



LL.B. I Term

JURISPRUDENCE-I (Legal Method)

Course Code: LB-106

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Semester - First
Course Name - Jurisprudence-I (Legal Method)
Course Code – LB 106

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 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 areas of law.

Course Learning Outcomes:

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

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

Course Content

Unit 1. Evolution of Bharatiya Jurisprudence - I

- (a) Environmental Consciousness in Vedic Age
- (b) Codification of Law - Dharmashastras, Smritis
- (c) Dispute Resolution System in Ancient India

READINGS:

1. Mohan Parasain, "Indian Jurisprudence: A Philosophical Overview" 1
2. S.N. Dhyani, "Indian Legal Theory – Past and Present" in *Fundamentals of Jurisprudence The Indian Approach* 48-75 (Central Law Agency, Prayagraj, 2023).....12
3. Seema Singh and Madhu Yadav, "Customary Dispute Resolution Mechanism in Bharat" 29

Unit 2. Evolution of Bharatiya Jurisprudence - II

- (a) Concept of Rta and Kartavya
- (b) Kautilya's Concept of State and Law
- (c) Concept of State and Law during the Mahabharata period
- (d) Idea of State and Law in Ramarajya

READINGS:

1. Seema Singh, "Rta and Kartavya: The Interlinking Jurisprudence" 38
2. Radhakrishnan Pillai, "Law Concepts in Kautilya's Arthashastra: A Dharmic Legal Framework for Governance and Its Modern-Day Relevance" 47
3. Ruchi Rawat, "Rājyotpatti: From Matsyanyaya to Dharma-Based Rule" 59
4. Vinayak Sharma and Ruchi Rawat, "Idea of State and Law in Ramarajya" 65

Unit 3: Major Legal Systems

- (a) Common Law Legal System
- (b) Civil Law Legal System
- (c) Hybrid Legal System
- (d) Islamic and Socialist Legal Systems
- (e) Legal System in Ancient India

READINGS:

1. Rene David & J.E.C. Brierley, *Major Legal Systems in the World Today* (3rd edn., 1985)...78
2. Ila Sudame, "The Shaastra of Law: Foundations from Indian Knowledge Systems for Contemporary Legal Methods" 83
3. N.R. Madhava Menon, "Our Legal System" 103

Unit 4: Principles, Institutions and Personnels of the Indian Legal System

- (a) Preamble of the Indian Constitution
- (b) Hierarchy of Courts and Jurisdiction
- (c) Legal Services
- (d) Legal Profession and Advocates Act, 1961

READINGS:

1. Anupam Jha, “Hierarchy of Courts, Tribunals & Commissions in India & their Jurisdiction” 108
2. R. Swaroop, “Legal Service/Aid and Lok Adalat” 116
3. A.N. Veera Raghavan, “Legal Profession and The Advocates Act, 1961” 14 *Journal of The Indian Law Institute* 228-262 (1972).....128

Unit 5. Sources of Law

- (a) Dharma
- (b) Custom
- (c) Precedent
- (d) Legislation

READINGS:

1. Justice M. Rama Jois, “धर्म मूलम् /Dharma Moolam” in *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 13-18 (LexisNexis Publication, 1st edn., 2022).....139
2. M.P. Jain, “Custom as a Source of Law in India”, 3 *Jaipur Law Journal* 96 (1963).....144
3. R.M.W. Dias, “Justice in Deciding Disputes” in *Jurisprudence* 126-164 (Ed. 5, 2013).....162

Unit 6. Western School of Thought – I (Positivism)

- (a) John Austin
- (b) H.L.A. Hart
- (c) Hans Kelsen

READINGS:

1. John Austin, *The Province of Jurisprudence Determined* 9 – 221 (1954).....178
2. H.L.A. Hart, “Law as the Union of Primary and Secondary Rules” and “Rule of Recognition and Legal Validity” in *The Concept of Law* 79-99 & 100-123 (1961).....200
3. Hans Kelsen, “Pure Theory of Law”.....216

Unit 7. Western School of Thought – II (Natural Law; Historical; Sociological)

