलती के लिए दंडित नहीं किया जा सकता।

6. अपीलकर्ता ने दिल्ली उच्च न्यायालय में एक रिट याचिका दायर की, जिसे एकल न्यायाधीश द्वारा दिनांक 25.9.2001 के निर्णय में खारिज कर दिया गया और उच्च न्यायालय की डिवीजन बेंच के समक्ष उसकी अपील को भी दिनांक 10.1.2002 के प्रभावित निर्णय में खारिज कर दिया गया। इसलिए, यह अपील इस न्यायालय में दायर की गई है।

7. अपीलकर्ता के वकील ने भारतीय टेलीग्राफ नियमों के नियम 443 का हवाला दिया, जो इस प्रकार है:

"443. भुगतान में चूक -- यदि, नियत तिथि पर या उससे पहले, टेलीफोन सेवा के लिए किराया या अन्य शुल्क का भुगतान ग्राहक द्वारा इन नियमों के अनुसार नहीं किया जाता है, या कॉल या फोनोग्राम के शुल्क के बिल या ग्राहक से अन्य बकाया का भुगतान उसके द्वारा समय पर नहीं किया जाता है, तो उसके द्वारा किराए पर ली गई किसी भी टेलीफोन या टेलीफोनों या टेलेक्स सेवा को बिना सूचना के डिस्कनेक्ट किया जा सकता है। डिस्कनेक्ट किए गए टेलीफोन या टेलीफोनों या टेलेक्स को, यदि टेलीग्राफ प्राधिकारी उचित समझे, तो पुनः जोड़ा जा सकता है, यदि चूक करने वाला ग्राहक बकाया राशि और पुनः कनेक्शन शुल्क का भुगतान कर देता है, साथ ही उस अंतराल अवधि के लिए किराया, जो टेलीग्राफ प्राधिकारी द्वारा समय-समय पर निर्धारित किया जाए। ग्राहक को उपरोक्त सभी शुल्क का भुगतान उस अवधि के भीतर करना होगा, जो टेलीग्राफ प्राधिकारी द्वारा समय-समय पर निर्धारित की जाए।"

अपीलकर्ता के वकील ने तर्क दिया कि नियम 443 के आलोक में, अपीलकर्ता के नाम वाली टेलीफोन लाइनों को उसकी पत्नी के नाम वाली लाइन के बकाया के कारण डिस्कनेक्ट नहीं किया जाना चाहिए था।

8. अपीलकर्ता के वकील ने हमारा ध्यान बॉम्बे उच्च न्यायालय के एकल न्यायाधीश के निर्णय डॉ. बी.वी. मानेक बनाम महानगर टेलीफोन निगम लिमिटेड AIR 1996 Bom 53 की ओर आकर्षित किया। हमने उक्त निर्णय का सावधानीपूर्वक अध्ययन किया है और पाया है कि यह भिन्न है। उस मामले में, याचिकाकर्ता की टेलीफोन लाइन को उसके पिता के नाम वाली अन्य लाइन के बकाया के कारण डिस्कनेक्ट कर दिया गया था। उच्च न्यायालय के एकल न्यायाधीश ने माना कि विभाग ग्राहक के टेलीफोन को उसके रिश्तेदार द्वारा की गई चूक के कारण डिस्कनेक्ट नहीं कर सकता। उक्त बॉम्बे उच्च न्यायालय के निर्णय में यह उल्लेख नहीं किया गया है कि याचिकाकर्ता का पिता आर्थिक रूप से याचिकाकर्ता पर निर्भर था।

9. वर्तमान मामले में, जो हमारे समक्ष है, यह रिकॉर्ड पर आया है कि अपीलकर्ता की पत्नी एक गृहिणी है, जो अपीलकर्ता के साथ दिल्ली के राजौरी गार्डन में उसके आवास पर रहती है। यह आरोप नहीं लगाया गया है कि अपीलकर्ता की पत्नी के पास किसी व्यवसाय या सेवा आदि से स्वतंत्र आय का स्रोत है। इन परिस्थितियों में, यह अनुमान लगाया जा सकता है कि अपीलकर्ता की पत्नी के नाम वाली टेलीफोन लाइन का बिल अपीलकर्ता द्वारा ही भुगतान किया जा रहा था, क्योंकि उसकी पत्नी के पास स्वतंत्र आय का स्रोत नहीं है और वह आर्थिक रूप से उस पर निर्भर है।

10. हमारे विचार में, हमें उन मामलों के बीच अंतर करना होगा जहां एक रिश्तेदार, जो एक ही घर में रहता है, के पास स्वतंत्र आय का स्रोत है, और उन मामलों के बीच जहां एक रिश्तेदार दूसरे पर निर्भर है। पूर्व मामले में, यदि दो अलग-अलग लाइनें हैं, जिनमें से एक उस रिश्तेदार के नाम पर है जो आर्थिक रूप से स्वतंत्र है और उसका अपना आय स्रोत है, और दूसरी याचिकाकर्ता के नाम पर है, तो यह माना जा सकता है कि रिश्तेदार द्वारा बकाया का भुगतान न करने के कारण याचिकाकर्ता की टेलीफोन लाइन

को डिस्कनेक्ट नहीं किया जा सकता। हालांकि, बाद वाले मामलों में, यानी जहां एक रिश्तेदार आर्थिक रूप से दूसरे पर निर्भर है, स्थिति, हमारे विचार में, पूरी तरह से भिन्न है। उदाहरण के लिए, यदि किसी पिता के नाबालिग बच्चे के नाम पर एक टेलीफोन लाइन है, और पिता के नाम पर एक अन्य टेलीफोन लाइन है, और दोनों एक ही घर में साथ रहते हैं, तो स्पष्ट है कि नाबालिग बच्चे के नाम वाली टेलीफोन लाइन का बिल पिता द्वारा भुगतान किया जा रहा है। इसलिए, हमारे विचार में, नाबालिग बच्चे के नाम वाली टेलीफोन लाइन के बिल का भुगतान न करने के कारण पिता की टेलीफोन लाइन को डिस्कनेक्ट किया जा सकता है।

11. इसी तरह, ऐसा मामला भी हो सकता है जहां पति और पत्नी एक ही घर में रहते हैं और दोनों के पास स्वतंत्र आय के स्रोत हैं, और पत्नी स्वयं अपने नाम वाली टेलीफोन लाइन के बिल का भुगतान करती है, जबकि पति अपनी टेलीफोन लाइन के बिल का भुगतान करता है। ऐसे मामले में, पत्नी के बिल का भुगतान न करने के कारण पति की टेलीफोन लाइन को डिस्कनेक्ट नहीं किया जा सकता।

12. जैसा कि ऊपर कहा गया है, बॉम्बे उच्च न्यायालय के एकल न्यायाधीश के निर्णय में यह उल्लेख नहीं किया गया है कि पिता आर्थिक रूप से याचिकाकर्ता पर निर्भर था। इसलिए, उक्त निर्णय वर्तमान विवाद को तय करने में कोई मदद नहीं कर सकता, क्योंकि आवश्यक तथ्यात्मक विवरण का अभाव है।

13. अपीलकर्ता के वकील ने तब हमारा ध्यान आंध्र प्रदेश उच्च न्यायालय के एकल न्यायाधीश के निर्णय वाई. प्रिध्वी कुमार बनाम जनरल मैनेजर, टेलीकॉम डिस्ट्रिक्ट, हैदराबाद AIR 1993 AP 131 की ओर आकर्षित किया। हमने उक्त निर्णय का सावधानीपूर्वक अध्ययन किया है और पाया है कि यह निर्णय भी भिन्न है। उक्त निर्णय में ऐसा प्रतीत होता है कि माता के नाम पर एक टेलीफोन लाइन थी और पुत्र के नाम पर एक अन्य टेलीफोन लाइन थी, और दोनों साथ रहते थे। माता के नाम पर बकाया था और आंध्र प्रदेश उच्च न्यायालय ने माना कि उस स्थिति में पुत्र पर दायित्व नहीं डाला जा सकता और उसकी टेलीफोन लाइन को डिस्कनेक्ट नहीं किया जा सकता। उक्त आंध्र प्रदेश उच्च न्यायालय के निर्णय से यह स्पष्ट नहीं है कि माता आर्थिक रूप से अपने पुत्र पर निर्भर थी। यह संभव है कि माता आर्थिक रूप से अपने पति पर निर्भर थी, जो उसके बिल का भुगतान कर रहा था। यह भी संभव है कि माता एक कामकाजी महिला थी, जिसके पास स्वतंत्र आय का स्रोत था। इसलिए, वर्तमान मामले में अपीलकर्ता उक्त आंध्र प्रदेश उच्च न्यायालय के निर्णय से कोई लाभ प्राप्त नहीं कर सकता।

14. अपीलकर्ता के वकील ने संतोख सिंह बनाम डिवीजनल इंजीनियर, टेलीफोन्स, शिलांग और अन्य AIR 1990 गुवाहाटी 47 के निर्णय पर भी भरोसा करने का प्रयास किया। हालांकि, ऐसा प्रतीत होता है कि उक्त निर्णय के खिलाफ इस न्यायालय में सिविल अपील संख्या 2849/1991 शीर्षक डिवीजनल इंजीनियर टेलीफोन और अन्य बनाम सरदार संतोख सिंह में अपील दायर की गई थी, जिसे इस न्यायालय द्वारा दिनांक 22.4.2001 को निर्णीत किया गया था। उक्त निर्णय में यह माना गया कि गुवाहाटी उच्च

न्यायालय के संतोख सिंह बनाम डिवीजनल इंजीनियर टेलीफोन और अन्य के निर्णय को एक मिसाल के रूप में नहीं माना जाएगा।

15. दूसरी ओर, प्रतिवादी के वकील ने दिल्ली उच्च न्यायालय की डिवीजन बेंच के निर्णय मदन तायल और प्राण कृष्ण तायल बनाम एमटीएनएल 1989 (16) DRJ 51, दिल्ली उच्च न्यायालय के एकल न्यायाधीश के निर्णय राजीव गोसेन बनाम एमटीएनएल, सिविल रिट याचिका संख्या 6343/1981, जो 20.4.2000 को निर्णीत किया गया था, और दिल्ली उच्च न्यायालय के एकल न्यायाधीश के निर्णय सुख दयाल नरूला बनाम एमटीएनएल, सिविल रिट याचिका संख्या 1693/1996, जो 26.9.1997 को निर्णीत किया गया था, पर भरोसा किया है। इन निर्णयों में दिल्ली उच्च न्यायालय ने यह माना है कि एक ग्राहक की टेलीफोन लाइन को उसके रिश्तेदार के बकाया के कारण डिस्कनेक्ट किया जा सकता है, जो उसी परिसर में रहता है। वकील ने गुजरात उच्च न्यायालय के निर्णय इंद्रवदन प्राणलाल शाह बनाम जनरल मैनेजर, अहमदाबाद टेलीफोन डिस्ट्रिक्ट खारपुर, अहमदाबाद और अन्य AIR 1990 गुजरात 85 पर भी भरोसा किया है, जिसमें यह माना गया कि याचिकाकर्ता की टेलीफोन लाइन को डिस्कनेक्ट किया जा सकता है यदि उस फर्म, जिसमें वह साझेदार है, द्वारा फर्म के नाम वाली टेलीफोन लाइन के बकाया का भुगतान नहीं किया जाता है।

16. अपीलकर्ता के वकील ने हमारा ध्यान भारतीय टेलीग्राफ नियम, 1951 के नियम 2(पीपी) की ओर आकर्षित किया है, जो 'ग्राहक' को इस प्रकार परिभाषित करता है:

" 'ग्राहक' का अर्थ उस व्यक्ति से है, जिसे इन नियमों के तहत या किसी समझौते के तहत एक इंस्टालेशन के माध्यम से टेलीफोन सेवा प्रदान की गई है।"

17. अपीलकर्ता के वकील ने तर्क दिया कि नियम 2(पीपी) में ग्राहक की परिभाषा के आलोक में, अपीलकर्ता के नाम वाली टेलीफोन लाइनों को उसकी पत्नी के नाम वाली लाइन के बकाया के कारण डिस्कनेक्ट नहीं किया जाना चाहिए था।

18. हम पहले ही ऊपर कह चुके हैं कि जहां दो रिश्तेदार एक ही घर में रहते हैं, वहां उस व्यक्ति के नाम वाली टेलीफोन लाइन, जो आर्थिक रूप से किसी अन्य (जैसे पति, पिता आदि) पर निर्भर है, और उस व्यक्ति के नाम वाली टेलीफोन लाइन, जिसके पास स्वतंत्र आय का स्रोत है और जो अपने टेलीफोन बिल का भुगतान स्वयं करता है, के बीच अंतर करना होगा। पूर्व मामले में, यानी जहां एक व्यक्ति आर्थिक रूप से किसी अन्य पर निर्भर है, जो उसके टेलीफोन बिल का भुगतान करता है, वहां नाममात्र ग्राहक के टेलीफोन बिल का भुगतान न करने के कारण उस अन्य रिश्तेदार के नाम वाली टेलीफोन लाइन को डिस्कनेक्ट किया जा सकता है, जिस पर ग्राहक निर्भर है।

19. अपीलकर्ता के वकील ने आपत्ति जताई कि ऐसी व्याख्या भारतीय टेलीग्राफ नियमों के नियम 443 और नियम 2(पीपी) में प्रयुक्त भाषा के विपरीत होगी।

20. यह सच है कि नियम 443 के शाब्दिक अर्थ के आधार पर, हमें अपीलकर्ता के वकील के तर्क को स्वीकार करना होगा। हालांकि, हमारे विचार में, इस मामले में शाब्दिक नियम को अपनाना नहीं है, क्योंकि हमें नियम के उद्देश्य को भी देखना होगा। उद्देश्य स्पष्ट रूप से यह था कि टेलीफोन बकाया का समय पर भुगतान किया जाए, अन्यथा टेलीफोन विभाग को नुकसान होगा। इसलिए, हमें ऐसी व्याख्या अपनानी होगी जो नियम 443 के उद्देश्य को प्रभावी और आगे बढ़ाए, यानी टेलीफोन बिल का समय पर भुगतान किया जाए।

21. एक पत्नी के मामले में, जो गृहिणी है और आर्थिक रूप से अपने पति पर निर्भर है, स्पष्ट है कि उसके नाम वाली टेलीफोन लाइन का बिल उसके पति द्वारा भुगतान किया जा रहा है, न कि उसके द्वारा। इसलिए, हमें इस मामले में उद्देश्यपूर्ण व्याख्या (purposive construction) अपनाना होगा और व्याख्या के शाब्दिक नियम का पालन नहीं करना होगा।

22. हालांकि, निस्संदेह, आमतौर पर किसी क़ानून या वैधानिक नियम की व्याख्या करते समय शाब्दिक नियम को लागू किया जाना चाहिए, लेकिन शाब्दिक नियम हमेशा किसी क़ानून में प्रावधान की व्याख्या का एकमात्र नियम नहीं है, और असाधारण मामलों में शाब्दिक नियम से हटा जा सकता है। जैसा कि इस न्यायालय के संविधान पीठ के निर्णय आर.एल. अरोड़ा बनाम उत्तर प्रदेश राज्य और अन्य 1964 (6) SCR 784 ए.आई.आर पेज 1236-37 पैरा 9 में कहा गया है:

"9...इसके अलावा, शाब्दिक व्याख्या हमेशा किसी क़ानून में प्रावधान की एकमात्र व्याख्या नहीं होती है, और अदालत को उस संदर्भ को देखना होगा जिसमें शब्दों का उपयोग किया गया है और उन परिस्थितियों को देखना होगा जिनमें क़ानून बनाया गया था, यह तय करने के लिए कि क्या उपयोग किए गए शब्दों के पीछे कुछ निहित है जो क़ानून के प्रावधान में प्रयुक्त शब्दों के शाब्दिक अर्थ को नियंत्रित करेगा। यदि संभव हो तो क़ानून में प्रयुक्त व्यापक भाषा को उस संदर्भ से नियंत्रित करना अनुमेय है, जिसमें शब्दों का उपयोग किया गया है और क़ानून बनाने वाले निकाय का इरादा, जो उन परिस्थितियों से स्पष्ट हो सकता है जिनमें विशेष प्रावधान बनाया गया था।" (जोर दिया गया)

. इसलिए यह निष्कर्ष निकलता है कि किसी क़ानून की व्याख्या करने के लिए कभी-कभी उस संदर्भ पर विचार करना होता है जिसमें इसे बनाया गया है और उस उद्देश्य और लक्ष्य पर विचार करना होता है जिसे यह प्राप्त करना चाहता है। एक बहुत ही शाब्दिक व्याख्या कभी-कभी क़ानून के उद्देश्य को ही विफल कर सकती है, और अदालत को ऐसे दृष्टिकोण से बचना चाहिए।

23. हिंदुस्तान लीवर लिमिटेड बनाम अशोक विष्णु काटे और अन्य 1995(6) SCC 326 (पैरा 42) में इस न्यायालय ने कहा:

"42...फ्रांसिस बेनियन ने अपनी पुस्तक 'स्टैच्यूटरी इंटरप्रिटेशन' के दूसरे संस्करण में फंक्शनल कंस्ट्रक्शन रूल (कार्यात्मक निर्माण नियम) पर चर्चा की है। उद्देश्यपूर्ण निर्माण की प्रकृति पर पुस्तक के भाग XX में पृष्ठ 659 पर इस प्रकार चर्चा की गई है:

'किसी अधिनियम का उद्देश्यपूर्ण व्याख्या वह है जो विधायी उद्देश्य को प्रभावी करता है-
(ए) अधिनियम के शाब्दिक अर्थ का पालन करके, जहां वह अर्थ विधायी उद्देश्य के अनुरूप है (इस कोड में इसे उद्देश्यपूर्ण-और-शाब्दिक व्याख्या कहा गया है), या
(बी) एक तनावपूर्ण अर्थ लागू करके, जहां शाब्दिक अर्थ विधायी उद्देश्य के अनुरूप नहीं है (कोड में इसे उद्देश्यपूर्ण और तनावपूर्ण व्याख्या कहा गया है)।'
पुस्तक के पृष्ठ 661 पर, लेखक ने 'उद्देश्यपूर्ण व्याख्या ' विषय पर शाब्दिक व्याख्या के विपरीत चर्चा की है। लेखक ने निम्नलिखित टिप्पणी की है:
'शाब्दिक व्याख्या के साथ तुलना - हालांकि 'उद्देश्यपूर्ण व्याख्या' शब्द नया नहीं है, लेकिन इसका फैशन में प्रवेश अपीलीय अदालतों द्वारा शाब्दिक व्याख्या से दूर जाने की प्रवृत्ति को दर्शाता है। लॉर्ड डिप्लॉक ने 1975 में कहा था: 'यदि कोई पिछले 30 वर्षों में वैधानिक व्याख्या के प्रश्नों पर [हाउस ऑफ लॉर्ड्स] के वास्तविक निर्णयों को देखता है, तो कोई भी शुद्ध रूप से शाब्दिक से दूर वैधानिक प्रावधानों के उद्देश्यपूर्ण व्याख्या की ओर एक प्रवृत्ति के साक्ष्य से प्रभावित हुए बिना नहीं रह सकता है।' इस मामले को लॉर्ड डिप्लॉक ने इस प्रकार संक्षेप में प्रस्तुत किया-
...मैं उद्देश्यपूर्ण व्याख्या अपनाने से हिचकिचाता नहीं हूं, जहां वैधानिक भाषा के शाब्दिक अर्थ को लागू करने से ऐसे परिणाम सामने आएंगे जो स्पष्ट रूप से अधिनियम के उद्देश्य को विफल कर देंगे। लेकिन ऐसा करते हुए, न्यायालय का कार्य व्याख्या का ही रहता है, भले ही इसमें अधिनियम में ऐसे शब्दों को पढ़ना शामिल हो, जो स्पष्ट रूप से इसमें शामिल नहीं हैं।' (जोर दिया गया) हम उपरोक्त व्यक्त दृष्टिकोण से सहमत हैं।
24. हमारे विचार में, इस मामले में, भारतीय टेलीग्राफ नियमों के नियम 443 की व्याख्या करते समय उद्देश्यपूर्ण व्याख्या अपनाना होगा।
25. हम इस मामले को हमारे पारंपरिक व्याख्या सिद्धांतों के दृष्टिकोण से भी विचार कर सकते हैं। महान संस्कृत व्याकरणाचार्य नागेश भट्ट ने अपनी पुस्तक 'परम लघु मंजूषा' में कहा है कि एक शब्द या वाक्यांश के तीन अर्थ हो सकते हैं:

"(i) अभिधा अर्थात शाब्दिक अर्थ; (ii) लक्षणा अर्थात संकेतात्मक या सुझावात्मक अर्थ; (iii) व्यंजना अर्थात अलंकारिक अर्थ।
सामान्यतः शाब्दिक अर्थ का पालन किया जाता है, लेकिन कभी-कभी संकेतात्मक या अलंकारिक अर्थ अपनाए जाते हैं। संकेतात्मक अर्थ (लक्षणा) के संदर्भ में अक्सर उद्धृत किया जाने वाला उदाहरण है 'गङ्गायां घोषः' अर्थात "मैं गंगा पर रहता हूँ।" इस वाक्य का शाब्दिक अर्थ नहीं लिया जा सकता क्योंकि कोई भी गंगा नदी की सतह पर नहीं रह सकता। इसलिए इसका अर्थ यह लिया जाना चाहिए कि "मैं गंगा नदी के किनारे रहता हूँ।"

तीसरे अर्थ व्यंजना के संदर्भ में अक्सर उद्धृत किया जाने वाला उदाहरण है 'गतोऽस्तमर्कः' जिसका अर्थ है:

"सूर्य अस्त हो गया है।" यहाँ वास्तविक अर्थ का सूर्य या उसके अस्त होने से कोई संबंध नहीं है, बल्कि इसका वास्तविक अर्थ है "दीपक जलाओ" या "चलो घर चलें" (क्योंकि सूर्य अस्त हो गया है)।

26. हमारे विचार में, वर्तमान मामले में हमें श्रुति या अभिधा (शाब्दिक) नियम के बजाय लक्षणा (या लिंग) नियम को अपनाना होगा। दूसरे शब्दों में, भारतीय टेलीग्राफ नियम 443 को उद्देश्यपूर्ण अर्थ में व्याख्यायित करना होगा। इसलिए, एक व्यक्ति के नाम पर टेलीफोन लाइन, जो वास्तव में दूसरे व्यक्ति के नाम पर टेलीफोन लाइन से संबंधित बिलों का भुगतान कर रहा है, जो आर्थिक रूप से पहले व्यक्ति पर निर्भर है, को बाद वाले के नाम पर टेलीफोन लाइन के बिलों के भुगतान न करने के कारण डिस्कनेक्ट किया जा सकता है। ऐसी व्याख्या नियम 443 के उद्देश्य को प्रभावी बनाएगी, जो यह है कि टेलीफोन बिलों का तुरंत भुगतान किया जाना चाहिए।

27. साथ ही, इससे कोई फर्क नहीं पड़ता कि टेलीफोन लाइन आवास पर है या व्यावसायिक परिसर में, भले ही दोनों पूरी तरह से अलग हों। इसलिए हमारे विचार में, अपीलकर्ता के नाम पर दोनों टेलीफोन लाइनें, एक उसके आवास पर और दूसरी उसके व्यावसायिक परिसर में, उसकी आश्रित पत्नी के नाम पर टेलीफोन लाइन के बकाया भुगतान न करने के कारण डिस्कनेक्ट की जा सकती हैं।

28. हम नियम 443 की व्याख्या करने में मीमांसा के नियमों का भी उपयोग कर सकते हैं।

29. यह गहरा खेदजनक है कि हमारे न्यायालयों में वकील मैक्सवेल और क्रेज़ का हवाला देते हैं, लेकिन कोई भी मीमांसा के व्याख्या सिद्धांतों का उल्लेख नहीं करता। आज हमारे तथाकथित शिक्षित लोग हमारे पूर्वजों की महान बौद्धिक उपलब्धियों और उनके द्वारा हमें सौंपी गई बौद्धिक संपदा से लगभग अनजान हैं। मीमांसा के व्याख्या सिद्धांत उस बौद्धिक संपदा का हिस्सा हैं, लेकिन यह देखकर दुख होता है कि इलाहाबाद उच्च न्यायालय के तत्कालीन मुख्य न्यायाधीश सर जॉन एज के निर्णय, बेनी प्रसाद बनाम हरदई देवी (1892) ILR 14 All 67 (FB) में इन सिद्धांतों के उल्लेख के अलावा, हमारे अपने देश में भी इन सिद्धांतों का लगभग कोई उपयोग नहीं किया गया है (हम में से एक, न्यायमूर्ति एम. काटजू के अलावा)।

30. यह उल्लेख किया जा सकता है कि मीमांसा के व्याख्या नियम हमारे पारंपरिक व्याख्या सिद्धांत थे, जिनका उपयोग ढाई हजार वर्षों से किया जा रहा है, जो जैमिनी द्वारा प्रतिपादित किए गए थे और जिनकी व्याख्या शाबर, कुमारिल भट्ट, प्रभाकर आदि ने की थी। इन मीमांसा सिद्धांतों का नियमित रूप से हमारे महान न्यायविदों जैसे विज्ञानेश्वर (मिताक्षरा के लेखक), जीमूतवाहन (दायभाग के लेखक), नंद पंडित आदि द्वारा उपयोग किया जाता था, जब भी उन्हें विभिन्न स्मृतियों के बीच कोई संघर्ष या अस्पष्टता या असंगति मिलती थी। कोई कारण नहीं है कि हम उचित अवसरों पर इन सिद्धांतों का उपयोग नहीं कर सकते। हालांकि, यह गहरा खेद का विषय है कि इन सिद्धांतों का हमारे न्यायालयों में शायद ही कभी

उपयोग किया गया है। हमारे संविधान या किसी अन्य कानून में कहीं भी यह उल्लेख नहीं है कि न्यायालय केवल मैक्सवेल के व्याख्या सिद्धांतों का ही उपयोग कर सकता है। हम किसी भी व्याख्या प्रणाली का उपयोग कर सकते हैं जो हमें किसी कठिनाई को हल करने में मदद करती है। कुछ स्थितियों में मैक्सवेल के सिद्धांत अधिक उपयुक्त होंगे, जबकि अन्य स्थितियों में मीमांसा के सिद्धांत अधिक उपयुक्त हो सकते हैं।

31. मीमांसा पर लगभग सभी पुस्तकें संस्कृत में हैं, लेकिन एक अच्छी पुस्तक है, 'मीमांसा रूल्स ऑफ इंटरप्रिटेशन' जो प्रोफेसर के.एल. सरकार द्वारा टैगोर लॉ लेक्चर सीरीज़ में प्रकाशित की गई है, जिसे देखा जा सकता है।