- (a) Natural Law School - Lon L. Fuller; Hart – Fuller Debate
- (b) Savigny
- (c) Roscoe Pound

READINGS:

1. Suri Ratnapala, “Lon Fuller on the Morality of Law” in *Jurisprudence* 161 – 173 (Cambridge University Press, 2009).....249
2. R.W.M. Dias, “Historical School – Savigny” in *Jurisprudence* 375-393 (5th ed., 1985).....258
3. R.W.M. Dias, “Sociological School – Roscoe Pound” in *Jurisprudence*, 431-35 (1985).....268

Suggested Reading (s):

Lon L. Fuller, “The Case of Speluncean Explorer” 62 *Harvard Law Review* 616 (1949).

INDIAN JURISPRUDENCE: A PHILOSOPHICAL OVERVIEW

Mohan Parasain*

Introduction

India has been a “knowledge civilization” and the only surviving civilization of antiquity with continuity till the modern period. To uncover her survival secrets, one must look deeper into her rational and critical innovations, rather 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.¹ It suggests that Indian philosophy is limited to primitive speculations. Some believe that it is associated with occult religious cults and “*an odd assortment of spirituality, mysticism, and imprecise thinking, concerned almost exclusively with spiritual liberation*” (Matilal, 2005, xii). It is as if “*Indians could engage themselves in philosophical reflection without reflexivity, without linguistic or conceptual self-awareness*” (Deshpande, 5). This misconception, coupled with the newly independent Nation’s complacency in continuing with the well-established British administrative and legal framework and existing adjudicatory mechanisms has deprived India of any genuine critical inquiry into its own past philosophical literature which could have given a foundation to its legal needs and at the same time rooted in the native soil. Any true examination into the epistemological and logical foundations of our civilization took a backseat in favour of the pragmatic considerations of continuity with British fascination with uniform territorial rules based on universalistic norms. Comparing the effect of English legal method in the Supreme Courts and the Sudder Courts during Colonial period, Maine observed that:

At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened and contracted a rigidity which they never had in real native practice. (Maine, 1895, 45).

When our colonial past and culturally rooted concepts were confronted on the grand discursive forum of the Constituent Assembly,² unfortunately those who wanted a renaissance of ancient Indian wisdom were dismissed in favour of Judeo-Christian universalism. Further, *Stare Decisis* of common law prevented the spirit of dharmic jurisprudence to get any political patronage. Consequently, even after independence, any decolonized perspective into our legal system was postponed for an indefinite period. As a result, as Galanter rightly points out:

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¹ Ramanujan in his celebrated essay “Is There an Indian Way of Thinking?” offers a nuanced exploration of the characteristics that might distinguish Indian thought from Western modes of thinking. He argues that Indian thought is deeply rooted in specific contexts, situations, relationships, and traditions. Truth, morality, and even identity are often understood as relative to the particular context. In contrast, Western thinking, influenced by Enlightenment philosophy, often strives for universal principles, objective facts, and generalized truths that are independent of context.

² Members like Lokanath Misra and H. V. Kamath argued that the Constitution should not merely adopt Western concepts of law and governance, but should be grounded in the principles of Dharma. Misra argued that India's ancient culture and faith should be given a prominent place in the Constitution. He criticized the “unjust generosity” of a secular state that didn't give the “ancient faith and culture of the land” a fair deal.

K. Santhanam and R. V. Dhulekar were in favour of the idea of making the village panchayat the cornerstone of the Indian republic. They drew upon the idealized notion of ancient Indian village republics as the foundation of a true democracy.

Contemporary Indian law is, for the most part, palpably foreign in origin or inspiration and it is notoriously incongruent with the attitudes and concerns of much of the population which lives under it. (Galanter, 65).

Highlighting the existing colonialism in thought, Krishnachandra Bhattacharyya (KCB) in his *Swaraj in Ideas* says,

Cultural subjection is ordinarily of an unconscious character, and it implies slavery from the very start ... There is cultural subjection only when one's traditional cast of ideas and sentiments is superseded without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. (KCB, 383).