32. यह उल्लेख किया जा सकता है कि मीमांसा के व्याख्या नियम वैदिक यज्ञों को करने में आने वाली व्यावहारिक कठिनाइयों को हल करने के लिए बनाए गए थे। विभिन्न यज्ञों को करने के नियम ब्राह्मण ग्रंथों में दिए गए हैं, जैसे शतपथ ब्राह्मण, ऐतरेय ब्राह्मण, तैत्तिरीय ब्राह्मण आदि। ब्राह्मण ग्रंथों में कई अस्पष्टताएं, संघर्ष, असंगतियां, लोप आदि थे, और इसलिए इस उद्देश्य के लिए व्याख्या के सिद्धांत बनाए गए। इस प्रकार मीमांसा सिद्धांत मूल रूप से धार्मिक उद्देश्यों के लिए बनाए गए थे, लेकिन वे इतने तर्कसंगत और तार्किक थे कि बाद में उनका उपयोग कानून, व्याकरण, तर्कशास्त्र, दर्शन आदि में किया जाने लगा, अर्थात वे सार्वभौमिक अनुप्रयोग के हो गए।

33. जैमिनी ने सूत्र 6:3:9 में कहा है:

"जब उद्देश्य और सामग्री के बीच संघर्ष होता है, तो उद्देश्य को प्राथमिकता दी जानी चाहिए, क्योंकि निर्धारित सामग्री की अनुपस्थिति में एक विकल्प का उपयोग किया जा सकता है, क्योंकि सामग्री उद्देश्य के अधीन है।"

34. इसे समझाने के लिए यह उल्लेख किया जा सकता है कि ब्राह्मण ग्रंथों में कहा गया है कि निर्धारित यूप (यज्ञ के लिए पशु को बांधने वाला खंभा) खदिर लकड़ी से बनाया जाना चाहिए। हालांकि, खदिर लकड़ी कमजोर होती है जबकि बंधा हुआ पशु बेचैन हो सकता है। इसलिए, मीमांसा सिद्धांत (जैसा कि ऊपर बताया गया है) यह अनुमति देता है कि यूप खादर लकड़ी से बनाया जा सकता है, जो मजबूत होती है। यह प्रतिस्थापन इस तथ्य के बावजूद किया जा रहा है कि निर्धारित लकड़ी खदिर है, लेकिन यह निर्धारण केवल यज्ञ के प्रदर्शन के अधीन है, जो मुख्य उद्देश्य है। इसलिए, यदि यह यज्ञ के प्रदर्शन में बाधा बनता है, तो इसे संशोधित या प्रतिस्थापित किया जा सकता है।

35. इस संबंध में हम लकड़ी की तलवार की मीमांसा (स्फदी न्याय) का भी उल्लेख कर सकते हैं, जो मीमांसा प्रणाली में एक प्रसिद्ध सिद्धांत है। यह सिद्धांत कहता है कि "किसी क्रिया के साधन के रूप में जो निर्धारित किया गया है, उसे उस क्रिया के प्रदर्शन के अनुकूल अर्थ में लिया जाना चाहिए" (जैमिनी 3:1:2, के.एल. सरकार की पुस्तक 'मीमांसा रूल्स ऑफ इंटरप्रिटेशन' में पृष्ठ 185 पर उद्धृत)। संस्कृत में ' स्फदी' शब्द का अर्थ तलवार होता है, जो सामान्यतः काटने के लिए एक धातु की वस्तु होती है।

हालांकि, यज्ञ के संदर्भ में ' स्फदी' को लकड़ी की तलवार के रूप में व्याख्यायित किया जाना चाहिए, क्योंकि यज्ञ में एक छोटी लकड़ी की तलवार का उपयोग किया जाता है, जिसे ' स्फदी' कहा जाता है, जो एक धकेलने वाला उपकरण होता है (क्योंकि यज्ञ में काटने के उपकरण की आवश्यकता नहीं होती, बल्कि केवल धकेलने वाले उपकरण की आवश्यकता होती है)। इस प्रकार, ' स्फदी न्याय' का तात्पर्य है कि हमें पाठ के उद्देश्य को समझने के लिए उसकी सही व्याख्या करनी चाहिए।

36. मीमांसा प्रणाली में, व्याख्या का शाब्दिक नियम श्रुति (या अभिदा) सिद्धांत कहलाता है, और सामान्यतः यही सिद्धांत लागू होता है जब किसी पाठ की व्याख्या की जाती है। हालांकि, कुछ अपवाद स्थितियाँ ऐसी होती हैं जब हमें शाब्दिक नियम से हटकर अन्य सिद्धांतों का सहारा लेना पड़ता है, जैसे कि (1) लिंग (लक्षण) सिद्धांत, जो शब्दों या अभिव्यक्तियों के सुझावात्मक शक्ति से संबंधित है, (2) वाक्य सिद्धांत, जो वाक्य रचना से संबंधित है, (3) प्रकरण सिद्धांत, जो अर्थ को स्पष्ट करने के लिए अन्य पाठों का संदर्भ लेने की अनुमति देता है, (4) स्थान सिद्धांत, जो एक पाठ का दूसरे पाठ के सापेक्ष स्थिति को दर्शाता है, और (5) समाख्या (नाम) सिद्धांत, जो संयुक्त नाम के व्युत्पन्न शब्दों द्वारा दिए गए संकेत के माध्यम से विभिन्न अंशों के बीच संबंध स्थापित करता है।

37. वर्तमान मामले में हमारा मत है कि लिंग (लक्षण) सिद्धांत लागू होगा।

38. लिंग का अर्थ वास्तव में संदर्भ को समझकर व्याख्या करना है, और यह व्याख्या के शाब्दिक नियम से एक अलगाव है। लिंग सिद्धांत को इस न्यायालय के उत्तर प्रदेश भूदान यज्ञ समिति बनाम बृज किशोर (एआईआर 1988 एससी 2239) के निर्णय से समझाया जा सकता है, जहाँ 'भूमिहीन व्यक्ति' शब्दों का अर्थ 'भूमिहीन किसान' से लगाया गया था, न कि भूमिहीन व्यापारी से। यहाँ हम देखते हैं कि न्यायालय ने व्याख्या के शाब्दिक नियम से हटकर फैसला किया है, क्योंकि शाब्दिक नियम के अनुसार एक बहुत अमीर व्यापारी जो जमीन नहीं रखता, उसे भी भूमिहीन व्यक्ति माना जाएगा। चूंकि उत्तर प्रदेश भूदान अधिनियम का उद्देश्य भूमिहीन किसानों को कुछ जमीन देना था, इसलिए 'भूमिहीन व्यक्ति' शब्द का अर्थ केवल 'भूमिहीन किसान' से लगाया गया। यह व्याख्या आवश्यक थी, अन्यथा उत्तर प्रदेश भूदान अधिनियम का पूरा उद्देश्य विफल हो जाता और भूमिहीन किसानों को वितरित करने के लिए दान की गई जमीन अमीर व्यापारियों द्वारा हथिया ली जाती, हालांकि उनके पास अपनी कंपनियों में शेयर, प्रतिभूतियाँ, बैंकों में करोड़ों रुपये आदि के रूप में बहुत अधिक धन हो सकता है।

39. हम यह भी बताना चाहेंगे कि लिंग (लक्षण) सिद्धांत और वाक्य सिद्धांत में अंतर है। पूर्व में पाठ के शब्दों के साथ कोई हिंसा नहीं की जाती, लेकिन शब्दों या अभिव्यक्तियों को शाब्दिक अर्थ से अलग तरीके से समझा जाता है, और इसलिए लिंग वास्तव में संदर्भ के आधार पर व्याख्या है। वाक्य में, हालांकि, पाठ के साथ कुछ हिंसा की जाती है, जैसे कि दो अलग वाक्यों को जोड़कर, या शब्दों या अभिव्यक्तियों को जोड़कर, या शब्दों या अभिव्यक्तियों को वाक्य में ऊपर या नीचे स्थानांतरित करके। यह हिंसा कभी-कभी पाठ को निरर्थक या बेतुका होने से बचाने के लिए आवश्यक हो जाती है, जैसे कि एक सर्जन को

रोगी की जान बचाने के लिए शरीर के साथ हिंसा (ऑपरेशन) करनी पड़ती है। इस उद्देश्य के लिए उहा सिद्धांत का उपयोग किया जाता है (उहा सिद्धांत या तर्क का उपयोग, आमतौर पर पाठों की व्याख्या के लिए लागू किया जाता है)।

40. इस संबंध में यह उल्लेख किया जा सकता है कि मैक्सवेल भी असाधारण स्थितियों में क़ानून के साथ हिंसा करने की अनुमति देता है। वह कहता है, "जहां किसी क़ानून की भाषा, उसके सामान्य अर्थ और व्याकरणिक संरचना के कारण, अधिनियम के स्पष्ट उद्देश्य के साथ एक स्पष्ट विरोधाभास, या कुछ असुविधा या बेतुकापन, कठिनाई या अन्याय, जो संभवतः इरादतन नहीं है, उत्पन्न होता है, वहां उस पर एक ऐसी व्याख्या लागू की जा सकती है जो शब्दों के अर्थ को संशोधित करती है, और यहां तक कि वाक्य की संरचना को भी। यह व्याकरण के नियमों से हटकर, विशेष शब्दों को असामान्य अर्थ देकर, उनके क्रम को बदलकर, उन्हें पूरी तरह से अस्वीकार करके, या अन्य शब्दों को जोड़कर किया जा सकता है, निस्संदेह इस विश्वास के प्रभाव में कि विधायिका का इरादा संभवतः वह नहीं हो सकता जो शब्द दर्शाते हैं, और इस प्रकार किए गए संशोधन वास्तव में लापरवाह भाषा के सुधार हैं और सही इरादे को दर्शाते हैं।" इस प्रकार, एस.एस. कालरा बनाम भारत संघ 1991(2) एससीसी 87 में इस न्यायालय ने कहा कि कभी-कभी न्यायालय उन शब्दों को जोड़ सकते हैं जो गलती से छूट गए हों। (जी.पी. सिंह की पुस्तक "प्रिंसिपल्स ऑफ स्टैट्यूटरी इंटरप्रिटेशन" 9वां संस्करण, 2004, पृष्ठ 70 से 77 में उल्लिखित निर्णय भी देखें)।

41. लिंग सिद्धांत को जैमिनी ने कई सूत्रों और अधिकरणों में दर्शाया है। इस प्रकार, प्राणभृत अधिकरण, जो जैमिनी के सूत्र 28, अध्याय IV, पुस्तक 1 पर आधारित है, यह दर्शाता है कि कैसे शब्दों ने लिंग या लक्षण प्रक्रिया के माध्यम से एक व्यापक अर्थ प्राप्त किया।

42. तैत्तिरीय संहिता (5.3.1.2) में एक अंश है:

"वह प्राणभृत का निपटान करता है - प्राणभृत उपदद्याति "

फिर से उसी संहिता (5.7.2.5) में एक समान अंश है:

"वह अज्यानी का निपटान करता है - आज्यानोरेता उपद्द्याति "

43. अब एक मामले में प्राणभृत और दूसरे में अज्यानी का क्या अर्थ है? प्राणभृत और अज्यानी शब्द क्रमशः दो मंत्रों या छंदों के नाम हैं जो उन शब्दों से शुरू होते हैं। ये छंद यज्ञ में एक निश्चित उद्देश्य के लिए आवश्यक ईंटों को समर्पित करने में उपयोग किए जाते हैं। इस तथ्य से, प्राणभृत मंत्र द्वारा समर्पित ईंटों को प्राणभृत का नाम मिल गया। इसी तरह, अज्यानी मंत्र द्वारा समर्पित ईंटों को अज्यानी का नाम मिल गया। लेकिन समय के साथ, एक विशेष प्रकार की ईंटों के पूरे ढेर को प्राणभृत कहा जाने लगा, क्योंकि उस ढेर की एक या दो ईंटों को प्राणभृत ईंटों के रूप में समर्पित किया गया था। इस प्रकार, प्राणभृत का उदाहरण उपरोक्त तरीके से एक नाम के दायरे को बढ़ाने के लिए एक मुहावरा बन गया। वास्तव में, इन मामलों में प्राणभृत और अज्यानी शब्दों का अर्थ शब्दों की विशेष संगति और उन अंशों

के संदर्भ से निर्धारित होता है जिनमें वे उपयोग किए जाते हैं। ऐसे उपयोग को लिंगसमबाय (लिंग का अवतार) कहा जाता है।

44. नंद पंडित ने अपने ग्रंथ 'दत्तक मीमांसा' में प्राणभृत सिद्धांत का उल्लेख करते हुए यह दिखाया है कि यद्यपि 'प्रतिनिधि' शब्द का प्रयोग प्रारंभ में केवल छह प्रकार के पुत्रों के लिए किया गया था, बाद में सामान्य प्रयोग के कारण यह शब्द सभी बारह प्रकार के पुत्रों पर लागू हो गया। प्राणभृत सिद्धांत कहता है:

"किसी वर्ग के एक प्रमुख वस्तु की विशेषता पूरे वर्ग को नाम दे सकती है।"

45. प्राणभृत का शाब्दिक अर्थ है जीवन से भरना या जीवन प्रदान करना; लेकिन यह अभिव्यक्ति एक मंत्र की शुरुआत है जिसका उपयोग कुछ ईंटों को समर्पित करने में किया जाता है। इसलिए यह शब्द एक प्रकार की ईंटों के लिए प्रयोग होने लगा (प्राणभृत उपदद्याति)। इसी प्रकार, अज्यानी शब्द भी एक अन्य प्रकार की ईंटों के लिए प्रयोग होने लगा।

46. प्राणभृत सिद्धांत इस मामले में भी लागू होता है क्योंकि हमें भारतीय टेलीग्राफ नियमों के नियम 443 में 'ग्राहक' शब्द को जीवंत अर्थ (यानी उचित व्याख्या) देना है।