KCB appeals for freedom from “cultural subjection,” which is a deeply insidious and almost invisible intellectual slavery. There is no doubt that foreign ideals need to be assimilated into our ideas and our own theoretical frameworks. However, it must be done with awareness that we may not become mere material suppliers to the framework constructed solely to subjugate our traditional knowledge system. Bhattacharyya's project of intellectual decolonization is founded on the respect for the integrity of tradition.³ His critics called it an invocation of “three millennia old tradition to delude themselves” (Rao, 195-6). But these criticisms appear to be hypocritical when it is found that those who dismiss looking back to *Shastras* as ‘revivalism’ or ‘obscurantism’ find it convenient to laud “*Europe's 13th century successful venture of relocating the European mind in its classical Greek roots*” ... as ‘revival of learning’ and ‘Renaissance’ (Kapoor). Therefore, what we need today is to relocate the Indian mind in Indian thought.

When we talk about Indian Philosophy of law, the first question that must be answered is, “Is there an Indian philosophy of law?” This question is more specific than A K Ramanujan's question with a very wide connotation “Is there an Indian way of thinking?”, which he answered in the affirmative, with an admission that the Indian way of thinking needs to be understood without falling into the trap of parroting Western methods and ways of philosophizing. What is true to general Indian ways of thinking is also true to Indian ways of understanding the concepts of law, relation between man and society, morals, spirituality, nature of reality and over and above the logic and epistemology on which Indian thought is based.⁴

The section to follow deals with “what exactly is the Indian jurisprudence” that we are talking about and the section next to it deals with the question if there is an Indian jurisprudence, then “is there a metaphysical foundation of it?” Finally, the concluding section highlights the major distinctions between the Eastern and the Western perspective on the subject.

Indian Jurisprudence

Jurisprudence, often described as the philosophy or science of law, is a field of study that delves into some fundamental questions: what is law, what are the sources of law and why do laws need to be followed? In the process of answering these questions, it also discusses organs of law enforcement, administration of justice, concepts essential for the understanding of laws in general and the core challenges, debates, and inherent difficulties in defining, understanding, and applying these concepts and finally the philosophy of practice that emerge in the process of adjudication and delivery of justice.

³ Ideas are deeply embedded in specific cultural “languages” and cannot be simply translated or adopted without losing their vital meaning or creating a “patchwork” that offends both scholarly and spiritual sense. KCB's “*Swaraj in Ideas*” is a powerful plea for intellectual decolonization, urging Indians to cultivate a robust and authentic intellectual identity rooted in their own heritage while engaging critically and creatively with global thought.

⁴ Those who are interested in the deeper understanding of the nature of reality in Indian philosophical schools and its impact on legal thinking may refer to the author's paper on the subject from Jurisprudence-II course content.

Chatrapati Singh,⁵ a prominent Indian thinker in the field of philosophy of law laments that philosophies of law are being written ‘unphilosophically’ probably because of methodological and historical reasons. The impact of logical positivism and its polemic against deeper metaphysical enquiry on legal positivism have affected the methodology of all social sciences. As a result, theorisation about law focused on “*legitimation, enforcement and validity of politically framed rules*” (Singh, preface, vii) and ignored deeper ‘soul searching’ into the nature of law itself. He is of the view that Indian philosophical insights from *Dharmashastra*, *Navya Nyaya*, *Samkhya* and *Vedanta* may enable the much-needed soul searching tools to the modern jurisprudence.

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 (Derret, 2). Because Dharma, as righteousness, has greater importance 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.⁶ 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. (Parasain, 100)

Dharma is the ecology of well-being which emerges organically from devotional relationships with all elements and creatures. Most of the central texts in the Indic knowledge and tradition describe the mutual relationship between nature and humans not as that of domination, but of friendship and harmony. Even people who do not believe in divine order should adhere to dharma for the sake of shared well-being. Observance of dharma secures two objectives- happiness on earth as well as salvation. But our inquiry into the *Dharmashastras* 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 has been wrongly 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,’*” (Derret, 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.⁷ 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 lifeworld of the community concerned, then in the higher-order decisions of the scientists, lawgivers and artists, finally in the theoretical discourse of the philosophers. (Mohanty, 261)