47. प्राणभृत सिद्धांत का उपयोग अक्सर किसी पाठ की व्याख्या करते समय इसे उदाहरणात्मक मानकर किया जाता है, न कि संपूर्ण। व्याख्या का उदाहरणात्मक नियम शाब्दिक नियम से एक अलगाव है, जिसे सामान्यतः किसी पाठ की व्याख्या करते समय अपनाया जाता है। हालांकि, कभी-कभी शाब्दिक नियम से अलग होना अनुमेय होता है, और ऐसा ही एक अलगाव उदाहरणात्मक नियम है। उदाहरण के लिए, संस्कृत में एक प्रसिद्ध कथन है "काकेभ्यो दधि रक्षितम्" जिसका अर्थ है "दही को कौवों से बचाओ"। इस वाक्य में 'कौवा' शब्द केवल उदाहरणात्मक है, न कि संपूर्ण। इसका यह अर्थ नहीं है कि दही को केवल कौवों से बचाना चाहिए, लेकिन बिल्लियों, कुत्तों या गंदगी आदि से खराब होने देना चाहिए। इसका वास्तविक अर्थ यह है कि दही को सभी खतरों से बचाना चाहिए। इसलिए, उपरोक्त कथन में 'कौवा' शब्द केवल उदाहरणात्मक है, न कि संपूर्ण।

48. हम एक और उदाहरण ले सकते हैं। अमेरिकी संविधान के अनुच्छेद 1 धारा 8 में कहा गया है कि कांग्रेस (अमेरिकी संसद) सेना और नौसेना का गठन कर सकती है। इसमें वायु सेना का कोई उल्लेख नहीं है, क्योंकि 1791 में जब अमेरिकी संविधान लागू हुआ था, तब विमान नहीं थे। पहला विमान राइट बंधुओं ने 1903 में बनाया था। हालांकि, आज की वास्तविकता यह है कि एक आधुनिक सेना वायु सहयोग के बिना नहीं लड़ सकती। अमेरिकी संविधान में संशोधन करना एक बहुत ही कठिन और लंबी प्रक्रिया है क्योंकि इसमें कांग्रेस के दोनों सदनों के दो-तिहाई बहुमत और राज्यों के तीन-चौथाई की अनुमति की आवश्यकता होती है। जब तक यह होता है, दुश्मन देश पर आक्रमण करके उसे कब्जा कर सकता है। इसलिए, 'सेना और नौसेना' शब्दों को उदाहरणात्मक माना जाना चाहिए, न कि संपूर्ण, और इनका वास्तविक अर्थ देश की सुरक्षा के लिए आवश्यक सभी सशस्त्र बल हैं (जिसमें वायु सेना भी शामिल है)।

इस प्रकार, अमेरिकी संविधान के अनुच्छेद 1 धारा 8 की व्याख्या श्रुति नियम (शाब्दिक नियम) के बजाय लिंग नियम के आधार पर की जानी चाहिए। अनुच्छेद 1 धारा 8 में 'सेना और नौसेना' शब्दों को शाब्दिक रूप से नहीं, बल्कि सुझावात्मक रूप में समझा जाना चाहिए। दूसरे शब्दों में, ये केवल उदाहरणात्मक हैं, और इनका वास्तविक अर्थ देश की सुरक्षा के लिए आवश्यक सभी सशस्त्र बल हैं।

49. हम मैक्सवेल के 'कानूनों की व्याख्या' का भी उल्लेख कर सकते हैं, जिसमें कहा गया है:

"लेकिन यह एक और मूलभूत नियम है कि कोई चीज जो कानून के शब्दों के भीतर है, वह कानून के भीतर नहीं मानी जाएगी जब तक कि वह विधायिका के वास्तविक इरादे के भीतर न हो, और शब्दों को, यदि पर्याप्त लचीला हो, उस अर्थ में समझा जाना चाहिए जो व्याकरणिक रूप से कम सही हो सकता है, लेकिन उस इरादे के साथ अधिक सामंजस्य रखता हो। भाषा शायद ही कभी इतनी स्पष्ट होती है कि उसे एक से अधिक अर्थ में प्रयोग न किया जा सके; और सभी मामलों में इसके शाब्दिक और प्राथमिक अर्थ पर कठोरता से बने रहना इसके वास्तविक अर्थ को कई बार खो देगा। यदि उन कानूनों को शाब्दिक अर्थ दिया गया होता जो एक साधारण व्यक्ति को पुजारी पर 'हाथ रखने' से मना करते थे और सड़क पर खून बहाने वाले सभी को दंडित करते थे, तो एक साधारण व्यक्ति जो हथियार से पुजारी को घायल करता, वह प्रतिबंध के अंतर्गत नहीं आता, और एक सर्जन जो किसी की जान बचाने के लिए खून निकालता, वह दंड के योग्य होता। शाब्दिक व्याख्या के अनुसार, मोहम्मद ॥ द्वारा वेनिस के गवर्नर के शरीर को आधा काटना उसके वादे का उल्लंघन नहीं था क्योंकि उसने सिर बचाने का वादा किया था; न ही तैमूर द्वारा एक गैरीसन को जिंदा दफनाना उसके खून न बहाने के वादे का उल्लंघन था।"

मैक्सवेल यह भी कहते हैं:

"किसी कानून के शब्दों को उस अर्थ में समझा जाना चाहिए जो उस अधिनियम के विषय और विधायिका के उद्देश्य के साथ सबसे अधिक सामंजस्य रखता हो। उनका अर्थ केवल व्याकरणिक या शब्द-साधन की दृष्टि से नहीं, बल्कि उस विषय या अवसर के संदर्भ में और प्राप्त किए जाने वाले उद्देश्य के अनुसार समझा जाना चाहिए।" (जोर दिया गया)

50. इस प्रकार, दोनों व्याख्या प्रणालियों में, मीमांसा प्रणाली और मैक्सवेल की प्रणाली, यह बल दिया गया है कि किसी कानून के इरादे को अक्सर समझना आवश्यक होता है ताकि उसकी सही व्याख्या की जा सके, और यह नहीं कि न्यायालय कभी भी शाब्दिक व्याख्या नियम से अलग नहीं हो सकता। यह सब संदर्भ, विषय-वस्तु, और उस प्रावधान के उद्देश्य पर निर्भर करता है।

51. जैसा कि पहले कहा गया है, नियम 443 की व्याख्या करते समय हमें एक ऐसी व्याख्या देनी होगी जो इस नियम के इरादे को पूरा करे, जो यह है कि टेलीफोन बिलों का तुरंत भुगतान किया जाना चाहिए, अन्यथा विभाग के पास टेलीफोन सेवाओं को वित्तपोषित करने के लिए आवश्यक धन की कमी होगी जो उपभोक्ताओं को प्रदान की जानी हैं। आखिरकार, टेलीफोन विभाग के कर्मचारियों का वेतन देना होता है, टेलीफोन उपकरणों को बनाए रखना, मरम्मत करना और आधुनिक बनाए रखना होता है। कभी-

कभी नई तकनीक को शुरू करना पड़ता है। विभिन्न अन्य आवश्यकताएं हो सकती हैं जिनके लिए धन की आवश्यकता होती है, और यह सब केवल तभी संभव है जब टेलीफोन बिलों का समय पर भुगतान किया जाए। इसलिए, हमारे विचार में, नियम 2(pp) में 'ग्राहक' शब्द को एक व्यापक अर्थ दिया जाना चाहिए, जैसा कि पहले कहा गया है।

52. उपरोक्त के आधार पर, हमें इस अपील में कोई ताकत नहीं दिखती है, और इसे खारिज किया जाता है। कोई लागत का आदेश नहीं होगा।

Buddhist logico-epistemology

Buddhist logico-epistemology is *a* term used in Western scholarship for *pramāṇa-vāda* (doctrine of proof) and *Hetu-vidya* (science of causes). Pramāṇa-vāda is an epistemological study of the nature of knowledge; Hetu-vidya is a system of logic.[1] 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 Kathāvatthu.

The first Buddhist thinker to discuss logical and epistemic issues systematically was Vasubandhu in his *Vāda-vidhi* ("A Method for Argumentation"), who was influenced by the Hindu work on reasoning, the *Nyāya-sūtra*.[2]

A mature system of Buddhist logic and epistemology was founded by the Buddhist scholar Dignāga (c. 480–540 CE) in his *magnum opus*, the *Pramāṇa-samuccaya*.[3][4] 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.[5]

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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-à-vis sophistical argument, and similar topics".[6] 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.[7]

‘Indian Logic’ should be understood as being a different system of logic than modern classical logic (e.g. modern predicate calculus), but as *anumāna*-theory, a system in its own right.[8] ‘Indian Logic’ was also influenced by the study of grammar, whereas Classical Logic which principally informed modern Western Logic was influenced by the study of mathematics.[9]

A key difference between Western Logic and Indian Logic is that certain epistemological issues are included within Indian Logic, whereas in modern 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.[9] 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.[10][11][12] 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 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.[13]

Pramana

Pramāṇa (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 *pramana*. Buddhist logico-epistemology was influenced by the Nyāya 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.[14]

Most Indic *pramanavada* accept 'perception' (Sanskrit: pratyakṣa) and 'inference' (Sanskrit: anumāna), but for some schools of orthodox Hinduism the 'received textual tradition' (Sanskrit: āgamāḥ) 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 pratyakṣa and anumāna. This view is thus in line with the Buddha's injunction in the *Kalama Sutta* not to accept anything on mere tradition or scripture.[15]

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:[16]

- 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.[17] 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".[18] 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 modern 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 (ayatanas).[19] The Kalama sutta states that verification through one's own personal experience (and the experiences of the wise) is an important means of knowledge.[20]

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.I.392–4) the Buddha states that a belief should only be accepted if it leads to wholesome consequences.[21] This has led scholars such as Mrs Rhys Davids and Vallée-Poussin to see the Buddha's view as a form of Pragmatism.[22][23] 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."[24] 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.[25] 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).[26] 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.[27]

Debate and analysis

The Early 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.[28] 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*.[29] 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.[30]

According to Jayatilleke, 'pure reasoning' or 'a priori' reasoning is rejected by the Buddha as a source of knowledge.[31] 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:[32]

- 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".[33]

- 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 (*paññatti*) could be used in conventional everyday speech while at the same time not referring to anything that exists ultimately (such as the pronouns like "I" and "Me").[34] 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.[35]

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*).[36] 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."[37] 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" (catuṣkoṭi) logical structure as a tool in argumentation. According to Jayatilleke, these "four forms of predication" can be rendered thus:[38]

1. S is P, e.g. *atthi paro loko* (there is a next 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".[39] Jayatilleke notes that the last two are clearly 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*).[40]

Two levels of Truth

The early 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 he is speaking about entities or substances; to this extent his meaning is to be inferred (neyyattha-). 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 certainly holds good for the Nikäyas at least, in the light of the above-statement.[41]

The later commentarial and Abhidharma literature began to use this distinction as an epistemic one. They spoke of two levels of truth, the conventional (samutti), and the absolute (paramattha).[42] This theory of double truth became very influential in later Buddhist epistemic discourse.

Kathāvatthu

The Theravada Kathāvatthu (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).[43] Western scholarship by St. Schayer and following him A. K. Warder, have argued

that there is an "anticipations of propositional logic" in the text.[44] 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."[45]

In the Kathāvatthu, 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*):[45]

1. Is A B?
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.[45]

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.[46]

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.[46]

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:[27]

1. The principle of dependence (apeksāyukti), 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 (kāryakāranayukti), 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 (sāksātkriyāsādhanayukti). We realize the presence of water from moisture and of fire from smoke.
4. The principle of natural reasoning, or the principle of reality (dharmatāyukti), 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."[27]

Nyaya

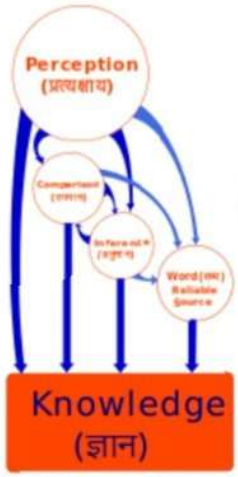
The Nyāya Sūtras of Gotama (c. 1st or 2nd century CE) is the founding text of the Nyaya school. The text systematically lays out logical rules for argumentation in the form of a five step schema and also sets forth a theory of epistemology.[47] According to Jonardon Ganeri, the Nyaya sutra brought about 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.[47]

BK Matilal outlines the five steps or limbs of the Nyaya method of reasoning as follows:[48]

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.[48]

The Naiyayikas (the Nyaya scholars) also accepted four valid means (*pramaṇa*) of obtaining valid knowledge (*pramana*) - perception (*pratyakṣa*), inference (*anumāna*), comparison (*upamāna*) and word/testimony of reliable sources (*śabda*).



Nyayasutras

The Nyaya school considers perception, inference, comparison/analogy, and testimony from reliable sources as four means to correct knowledge, holding that perception is the ultimate source of such knowledge.

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.

Mahayana Buddhist philosophy

Nagarjuna (c. 150 – c. 250 CE), one of the most influential Buddhist thinkers, defended the theory of the emptiness (shunyata) of phenomena and attacked theories which posited an essence or true existence (svabhava) to phenomena in his magnum opus The Fundamental Verses on the Middle Way.[49] He used the Buddhist catuṣkoṭi ("four corners" or "four positions") to construct reductio ad absurdum arguments against numerous theories which posited essences to certain phenomena, such as causality and movement. In Nagarjuna's works and those of his followers, the four positions on a particular thesis are negated or ruled out (Sk. *pratiṣedha*) as exemplified by the first verse of Nagarjuna's Middle way verses which focuses on a critique of causation:[50]

> "Entities of any kind are not ever found anywhere produced from themselves, from another, from both [themselves and another], and also from no cause."

Nagarjuna also famously relied upon refutation based argumentation (*vitanda*) drawing out the consequences (*prasanga*) and presuppositions of his opponents' own theories and showing them to be self refuting.[51] Because the *vaitandika* only seeks to disprove his opponents arguments without putting forward a thesis of his own, the Hindu Nyaya school philosophers such as Vatsyayana saw it as unfair and also irrational (because if you argue against P, you must have a thesis, mainly not P).[52] According to Matilal, Nagarjuna's position of not putting forth any implied thesis through his refutations would be rational if seen as a form of illocutionary act.[52]

Nagarjuna's reductions and the structure of the catuṣkoṭi became very influential in the Buddhist Madhyamaka school of philosophy which sees itself as a continuation of Nagarjuna's thought. Nagarjuna also discusses the four modes of knowing of the Nyaya school, but he is unwilling to accept that such epistemic means bring us ultimate knowledge.[27]

Nagarjuna's epistemic stance continues to be debated among modern scholars, his skepticism of the ability of reason and language to capture the nature of reality and his view of reality as being empty of true existence have led some to see him as a skeptic, mystic, nihilist or agnostic, while others interpret him as a Wittgensteinian analyst, an anti-realist, or deconstructionist.[27]

Nagarjuna is also said to be the author of the *Upāyaśŗdaya* one of the first B pr reasoning and argumentation.[53] He also developed the Buddhist theory of two t ultir truth as the truth of emptiness.

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Vasubandhu was one of the first Buddhist thinkers to write various works on sound reasoning and debate, including the *Vādavidhi* (Methods of Debate), and the *Vādavidhāna* (Rules of Debate).[53] Vasubandhu was influenced by the system of the Nyaya school. Vasubandhu also introduced the concept of 'logical pervasion' (vyapti).[2] He also introduced the Trairūpya (triple inferential sign). The Trairūpya is a logical argument that contains three constituents which a logical 'sign' or 'mark' (linga) must fulfill to be 'valid source of knowledge' (pramana):[54]

1. It should be present in the case or object under consideration, the 'subject-locus' (pakṣa)
2. It should be present in a 'similar case' or a homologue (sapakṣa)
3. It should not be present in any 'dissimilar case' or heterologue (vipakṣa)

> It is this praxis that leads a representative thinker such as Dharmakīrti to claim that the Buddha, whose view he and his successors claim to propound, is a true embodiment of the sources of knowledge. Thus, far from seeing a tension between empirical scrutiny and the exercise of reason, the Buddhist epistemological enterprise positions itself not merely as a dialogical disputational method for avoiding unwarranted beliefs, but as a practice aimed at achieving concrete, pragmatic ends. As Dharmakīrti reminds his fellow Buddhists, the successful accomplishment of any human goal is wholly dependent on having correct knowledge.[27]

Later philosophers who worked on Buddhist epistemology and logic include Devendrabuddhi (630-690 C.E.), Dharmottara (750-8 10 C.E.), Prajñākaragupta (740-800 C.E.), Jñanasrimitra (975–1025) and Ratnakīrti (11th century).

Bhāvaviveka and *svatantrika*

Bhāvaviveka (c. 500 - c. 578) appears to be the first Buddhist logician to employ the 'formal syllogism' (Wylie: sbyor ba'i tshig; Sanskrit: prayoga-vākya) in expounding the Mādhyamaka view, which he employed to considerable effect in his commentary to Nagarjuna's *Mūlamadhyamakakārikā* entitled the *Prajñāpradīpa*.[66]

Bhāvaviveka was later criticized by Chandrakirti (540-600) for his use of logical arguments. For Chandrakirti, a true Mādhyamika only uses reductio ad absurdum arguments and does not put forth positive arguments. Chandrakirti saw in the logico-epistemic tradition a commitment to a foundationalist epistemology and essentialist ontology, while for him a Mādhyamika's job should be to just deconstruct concepts which presuppose an essence.[67]

In spite of these criticisms, Buddhist philosophers such as Jñanagarbha (700-760) and Śāntarakṣita (725–788) continued to explain Madhyamaka philosophy through the use of formal syllogisms as well as adopting the conceptual schemas of the Dignaga-Dharmakirti school.[67] This tendency is termed *Svātantrika*, while Chandrakirti's stance is termed *Prasangika*. The Svatantrika-Prasaṅgika distinction is a central topic of debate in Tibetan Buddhist philosophy.

Tibetan tradition

Tom Tillemans, in discussing the Tibetan translation and assimilation of the logico-epistemological tradition, identifies two currents and transmission streams:

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The first is the tradition of the Kadampa scholar Ngok Lodzawa Loden Shayrap (1059–1109) and Chapa Chögyi Sengge (1109–69) and their disciples, mainly located at Sangpu Neutok .[68] Chapa's *Tshad ma'i bsdus pa* (English: 'Summaries of Epistemology and Logic') became the groundwork for the 'Collected Topics' (Tibetan: Dūra; Wylie: bsdus grwa) literature, which in large part furnished the Gelugpa-based logical architecture and epistemology.[68] These two scholars (whose works are now lost) strengthened the influence of Dharmakirti in Tibetan Buddhist scholarship.[69]

There is also another tradition of interpretation founded by Sakya Pandita (1182–1251), who wrote the *Tshad-ma rigs-gter* (English: "Treasury of Logic on Valid Cognition").[70][71][68] Sakya pandita secured the place of Dharmakirti's *pramanavarttika* as the foundational text on epistemology in Tibet. Later thinkers of the Gelug school such as Gyeltsap and Kaydrup attempted a synthesis of the two traditions, with varying results. This is because the views of Chapa were mostly that of Philosophical realism, while Sakya pandita was an anti-realist.[72]

THEORIES OF NATURE OF REALITY: Materialism of Charvaka, Anekantavada of Jainism and Non-dual Nature of Reality in Advaita

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This course content covers three diverse theories of reality in Indian tradition: materialism of Charvaka, theory of many-sidedness of truth in Jainism and philosophy of non-duality in Advaita. Charvaka materialism is studied in terms of Scepticism and Evidence-based reasoning, the concept of Anekantavada is studied in terms of the impact of multiple perspectives on legal interpretation and decision-making, and finally, Advaita theory of non-duality is discussed in terms of interconnectedness of all beings. This course content is primarily designed for Jurisprudence-II paper of LLB Courses. It is intended to serve the purpose of introducing law students to diverse Indian Philosophical approaches to the nature of reality and the impact of these approaches in the evolution of Indian philosophy of law.

I. GENERAL INTRODUCTION TO INDIAN METAPHYSICS

The nature of reality, being or existence is a subject-matter of metaphysics[1]. The Indian knowledge tradition, spanning millennia, offers a rich tapestry of philosophical and spiritual perspectives on the nature of reality. These various perspectives have enriched human understanding of the universe, the self, and the relationship between them, providing valuable insights for individuals seeking to navigate the complexities of existence. When the materialist Charvaka says, "matter is the only reality", he is offering a metaphysics which is opposed to the theory of reality in Upanishads and Vedantic literature, which say *"all this is Atman"* (*Chandogya*) or *"the ultimate reality is known and realised within us as the Self"* (*Brahmasutra*). Further, when Jaina says that there are multiple perspectives to reality, they are offering metaphysics, which is substantially different from both the Charvaka and Vedanta. In these diverse views, from the early materialism to the profound concept of non-duality, Indian thinkers have explored the universe's essence, the self, and the relationship between them. The logical realism and pluralism of Nyaya, atomic realism of Vaisesika, evolutionary dualism of non-theistic Samkhya, meditative dualism of theistic Yoga, linguistic, interpretative and realistic pluralism of Mimamsa, and Absolutism and monism of Vedanta offer too many diverse theories of reality even within the believers on the authority of Vedas (*Astika Darshan*). It is because the

[1] Metaphysics is a branch of philosophy that explores the fundamental nature of reality. It asks big questions about the universe, existence, and our place in it. Metaphysics uses logic and reasoning to explore the questions on space, time, causality, consciousness etc, and often delves into abstract concepts and thought experiments. It's a field that encourages deep thinking about the world around us and our place in it.

ancient Indian minds were motivated to their philosophical speculations by their earnest sense of wonder. This earliest wonder and critical approach is reflected by the oldest available text *Rig Veda* in (*Nasadiya-Sukta* X. i.), which expresses a deep doubt as to whether the world comes from being (*Sat*) or non-being (*Asat*). The same *Rig* vedic temperament enables the growth of all shades of metaphysical doctrines in India from the scepticism of materialistic doctrines to the idealistic interpretation of the world.

These conceptions of reality run in the subterranean sphere of Indian life-view and the socio-political thoughts developed in the Indian soil. As Indian thought is as variegated as the socio-cultural lives flourished in its linguistic, cultural and geographical diversity across the sub-continent, the tendency to synthesise the Indian systems of thought as different aspects of one unified point of view would be erroneous. It would not only undermine the fact that each system of thought has maintained its identity continuously for centuries but it would also undermine the rich and vigorous argumentative tradition and public debates amongst the competing systems which enriched their philosophical rigour. However, these philosophical and theoretical differences apart, there is an unbelievable uniformity in the domain of belief and faith. The unity of spirit in the diversity of ritualistic and religious practices and differences in philosophical speculations is the most surprising element in the Indian way of life. The philosophical theories of suffering, ultimate freedom, non-attachment, the unreality of the apparent and of moral requirement of intellectual attainments have produced convictions and beliefs which have not only altered the outlook of their believers but have given a different turn to their style of living (Saksena, 36).

Further, the philosophical views of India have permeated the entire population irrespective of their intellectual calibre, whereas in other civilisations, philosophical views are circulated amongst intellectuals alone. It is because these truths are rooted in the total experience of man, the whole of being and not based on any single sensory, rational or intuitive part of his being. The modern Western analytical and rational mind tends to break up the unity of man into separate and autonomous compartments of reason, faith, emotions and feelings and thereby miss the entire forest ecosystem in their attempt to analyse the tree, river or the mountain as if they exist independent of each other. The unitary and integrated vision of man, life and world is the single most distinguishing feature of the Indian mind. Though there are divergences in certain details or technical terms, the unity of *sadhana* in control of passions, non-injury to life-forms and check on all desires for pleasure serve as a common ground derived from the Yogic philosophy (Dasgupta, Vol. I. 77). Further, this vision has served as the foundation of their religious beliefs. This uniformity in Bharatiya beliefs and Bharatiya view of life, however, often confuses an external observer and tends to gloss the philosophical differences which become evident only in a deeper inquiry into the various literatures developed by these schools of thought. Therefore, in order to understand India and its people, it is important to understand the basic philosophies of India because the intimacy of philosophy and life in India is so fundamental to the whole Indian point of view (Moore, 2). This understanding broadens the

horizon of philosophers and jurists and enlarges the scope of their thinking. The plethora of ideas that Indian tradition offers, warrants intense and comprehensive study not only because of its diversity but also because it is a tight-rope walk between *"truths and half-truths, facts and fancy, understanding and misunderstanding, extremes and exaggeration, admiration and ridicule, devotion and what seems sometimes malicious distortions"* (Moore, 1). It is particularly a difficult task for the modern Indian mind, which is trained in Western epistemologies and its 'thought world' and grown up in a political setting of polarised convictions, to strike a balance between admiration and neglect and study the subject-matter with a critical conscience needed for a philosophical approach.

The various approaches to reality within Indian philosophy have significantly influenced the development of Indian legal thought. It is important to note that the impact of Indian philosophies on law is complex and multifaceted. The concepts of social, political and legal philosophy, therefore, need combination, modification and reconstruction for their final application. Nevertheless, the methods and ways of the proposed reconstruction may also be found in the Indian epistemological tradition itself.

Is There a Metaphysical Foundation of the Principles of Morals and Thereby That of Law?

Western philosophy has a width and breadth thanks to the *Republic* of Plato, which was mainly interested in the discovery of the true nature of man in society in order to build a stable society upon earth. Its intent was to discover the eternal laws of man and society in order to remold them accordingly. One of the most prominent and influential philosophers of modern philosophy, Kant inquires into the metaphysical foundation of the principles of morals and finds it in the rational nature of man. Practical reason leads him to the principles of universalizability, treating human beings as end-in-itself and the third formulation of his famous categorical imperative provides the basis for his political philosophy, an international politics of peace based on republicanism and liberal democracy.[2] Many commentators opine that such a thorough metaphysics of morality is not to be found in Indian philosophy (Raju, 56). It is so because of many reasons, and the foremost of them is that the Dharmashastras (*Manu* and *Yajnavalkya*) did not push their inquiries into their metaphysical foundations nor did the metaphysicians develop the social implications of their thought. The principal direction of Indian thought has never been to social and material sciences, but to a deeper level of being. The Indian treatise on laws could also have developed logic and epistemology of its own, just like the Indian medical practitioners did. *Charakasamhita* talks about the rules that were to be observed in actual arguments and used

[2] Kant argued that moral principles shouldn't be based on experience or observation, as those can be subjective and change over time. Instead, he believed morality should be grounded in reason and universal principles that apply to everyone, everywhere. Metaphysics of morals provides this foundation by exploring the fundamental nature of moral concepts like good will, duty, and the categorical imperative. Metaphysics of morals helps us understand how our rational nature interacts with our inclinations and desires, shedding light on the challenges of moral decision-making and the importance of self-control and moral character.

logic not only to diagnose a disease, but also in the debates with one-another. It also talks about a Pramana, *Yukti*, (coming to a conclusion by a series of syllogisms of probabilities) in addition to Perception, Inference and *Aptopadesa,* which is not found in any other logical school. However, it was primarily developed as a method and philosophy of science i.e., an epistemological and logical foundation for a scientific practice of medicine. On the similar lines, the methodological and epistemological thinking in the logical schools of Indian thought could be of much help to the philosophy of law from a Dharmic perspective.