Therefore, the rationalities which have travelled through the public discourse to *shastras* and then to the treatise of logic and epistemology must act as the most important supplement to the *Dharmashastras*.⁸

⁵ Chatrapati Singh’s most notable work, *Law from Anarchy to Utopia* (1985), is a groundbreaking text that seeks to establish a new theory of law by examining its logical, epistemological, and ontological foundations. In this book, he argues that the philosophy of law should take precedence over other social philosophies because it deals with the fundamental conditions of peace and justice necessary for societal progress. He viewed legal philosophy as an emancipatory enterprise aimed at creating a just social order. For this purpose he proposes re-engagement with Indian philosophical traditions.

⁶ Once again, interested persons may refer to the Sources of Law section of this course content.

⁷ Spivak also highlights the power dynamics embedded in knowledge production and representation. The eastern perspective is systematically silenced, distorted, or rendered inaudible within dominant discursive structures of the West. She argues that Western academic discourse often commits “epistemic violence” by imposing its own frameworks and categories of knowledge onto non-Western cultures. (Spivak, G. D. ‘Can the Subaltern Speak?’ in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* London: Macmillan, 1988)

⁸ Parasain, M., “Nyaya in Legal Reasoning and Argumentation”, (388-405) in Anju Vali Tikoo, Seema Singh & others

The Indian knowledge tradition, spanning millennia, offers a rich tapestry of philosophical and spiritual perspectives enriching human understanding of the universe, the self, and the relationship between them, providing valuable insights for individuals seeking to navigate the complexities of existence. 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 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 skepticism 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. The philosophical views of India have permeated the entire population irrespective of their intellectual caliber, whereas in other civilizations, 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. This vision has an indelible mark on the concept of law as *Dharma*, legal philosophising and the interpretation and application of the various sources of law in this tradition.

To supplement and exemplify the above point it is pertinent to recall that *Shruti* is always held to be the spirit of the law. The injunctions in the *Dharmashastras* may be compared with the modern Bare Acts, which in itself may be proved to be outdated for modern jurisprudence. Therefore, the argument in this paper is not in favour of reviving the *Dharmashastras* and vigorously infusing them into the modern legal system, but to enquire how the spirit of the *Dharma* can be useful for the legal order of our times. The *Dharmashastras* as texts could be static but *Dharma* is dynamic and has the seeds of discursive practice in it. The spirit of *Shruti*, particularly the *Mahabharata* repeatedly claims that tradition is not *Dharma* if it fails to accommodate emerging situations and does not act as a problem solving device. When “*the structure of a social system allows fewer possibilities for problem solving than what is required for the continued existence of the system*” (Habermas, 2), a crisis situation is already emerging. These potent lines from *Legitimation Crisis* surprisingly have several reference points in the *Mahabharata*, which therefore prescribes problem-solving approaches along with the consideration of benefit of others at large (*Maitribhava*) even at the cost of breaking a vow, which is merely a personal virtue. As we know that the *Mahabharata* is an epic which tells us what should not be done by exposing the tragic flaws of its heroes when they meet their nemesis in the battlefield, and presents a complex of utilitarian, duty-centric as well as a spiritual theory of action, its understanding of law, morality and spirituality too needs to be explored in an integral manner.

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 doctrines within Indian philosophy have significantly influenced the development of Indian legal thought. However, 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.

Metaphysical Foundation of the Principles of Morals and thereby that of Law

Every society irrespective of location and antiquity follows certain regulations for peaceful co-existence. These regulations are often well-connected with their belief system. But to have mere rules and belief systems is not a marker of advanced philosophical thinking unless those rules and belief systems have a) *Pramanashastra*, or theory of proof in the form of axiomatic principles to resolve conflicting claims in a philosophical way and b) a metaphysical foundation of law in addition to the laws prescribed to be followed.

As a theory of proof, there is a rich epistemological tradition in Indian philosophical schools particularly developed by Nyaya, Buddhists and Jain logicians in argumentative and adversarial settings. These axiomatic principles are not only natural law principles and procedural niceties but the plinth on which a system of philosophy is based.