The West has built up philosophical structures to support the newly discovered, formulated and revived values, particularly democracy and individual rights. The Indian approach, however, was to delve deeper and inquire into the true nature of the self. The metaphysics of Indian moral ideals and thereby politico-legal understanding, therefore, can only be searched in the Epics and the Bhagavad-Geeta, which is believed to be the cream of the Upanishadic philosophy. Geeta talks about two Dharmas: *Pravritti* or activity and *Nivritti* or renunciation. *"Twofold dharma is the cause of stability of the world order and also the means by which men attain prosperity and the highest good"* (Geeta XVIII, 78). The Upanishads do not deny the reality of the world. They allow it as an empirical reality (*vyavaharika satta*). As long as man is conscious of multiplicity, he must deal with it as real. He must accept social values and ethical laws. The *smritis* recognise that the immutable and universal philosophical truths must be adapted to peculiar social conditions of time and place. Geeta do not distinguish between spiritual enlightenment and the performance of social duties in the spirit of non-attachment. When Arjuna wanted to retire, Krishna characterised his attitude as *"lowness of spirit, unbecoming of his svadharma, dishonourable, unmanly, and an obstacle to the attainment of heaven"* (Geeta, II-2.3).

In this context, it wouldn't be out of place to remind ourselves about the contextuality in Indian thought. There is a tendency to recognize the importance of context and individual circumstances in understanding and applying moral and legal principles in the Indian way of life. The notion of *ritusamyata* or appropriateness in Indian Philosophy is applied to poetry, music, sacrificial ritual and medicine. When in *Brihadaranyaka Upanishad*, Lord Prajapati speaks in thunder three times: 'DA DA DA', the gods hear it as *damyati* or control, the *daityas* (being habitual to cruelty, hear it as *dayadhvam,* 'be compassionate' and humans (being submerged in greed, hear it as *datti* or 'give to others'. Thus context-sensitivity is spread over in all enquiries. So rasa in aesthetics, Moksha as aims of life', crimes and punishment are defined in contextuality. Legal authorities try to reduce the appropriateness or contextuality to a principle of 'equitable relativity' (Datta, 292). Manu (8.126) says punishment should be inflicted after examining the circumstances, place, and time as well as the worth and offense of the culprit.

This perspective can lead to a more nuanced and flexible approach to legal interpretation and application, taking into account the unique needs and circumstances of individuals and communities. The transition from the moral principles in Ramayana to that of Mahabharata best exemplifies it. In contrast to the 'formalistic' ethics advocated in the Ramayana, in which telling the truth, keeping a promise, or doing one's caste duty, happens to be unconditional obligation,

the Mahabharata adopts more pragmatic considerations. For Krishna in the Mahabharata, formal obligations need not override all other moral and non-moral considerations. Krishna's attitude to the formal moral code can be compared to that of a poet, who *'accepts the constraints of metre, verses and metaphors . . . but has absolute control over them. He uses them to produce music which you cannot but admire. He governs from above but does not dictate'* (Matilal, 2015, 34).

The Indian philosophical traditions have deep metaphysical underpinnings that inform their ethical systems. Though they have a diverse range of perspectives, rather than any unified metaphysics, their common inspiration from the epics is noteworthy. There are certain elements in these thinking which are discernible even in that diversity.

The first among them is the concept of Karma. The doctrine of Karma is a central tenet in many Indian philosophies, including Hinduism, Buddhism, and Jainism. It is a storehouse of the Indian way of life and that of being. It compensates the under-emphasis on 'man as a social unit' by the Indian thinkers. It posits that actions have consequences, not just in this life but also in future lives. Karma is often linked to the idea of reincarnation (*samsara*), the cycle of birth, death, and rebirth. Ethical actions are seen as a way to accumulate good karma and ultimately achieve liberation (*moksha* or *nirvana*) from this cycle. Max Weber also sees ethical rationality in the karma doctrine (Weber, 121). The Karma theory in its simplest form means that every act, whether good or bad, produces a certain result which cannot be escaped. The doctrine is posited as a moral necessity. Metaphysically, Karma is based upon *"the doctrine of physical causation, according to which each effect has to be accounted for by its causal precedents"* (Matilal, 2015, 412). Karma doctrine attempts to answer three problems:

1. It refuses the view that world is arbitrary
2. Believes in the freedom of will and it is against fatalism and determinism, and
3. Attempts to answer the inequalities in the world without resorting to the presumption of all powerful God.

It is neither a mechanical law nor a verifiable principle, but probably the best possible explanation to justify the moral responsibility of human action (Matilal, 2015, 413). Sankara says *"how god can be responsible for these worldly inequalities without being unjust and partial"* (2.1.34-6). So God is dependent upon man's Karma. Man's own character decides his destiny. Sankara says that God creates everything depending necessarily upon the *Dharma* and *Adharma* (the residual force of Karma) of the living beings. Just as rain is the creator of all vegetation, the difference between the species is due to the various potentialities of the respective seeds. Like rain, God is the common cause of the creation but the respective merit (Dharma) belongs to the individual souls. So *"being bound by such limitations God cannot be blamed for lack of impartiality"* (2.1.34).

The second element is the nature of the self. Many Indian schools of thought explore the nature of the self or soul. Some, like Advaita Vedanta, posit a non-dualistic reality where the

individual self (Atman) is ultimately identical to the ultimate reality (Brahman). Understanding this interconnectedness can lead to ethical behaviour, as harming others is seen as ultimately harming oneself. A common thread in many Indian philosophies is the emphasis on the interconnectedness of all things. This understanding can have profound implications for ethical behaviour.

The third is the concept of *Dharma*, which is a complex concept that encompasses duty, righteousness, and the natural order of the universe. It is not just about following rules, but also about understanding one's place in the cosmos and acting accordingly.

The fourth is the importance of consciousness. Many Indian philosophies emphasize the role of consciousness in shaping our experience of reality. Ethical development is often linked to cultivating self-awareness and understanding the nature of consciousness. Practices like meditation and yoga are seen as ways to purify the mind and develop greater ethical sensitivity.

The fifth is non-violence. Ahimsa is a fundamental principle in many Indian ethical systems. It emphasizes the importance of non-violence not only in action or deed, but also in thought and language. This principle extends to animals and all living beings.

Thus though the Dharmashastras themselves have not attempted anything like Kant's *Fundamental Principles of the Metaphysics of Morals*, presuming the understanding of the teachings of Epics and that of Indian way of life, a different paradigm of thought may be attempted to inquire into these aspects. Therefore, the question of metaphysical foundation of morality in Indian context needs to be dealt with carefully without falling into the pitfalls of comparative philosophy, like adopting available western categories to analyse *Dharmic* ideals or falling into the trap of uncritical admiration or utter contempt. When Tagore spoke of the 'surplus in man', he had in mind our capacity to question and transcend our own values, and eventually to reach the dignity that comes with self-understanding. 'It may be necessary to revive, the old classical Indian concern for the dignity of human nature… making the 'Surplus in Man' more visible to us in our perception of the self. Tagore likened the cultures of the world to several mountain peaks 'having different altitude, temperature, flora and fauna, and yet belonging to the same chain of hills'. There are, Tagore says, 'no absolute barriers of communication' between different cultures, because in each case 'their foundation is the same' (Tagore, 34). Therefore, by critically examining the historical, epistemological and social context of Indian philosophical ideas, one may be able to integrate Indian Knowledge System with individual rights and modern democratic tradition and progressively engage oneself with the diverse civilisational perspectives towards philosophy of law.

While Indian philosophical ideas have shaped legal thinking in India for centuries, their influence is not always explicit or easily discernible in contemporary legal practice. However, there is a tremendous potential philosophical renaissance in Indian jurisprudence through the use

of these thoughts. The discussions to follow shall set forth some of the theories of reality in their relation to the above potentialities.

II. SCEPTICISM IN LOKAYATA AND EVIDENCE BASED REASONING

One of the most important characteristic features of Indian philosophical schools is that every philosophical discussion therein starts with an explicit statement of its utility (*Prayojana*) for human good (*Purusartha*). The ultimate purpose of philosophical knowledge is the avoidance of evil, pursuit of desirable ends, and remaining indifferent to other things which are not relevant according to their perspective. Philosophical discussion arises from the desire to know (*Jignasa*) and from doubt (*Samsaya*). Philosophical inquiry aims at the elimination of doubt. It is based on the assumption that argument and the arguer have the capacity of attaining truth. But if doubt leads to contradiction it must be given up in favour of the truths arrived at after reasoning. The materialistic conception of the reality too has been true to the above approach of *Jigyasa* and *Samsaya,* but admits of only perception as the valid way of satiating that doubt. As a result, anything that is perceived is believed to be only true. That is, their epistemology naturally leads them to their metaphysical theory that only matter is real. One of the earliest Indian schools of thought, Charvaka (literally sweet-tongued), also called *Nastika-shiromani* (arch-heretic) and often known as Lokayata[3] as well, emphasized the primacy of sensory experience and rejected metaphysical speculation. It is called Lokayata as it is not only a philosophy of the people but also a philosophy of this-worldliness (Chattopahyaya, 2). Materialism is based on a criterion of pragmatic necessity. They accept the reality of four elements only- earth, water, fire and air. That is, reality consists solely of material objects and sensations. The general scepticism of Charvaka about reality other than what is perceived, gives rise to their materialistic philosophy and consequently their ethics and hedonistic way of life, which may be summarised in the oft-quoted maxim *"rinam kritva ghritam pibet.*" [4]

Scholars are of the opinion that Lokayata may have arisen as a result of excessive monkdom of Brahmins. It is perhaps when the idealistic philosophy no longer suited the commoners who are busy with meeting their daily needs or when the commoner is exploited in the name of excessive rituals, discontent with the idealistic view gradually grew or the natural scepticism of human mind started to question them on the basis of reason, the materialistic tendencies started to gain ground during post-Upanishadic age. The mythological view is that Brihaspati, the teacher of the Gods, propagated materialism among the Asuras so that they might be ruined (Sharma, 40). Most of the literature of Lokayata available today is found in the

[3] Literally, Lokayata means that which is found among people in general, or according to some Lokayata is derived from the essential emphasis on the natural world or *iha-loka* in this philosophy or a philosophy, the basis of which is the natural world (Chattopahyaya, 2).

[4] "यावज्जीवेत सुखं जीवेद ऋणं कृत्वा घृतं पिवेत, भस्मीभूतस्य देहस्य पुनरागमनं कुतः"

writings of the critics of materialism, advanced in order to refute them.[5] However, Kautilya's Arthashastra (I. 1) counted *Lokayata* along with Samkhya and Yoga as a logical science (Anvikshiki) (Dasgupta, Vol iii, 512). Upanishads (Svetasvatara) mention various atheistic creeds and also about two schools of Charvakas: *Dhurtta* and *Sushiksita* (Dasgupta Vol. I, 78). The first holds that there is nothing but four elements, and the body is but the result of atomic combination. The *Sushiksita Charvaka* holds that there is a soul apart from the body but that it is also destroyed with the destruction of the bo*d*y (Dasgupta vol. I, 79).

D P Chattopadhyaya in his groundbreaking work, *Lokayata: A Study in Ancient Indian Materialism,* challenges the conventional understanding of Indian philosophy as being solely focused on spiritual matters. Instead, he argues that materialism was a significant and influential current in ancient India. Chattopadhyaya meticulously reconstructs the Lokayata philosophy from scattered references in ancient texts, demonstrating its materialist tenets, including the denial of the soul, afterlife, and supernatural forces. However, according to recent commentators on Charvaka, like Pradeep Gokhale, Charvaka is to be understood as a family-resemblance term that refers to Indian philosophers with irreligious intentions.[6]

Lokayata emphasis on perception (Pratyaksa) as the sole source of knowledge, rejecting scriptural authority and metaphysical speculation is the most heretical and independent approach found in the ancient Indian intellectual life. The validity of even inference is rejected. Inference is said to be a mere leap in the dark. When we proceed from the known to the unknown, there is no certainty even though some inferences may turn out to be accidentally true. A general proposition may be true in perceived cases, there is no guarantee that it will hold to be true even in unperceived cases. Deductive inference is vitiated by the fallacy of *petitio principii, or* argument in circle, since the conclusion is already contained in the major premise and the validity of the major premise cannot be proved unless all cases are observed. Inductive inference undertakes to prove the validity of the major premise, but it is too uncertain because it proceeds unwarrantedly from the known to the unknown on the basis of causal relation, which means invariable association or *Vyapti*. *Vyapti* is central to all inferences. But Charvaka challenges this universal and invariable relation of concomitance and regards it a mere guess-work. Perception does not prove this *Vyapti*, nor can it be proved by inference, as inference itself is presupposing its validity. Testimony cannot be relied upon unless it is perceived. Hence inference is not a valid source of knowledge. However, Purandara, a Charvaka, admits the usefulness of inference in determining the nature of all worldly things where perceptual experience is available, but

[5] Sarvadarshanasangraha of Madhavacarya, Tattvasangraha, Manusamhita, Ramayana, Mahabharata and an allegorical play Prabodha Chandrodaya of Krishnapati Mishra give some account of the Charvaka point of view. The only available concrete sources of this philosophical school are the ones which are primarily written to refute and ridicule the philosophy. As some scholars remarked, *"this philosophy had the misfortune of being known to us only through the writings of its opponents"*. (Belvalkar and Ranade quoted by Chattopahyaya, 7)

[6] He criticizes what he calls a singularist approach to Charvaka in the works of scholars such as Debiprasad Chattopadhyaya and Ramkrishna Bhattacarya, who conceive of it as a single school with a more-or-less unified set of positions (Gokhale, 9).

inference cannot be employed for establishing any dogma regarding the transcendental world, life after death, laws of karma which cannot be available to ordinary perceptual experience (Dasgupta, vol. III, 536). Dasgupta argues that the main reason for upholding the validity of inference in the domain of practical life and not in the domain of transcendental is that inductive generalisation is made by observing a large number of cases in agreement presence, together with agreement in absence and no cases of agreement in presence can be observed in the transcendental sphere. That is, the law of concomitance cannot be applied to this sphere. Similarly, they rejected the authority of religious texts and traditions, considering them to be products of human imagination and social conditioning.

There is a kind of mitigated empiricism in Charvaka which is *"the position that though perception is the major instrument of knowledge, a certain kind of inference can be accepted as a means to knowledge"* (Gokhale, 86). According to this view, inference can be accepted as a means of knowledge in a weaker, secondary sense according to which inference sometimes does yield knowledge in particular domains even though it cannot necessarily be guaranteed to yield knowledge in all domains.

Thus according to Lokayata, the primacy of observation is central to any knowledge claim. 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. Lokayata's materialist worldview posed a direct challenge to the dominant Brahmanical orthodoxy, which focused on spiritual liberation and otherworldly concerns. The emphasis on sensory experiences and empirical observation as the foundation for understanding reality aligns with key principles of evidence-based reasoning. It highlights the importance of direct observation and empirical evidence, gathering data through careful observation and experimentation, scrutinizing evidence for its validity, reliability, and elimination of potential biases. They are thus questioning assumptions, challenging dogmas, and demanding evidence for extraordinary claims and ultimately they want to apply the knowledge derived from such observation to improve human well-being and solve real-world problems. In essence, Lokayata can be seen as an early form of scepticism that emphasized the importance of empirical evidence and critical thinking in understanding the world. While their specific philosophical framework may differ from modern scientific methodology, their emphasis on direct observation and rejection of unsupported claims resonates with the core principles of evidence-based reasoning. In our contexts today, Charvaka may be understood as a moral critique of Brahmanical orthodoxy from a secular point of view.

Materialism of Carvaka and its Influence on Non-materialistic Schools

The non-materialistic systems of Indian thought have been, consciously and unconsciously, influenced by materialism. 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. 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* (Ayodhya Kanda, sarga 108, verse 17) Javala elucidates similar doctrine (Vidyabhushan, p. 9). Such a challenge to the orthodox beliefs and 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 Bhartruhari, 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?"*(Kapoor). Questions, answers and debates became the order of the day. Matilal has called debate the 'preferred form of rationality' in classical India (Matilal, 1998, 32).

Descartes, who is known as the father of modern western philosophy, says that the scepticism of Hume has awakened him from dogmatic slumber. The uncompromising scepticism of Charvaka awakened the Indian philosophical schools, particularly the logical school of Nyaya from their one-sided views centuries earlier and who therefore could develop logic, epistemology and dialectical methods independent of their metaphysical convictions and religious practices. Their debates on methods of establishing a thesis (*Siddhanta*) remained secular and are considered as a common ground of Indian philosophical schools. The elaborate treatment of method and technical language of the *Nyaya Sutra* of Gautama came to be adapted to a large extent by all the other schools, with minor variations (Datta, 132).

The logical and rationalist schools believe that the material basis of philosophical discussion is the individual's own direct experience (*pratiti or anubhava*), including introspection and knowledge obtained from other valid sources. Current linguistic usage (*vyavahara*), which is a socially accepted experience, is often taken as the material basis of philosophical theories, thus making common-sense the foundation of philosophical inquiry. Doubt (*samsaya*) is regarded by Gautama as the chief incentive to philosophical inquiry. For the removal of doubt one must carefully consider the pros and cons (*paksa-pratipaksa*) and ascertain the true nature of things. For this purpose one is advised to take the help of all valid sources of knowledge, use (and avoid conflict with) previously established theories (*siddhanta*), use examples (dristanta) which are acceptable to all, employ the five-step method of discovery and proof (*panchavayava-nyaya*), use the indirect hypothetical or postulational method of strengthening the conclusion (*tarka*), and also take care to avoid five kinds of material fallacies (*hetvabhasa*), three kinds of quibbles (*chala*), twenty-four kinds of false analogies (*jati*), and twenty-two kinds of self-stultifying steps which would cause defeat in debates. This elaborate

method of critical inquiry was regarded as the light for all branches of knowledge, as the means of all (rational) activity, and as the basis of all virtues (*dharmas*). As one commentator remarks, *"the part played by materialism as a presupposition of the science of medicine (Ayurveda), Chemistry (Rasayanshastra), Economics (Arthashastra), Erotics (Kamashastra), and Poitics (Dandaniti and Dharmaniti or Rajniti) is much more pronounced than it is in the case of philosophical thought."* (Mittal, 19)

III. ANEKANTAVADA: MULTIPLE PERSPECTIVES AND LEGAL INTERPRETATION

Jainism, practising some of the most rigorous methods towards salvation, is as old as any other orthodox schools of Indian thought. Its metaphysics of realistic and relativistic pluralism or *Anekantavada* offers a middle path between the idealistic monism of Brahmanism and the momentariness of early Buddhism, though it existed in the intellectual domains of ancient India much earlier to Buddhism. *Anekantavada* or the many-sidedness of reality has a corollary epistemological theory. It suggests that truth is multifaceted and can only be grasped partially from any single perspective.

Jaina epistemology classifies knowledge into *Aparoksha* or immediate and *Paroksha* or mediate and also into *Pramana* or "knowledge of a thing as-it-is" and *Naya* or "knowledge of a thing in its relation". The second classification is found in one form or the other in Ancient Greek to modern philosophers of the West and other schools of Indian philosophy. Parmenides distinguishes between opinion and truth, Socrates between the world and the form; Plato between *doxa* and truth, Kant distinguishes between noumena and phenomena, Upanishads between *para vidya* and *apara vidya*, and Advaita between *vyavahara* and *paramartha*. Philosophers across the civilisational divide have always stressed on this distinction highlighting the difference in our knowledge of the external world as it is posited to our cognition and the true nature of things.

Coming to the first division, Jainas divide immediate knowledge further into *1. avadhi, 2. mana paryaya, and 3. kevala* and mediate into *Mati* and *Shruta*. Perception is not immediate knowledge according to Jainas, but is included under *mati*. Because, according to Jainas, perception in the sense of mere sensation cannot rank as knowledge unless it is given meaning and arranged into order by conception or thought. In modern western philosophy, Kant reconciled the battle between rationalist and empiricist by offering logic similar to that of Jains that "Concepts without percepts are empty; percepts without concepts are blind." Jaina *Mati* includes both perception and inference and *Shruta* stands for authority. The three kinds of immediate knowledge are extraordinary or extrasensory. *Avadhi* is direct knowledge of things from the distance of space and time. But it cannot go beyond spatial and temporal limits. *Manahparyaya* is the direct knowledge of the thoughts of others. In both *avadhi* and

Manahparyaya, the soul has direct knowledge unaided by the senses and mind. Finally, *kevala jnana* is unlimited and absolute knowledge, which can be acquired by the liberated souls only.

The Jaina distinction between *Pramana* and *Naya* offers their unique perspective on the many sides of reality. *Naya* means standpoint of thought from which we make a statement about a thing. All truth is relative to our standpoint. Partial knowledge of one of the innumerable aspects of a thing is called *Naya*. When taken as absolute a *Naya* becomes fallacious, that is *naya-bhasha.* In Jain philosophy, *Naya* refers to a particular perspective or viewpoint from which reality can be understood. It acknowledges that reality is complex and multifaceted, and no single viewpoint can capture its entirety. A *Naya* offers a partial understanding of reality, focusing on a specific aspect or attribute of an object or concept. It doesn't deny the existence of other aspects, but it doesn't explicitly acknowledge them either. Thus, each *Naya* represents a relative standpoint, which is valid within its own context. However, it's crucial to recognize that it's not the complete truth. An object whose nature is to be many-sided is the content of complete knowledge. The field of a *Naya* is a thing qualified by one aspect. (Siddhasena, 29)

Complete knowledge is knowledge of everything about the object; partial knowledge is the knowledge of something about it. As a metaphor from the *Tattvartha Sloka Vartika* (Vidyananda, 1.6.21, 1.6.25) has it, just as a part of the ocean is not the whole of the ocean, but neither is it something other than the ocean, so too a *Naya* is not a *Pramana*, but neither is it something other than a *Pramana*.

Jain philosophy categorizes *Nayas* into various types, based on the specific aspect of reality they emphasize. For example, some *Nayas* focus on the substance of an object, while others focus on its qualities or modes. The first is *Naigama Naya*. From this standpoint, we look at a thing as having both universal and particular qualities and we do not distinguish between them. It becomes fallacious when both Universals and particulars are regarded as separately real and absolute. The second is *Sangrah Naya*. Here we emphasize the universal qualities and ignore the particulars when they are manifested. It becomes fallacious when universals alone are treated as real and particulars are rejected as unreal. The third is *Vyavahara Naya,* the conventional point of view based on empirical knowledge. Here things are taken as concrete particulars and their Specific features are emphasized. It becomes fallacies when particulars alone are viewed as real and universals are rejected as unreal. The fourth is called *Rijusutra Naya.* Here the real is identified with the momentary. The particulars are reduced to a series of moments and any given moment is regarded as real. When the partial truth is mistaken to be the whole truth it becomes fallacious.

The next three are related to words and language. *Shabda Naya, Samabirudhha Naya, and Evambhuta Naya* refers to our confusions as a result of our use of language and is akin to

Bacon's idols of marketplace.[7] Each *Naya* or point of view represents only one of the enumerable aspects possessed by a thing from which we may attempt to know or describe it. When any such partial viewpoint is mistaken for the whole truth we have a *Naya-bhasa*.

The concept of *Naya* is closely related to the principle of *Anekantavada*, which emphasizes the multiplicity of viewpoints and the relativity of truth. Jaina philosophy believes in matter (*Pudgala*) and spirit (*Jiva*) as separate and independent realities. There are innumerable material atoms and innumerable individual souls, each of which possesses innumerable aspects of its own. Every object possesses innumerable positive and negative characters. It is not possible for ordinary people to know all the qualities of a thing. Only an omniscient liberated soul knows all the qualities of one thing and all the qualities of all things. Therefore human knowledge is relative and so are their judgments, which also need to be relative. This leads us to the Jaina concept of *Syadvada* or *saptabhangi Naya* or the theory of relativity of knowledge. So the best way to make a judgement is to begin with or to condition our judgement with 'Syat' or 'relatively speaking' or 'viewed from a particular viewpoint which is necessarily related to other viewpoints' before saying anything at all. This epistemic humility is the foundation of Jaina world-view, their metaphysics and their ethical doctrine of Ahimsa. Because, when we are aware of our own limited perspective to the truth, there is natural tolerance and non-violence against other perspectives. Jainas are fond of the example of six blind men and an elephant. According to them, almost all philosophical, ideological and religious differences and disputes are mainly due to mistaking a partial truth for the whole truth (Sharma, 53).

Jain epistemology highlights the importance of understanding different perspectives to gain a more comprehensive understanding of reality. In essence, the concept of *Naya* encourages us to approach reality with an open mind, acknowledging the limitations of our own perspectives and appreciating the validity of diverse viewpoints.

This concept can offer valuable insights into legal interpretation and decision-making by encouraging epistemic humility. Any legal issue can be viewed from various angles, considering the viewpoints of all stakeholders involved. This can help legal professionals avoid tunnel vision and ensure a more comprehensive understanding of the situation. It may also be helpful for us to communicate effectively because by understanding that others may see things differently we can be more open to their perspectives and find a common ground to resolve a conflict like situation. The weakness of every dogmatic assertion that tries to monopolise truth may be exposed with Jaina epistemology. That is why, Gandhi and Vinobha advocated Jaina logic in practical politics (Datta, p. 275).

[7] Errors in thinking that arise from the misuse of language and the way words are commonly understood in social discourse, essentially meaning that people can be misled by the imprecise or ambiguous language used in everyday conversations and public discourse, hindering clear understanding; it is considered a type of logical fallacy.

The Jaina belief in non-violent way of life, the renunciation from a worldly ego, the dissociation of self and non-self, and a gradual purification of the self towards unobstructed knowledge, become as many different facets of the same effort to access to a superior order of being in which each self manifests its true nature (Gorisse). By acknowledging the existence of multiple truths, Anekantavada fosters open-mindedness and tolerance, thereby aligning their pursuit of knowledge with the virtuous principle. Their ethics and political philosophy is founded on their epistemic humility, where virtues like compassion are hand in hand with intellectual empathy. *Aparigraha* (non-possession/non-interference), *anekanta* (non-absolutism), and *ahimsa* (non-violence) are the principle virtues that Jainas prescribe. The concept of *aparigrah*a extends beyond the mere non-possession of physical objects to include ideas.[8] While those who attain Kaivalya may not perceive possession towards thoughts, knowledge, and intuitions, for truth aspirants, clinging to specific ideas risks fostering dogma. Dogma, in turn, interferes with the autonomy of others' thoughts, words, and actions, constituting intellectual violence or *himsa.* Jainism underscores that each vantage possesses relative validity due to *anekanta*, demanding practitioners to grapple with cognitive issues for a robust epistemic framework.

In Jain ethics, the pursuit of knowledge harmonizes with the fundamental principles of *aparigraha* and *ahimsa*, exemplified by *'anekantavada*' or non-absolutism. This doctrine recognizes the intricate nature of reality, urging individuals to embrace diverse perspectives for a comprehensive understanding. The ethical dimension lies in committing to approach knowledge with an open mind, recognizing the limitations of one's viewpoint, and respecting the autonomy of diverse perspectives. Such an approach is sympathetic to the differing legal interpretations and arguments. This can lead to more nuanced and balanced legal decisions as well. Anekantavada highlights the importance of considering the specific context of a legal issue, recognizing that the same law may have different implications in different situations. This can help legal professionals avoid rigid application of legal principles and ensure that justice is served in each individual case.

Recognizing the multifaceted nature of reality, Anekantavada encourages dialogue and deliberation among legal professionals, stakeholders, and the public. This can lead to more informed and just legal outcomes. Anekantavada cautions against dogmatic adherence to any single legal interpretation or perspective. This can help legal professionals avoid imposing their own biases or preconceived notions on legal issues. While the direct application of *Anekantavada* in legal practice may be challenging, its underlying principles can offer valuable guidance for legal professionals seeking to navigate complex legal issues with greater sensitivity, nuance, and fairness.

IV. ADVAITA VEDANTA: NON-DUALITY AND INTERCONNECTEDNESS OF ALL BEINGS

[8] Some commentators have stressed on the idea of knowledge, intuition, and thought as possessions. (Pujyapada Devanandi, *Sarvarthasiddhi*, a commentary on the *Tattvartha Sutra*)

Advaita is the most influential school of Indian philosophy. Though a view attempting to establish uniformity of Indian philosophical schools as if all differences are evolving towards the doctrine of non-duality may not be entirely true, there is no doubt that Advaita presents the fulcrum of what Upanishads taught. The *Brahma Sutras* of Badarayana[9], which was the primary text of Vedanta, was written in order to establish the uniformity in the teachings of Upanishads and Vedanta *Acharyas* have given detailed commentaries on it including the principal *Upanishads* and *Bhagvad-Geeta*, which constitutes *Prasthana Trayi*.[10] It is believed that Sankara wrote his commentary on the Brahmasutra when he was twelve years old. In his way of establishing Vedanta philosophy of non-dualism, Sankara travelled across the country defeating the adherents of other schools of thought and ultimately moulding the religious life of India (Dasgupta, Vol-I, 432). His commentaries on these basic canons were intended primarily to refute all those who were opposed to the right doctrine of perceiving everything as the unity of the self (*atmaikatva*) (Dasgupta, Vol-I. 433).

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 in spite of 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). Viewed *sub specie temporis* (viewed in relation to time rather than eternity), the world is the world of finitude around us, but viewed *sub specie aeternitatis* (in its essential or universal form) it is the Brahman (Raju, 55).

Maya or *Avidya* is not only a psychological existence but also an ontological existence. *Ajnana* forms its subjective plane of the mind and senses, on the objective plane, the Jagat, the whole of the objective universe. *Ajnana* has two powers- power of veiling (*Avarana*) and the power of projection (*Vikshepa*). The power of veiling is like a little cloud veiling the sun. Though in a limited way, it actually covers a particular area. Likewise, it covers the infinite unchangeable self by veiling its self-luminosity as cognisor. As a result the self appears as an

[9] These are a collection of aphorisms that systematize the teachings of the Upanishads. They provide a logical framework for understanding the Vedanta philosophy and are known as the *Nyaya Prasthana***.**

[10] The *Prasthana Trayi*, meaning "three sources" or "three axioms", refers to the three canonical texts that form the foundation of Vedanta philosophy: i. The Upanishads- also known as *Shruti Prasthana* meaning "the starting point or axiom of revelation"; ii. The Brahmasutra- the *Nyaya Prasthana* or *Yukti Prasthana***,** meaning "the logical text or axiom of logic"; iii. Bhagava Geeta- also known as *Smriti Prasthana* meaning "the starting point or axiom of remembered tradition". These texts are considered authoritative sources of spiritual knowledge and are essential for understanding the nature of reality, the self, and the relationship between the two. Gaudapada in his *Mandukya Karika* revived the monistic teachings of Upanishads. Sankara commentaries on the three give rise to a host of sub-commentaries *viz*,, *Nyaya Nirnaya* of Anandagiri, *Ratnaprabha* of Govindananda, *Bhamati* of Vacaspati Mirsa, *Kalpataru* of Amalananda, *Naiskarmyasiddhi* of Suresvara, to name only a few of the great tradition of Advaita. These three texts complement each other and offer different perspectives on the same fundamental truths. The *Upanishads* provide the philosophical foundation, the *Brahma Sutras* offer a logical framework, and the *Bhagavad Gita* provides practical guidance on how to live a spiritual life.

agent and enjoyer of pleasure and pains and is subject to ignorant fears of rebirth. Through its projecting power it creates the manifest world-appearance.

Contemporary interpretations of Advaita Vedanta often emphasize the dynamic and creative aspects of reality, acknowledging the importance of individual experience and action in the path of self-realization. However, while doing so it also asserts that the ultimate truth cannot be known by reason alone. What one debater shows to be reasonable another expert debater may prove it to be false and the expert debater may again be proved to be false by yet another. That is, there is no finality or certainty to which we can arrive at by logic and argument alone (Dasgupta, Vol. I, 434). All experience starts and moves in an error which identifies the self with the body or the senses. All cognitive acts presuppose this illusory identification, for without it pure self can never behave as a phenomenal knower and without such knower there would be no cognitive act. This identification is a beginning less illusion. The pure self as pure being (*sat*), as pure consciousness (*cit*) and pure bliss (*ananda*) is the ultimate truth. So the world as it appears could not be real. This theory of *Maya* influenced the outlook and life of its believers. The vision of the socialised transformation of mankind is, therefore, routed through the inner transformation of individual man. Sankara prescription for the transformation of man is in form of *Sadhana-Chatushtaya* or the qualifications necessary for the study of Vedanta.

1. *Nitya Anitya Vastu Viveka* or ability to discern the eternal from the non-eternal,
2. *Iham utraphala bhoga viraga* or disinclination to the enjoyment of the pleasures of this world and of the after world,
3. *Samadamadi sadhana sampat* or the attainment of peace, self restraint, renunciation, patience, deep concentration and faith, and finally,
4. *Mumukshutva* or the desire for salvation.

When one realises that the self alone is the reality and all else is *Maya*, all injunctions cease to have any force on him. The fourfold discipline blends virtue and knowledge, thought and moral practice. The philosophical wisdom needs to be morally conditioned. To be rational is to be moral and ethical failings distort the philosophical vision. Even the intuitive faculty is not independent of the moral. The knowledge of the nature of reality is, thus, intricately connected with our actions. In *Nishkama Karma*, actions without desire to its consequences or one who performs actions with non-attachment, because he considers it his duty and not because he has bargained for results has liberated himself from the chains of actions and consequences to himself. It is not merely a moral ideal but a philosophical theory arrived at by deep reflection on the psychology of desiring or striving and its impact on the reasoning purity of the knowing mind. *Nishkama Karma* is counterpart in the sphere of action to the *Niskama Citta* (un-defective and clean instruments of reason) or theory of non-attached mind in the realm of knowledge. The former can only flow from the later.

Advaita Vedanta emphasised personal ethics more than social ethics and prescribed austerity, control of mind, non-attachment, chastity, reverence, forbearance and concentration. But it appears that it has overlooked the fact that good society is also necessary for good individuals. Spiritual is regarded as more enduring than the physical. However, the non-dualists are not indifferent to the world. They take the world to be very real in a certain important sense. Fulfilment of social obligation is an indispensable condition of spiritual experience.

Advaita has a unique metaphysical foundation that profoundly shapes its ethical framework. It implies that harming others is ultimately harming oneself, as we are all interconnected and essentially one. While Advaita acknowledges the concept of Karma, it views it within the framework of non-duality. Actions performed under the influence of *Maya* create karmic impressions that perpetuate the cycle of birth and death. However, with self-realization, the sense of individual agency dissolves, and the cycle of karma is transcended. The understanding of the oneness of all beings fosters compassion, empathy, and a sense of responsibility towards others. Recognizing the inherent unity of all life promotes non-violence in thought, word, and deed. Advaita encourages detachment from the ego and the pursuit of selfish desires, as these are seen as rooted in the illusion of individuality. While not necessarily implying physical renunciation, Advaita emphasizes detachment from worldly bondages and desires, which are seen as obstacles to self-realization. This perspective can inform legal approaches that prioritize empathy, compassion, and the recognition of shared humanity. It can also lead to a critical examination of legal systems that perpetuate social divisions and inequalities.

V. CONCLUSION: POSSIBILITY OF RECONSTRUCTION

> *"From food all creatures are born; from rain food is produced; from sacrifice comes rain; sacrifice is born of action. Known that action arises from the Vedas, and the Vedas from the Imperishable. One who does not recognise this all-pervading co-operative spirit lives in vain."* (Geeta-III-14-15-16)

The philosophy, politics and legal system of a nation are outward expressions of national culture and sentiments. Our political culture is a function of our intellectual and civic life. Respect to dissent has been a basic philosophy of our social life. Respect has a positive connotation and emotion attached to it and is more inclusive than simply tolerance. The Indian civilization was plural and included different currents of moral and philosophical thought ranging from polytheism to atheism and from crude materialism to idealism. The philosophic-religious traditions of Jainism and Buddhism co-existed in the Grand Discursive Model of the Indian Civilization. This grand Discursive Model did not find it much difficult to absorb even invaders' legal and administrative vocabulary in the mediaeval period and after centuries of

political subjugation assimilated the political wisdom of the Western world when it adopted and gave itself a modern constitutional framework.

> *"In spite of their occasional quarrels and periods of intolerance, these bodies of ideas enjoyed considerable freedom of expression, engaged in critical dialogue, challenged and borrowed each-other's ideas and created over time a distinct and internally differentiated composite culture* (Parekh, 48)*."*

The Indian tradition and the Indian society were congenial to democratic government. As Austin remarks, *"The ideas and spirit of English liberal democracy fell on fertile ground."*(330) This fertile ground is actually irrigated for centuries by the ancient Indian concept of *Rta/ Rita*, which transformed to the idea of *Dharma* in later years, meaning virtues and duties in personal life and the laws of the state in political life. The Vedic seers reflected deeply on the moral principles behind the universe and sang hymns in honour of cosmic order, ethical laws and social virtues (Radhakrishnan & Moore, 25ff). The concept presumes laws to be just laws which restrain evil propensities and promote virtuous life. *Rita* was conceived as above the Gods just as Dharma is understood in *Dharmashastras* as above the king. (Datta, 286-287). These ideals enable us to *"ascend to a height from which we can see law as an ever-present part of an ever-flowing stream"*.[11] The common emphasis by the Indian philosophical schools on the importance of reason and inference in understanding the world and at the same time, their grounding on the common or at least similar ethico-ontological concept of *Dharma* has a profound impact on the social and political worldview of the sub-continent, and may also serve as the metaphysical foundation of the principles of moral, political and legal worldview.

The possibility of conceptual reconstruction of metaphysical foundations for socio-political realities may be found in the cooperative spirit in the *Dharmic* way of life. This scheme of life is not competitive but cooperative. It is believed that it is by the ceaseless cooperative activity of both inanimate nature and living beings that the wheel of creation is kept moving (Nikhilananda, 217).

The philosophical developments in the colonial era had a great opportunity of evolving philosophies in the process of ongoing dialogue of perspectives provided by the enlightenment philosophies of the West. This dialogue of perspectives produced thinkers and philosophers like Gandhi, Tagore and Aurobindo, who transformed the collective unconscious of the Indian mind into political philosophy, literature and spirituality for the modern man respectively. Today we have reached a juncture in Indian intellectual life where Indian logic and metaphysics must be reinvented to lay the foundation of a social philosophy for the mortal existence as well. A metaphysics which is consistently spiritual in outlook and objective must take recourse to secondary methods to supply the categories that social context demands. In this situation, the moral requirement needed for achieving spiritual objective, as in the various concepts discussed

[11] Sir John Macdonell in his "Introduction to the Translated Volume" of Fritz Berolzheimer's *The World's Legal Philosophies*. (Berolzheimer, xxxviii)

above, may serve as a starting point for this reconstruction. The rigorous moral requirements of a *sadhak* may themselves be less adequate for the day to day co-existence of individuals living in the society. But these personal virtues are intricately connected with the social. Kathopanishads says both the desire for worldly happiness and the desire for highest good are legitimate desires and they are always present (I-ii-2). Both are accepted as valid in the epics, Upanishads and Manusmriti. The ethics of Bhagavad-Geeta centres around a war fought for preserving social order or *Dharma* in the society. It is not the unitary pursuit of salvation that the Geeta preaches, but the salvation through performance of one's duties of establishing a political system where rule of law permeates. Mahabharata shows that all the complexities of performance of duties, *svadharmas*, loyalty to king, friendship and all other virtues have proved to be subordinate to the ultimate objective of the war, which was *Dharma Vyavastha*. Mahabharata Shanti Parva (63.28.29), therefore, declares,

> *"In governance is realised all forms of renunciation; in governance is united all the sacraments; in governance is combined all knowledge; in governance is centred all the worlds."*

The epic is replete with instances when the objective of establishing *Dharma* outweighed all other considerations including personal virtues. Modern jurisprudence and legal reforms particularly in the field of public law must be made akin to such an approach to justice. Justice will no longer be blind, because it has to be aware of the particularities, contexts and individual circumstances. The fold of Contractarian blind impartiality was removed when the Supreme Court of India unveiled a redesigned version of the 'Lady Justice' statue, not only marking a significant departure from its colonial past, but also placing the book of the Constitution in her hand (in place of the sword), interpreting which in the true spirit of *Dharma* is the primary job of the judiciary. The *Danda*, as a symbol of sovereign power and a reminder of virtuous administration is placed in the form of *Sengol* in the popular house of the Union Parliament when the new Parliament House building was inaugurated, signifying popular sovereignty of the highest law making body of the nation. This may only be a symbolic gesture towards the possibility of aligning Indian polity and legal system with *Dharma Vyavastha*, but a sufficient inspiration to toil the soil and reinvent our laws in our own ways of being.

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