The second marker of a philosophy of law is to have metaphysical foundation of law. Legal validity and authority must be anchored in something more fundamental and enduring than human decree, often appealing to reason, human nature, or a divine order to establish principles that are universal and inherently just means that the ultimate source, validity, and authority of law are rooted in fundamental truths about reality, human nature, or a higher order of existence, rather than solely in human decrees or social conventions. It is a quest for an objective, universal basis for legal principles.

A brief account of the development of jurisprudence in the Western world may clarify the above claim. The natural law tradition of Aquinas was a branch of theology. It was developed to provide a rational foundation to the canonical laws of medieval theological regimes. 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. It was the most radical shift at the dawn of enlightenment. Practical reason leads Kant 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.⁹ Kantian prescription of *Sapere Aude* - “*have courage to use your own understanding*” (Kant, 54) provides the much needed booster

⁹ 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.

to the process of separating jurisprudence from theology. According to Kant, pure reason has its limitations in providing the metaphysical foundation for law and morals, because it is confined to the phenomena alone. The philosopher of law, therefore, must bring the reason's house in order before applying that reason for his inquiry. Kant could do that by taking resort to practical reasons. The question "*why shall I be good to others?*" was answered by Kant for the first time in Western civilization without referring to the divine causes. For Kant, any rational person will be good to others because he knows the moral law and "*true politics cannot take a single step without paying homage to morals*" (Kant, 1970: 117–18).

Bentham further freed jurisprudence from theology with his appeal to the greatest benefit of the greatest number. We should be good to others to maximize happiness. Here the sanction is not divine but temporal happiness. The Bharatiya jurisprudence, in this context, may get a helping hand from modern psychology, which has already exposed the "happiness industry" and established the paradoxical nature of our pursuit of happiness. Indian jurisprudence is built upon the realisation that happiness itself is ephemeral.¹⁰ American constitutional jurisprudence which is founded on the Jeffersonian ideals of individual's "pursuit of happiness" and state's role in removing obstacles to that pursuit gave rise to right-based constitutional jurisprudence, making it obligatory for the organs of the state to balance public policies with individual rights and sometimes even sacrificing collective well-being for the sake of rights.

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 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 the 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.

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. 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*,

¹⁰ The Indian concept of *Anand* is not ephemeral happiness, but an aspect of the highest being: *Sat-cit-anand*.

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. *Dharma* (righteous order and obligations), as law possesses three foundational elements - scriptural authority, tradition, ‘exemplary conduct’, and only marginally custom, which are said to underwrite the central principle of life.

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. 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. Though the religiosity of the practice of rituals and prescribed practices for salvation permeates Indian legal theory, it has the capacity to stand alone as a secular enterprise not limited to any particular religious belief.

East and West

“Oh, East is East, and West is West, and never the twain shall meet,

Till Earth and Sky stand presently at God's great Judgment Seat;

But there is neither East nor West, Border, nor Breed, nor Birth,

When two strong men stand face to face, though they come from the ends of the earth!”

Rudyard Kipling, *The Ballad of East and West*

The above-quoted lines from Kipling summarizes the predicament faced in understanding the life, culture, and world-view of the two hemispheres in relation to one another as well as the hope of meeting of minds on the platform of universal human values. A long historical and philosophical account is warranted

to supplement the claim above. However, to meet our limited goal pre-settled by the mandate of this course content on Indian Jurisprudence, we must spell out the following distinction at the outset.

Firstly, the foundational concept of Indian Jurisprudence is *dharma*. It differs from the theories of Jurisprudence and “the concept of law” developed in the West. Western theories are individualistic, realistic and based on the presumption of the nature of man in the West. The Contractarian tradition, from Hobbes to Rawls, presumes that self-interest is central for the moral or political agent in their policy formulation. It lacks consideration for the pure altruistic concerns in humans and consideration for *the other*. The motivation to follow the law is a necessity or a rational assessment of the best strategy for maximizing the self-interest and does not have any bearing on personal pursuit of improvement of the self. On the other hand, eastern theories are communitarian and centred on collective well-being. They are idealistic and presume the inherent goodness of man and the idea of freedom from worldly bondage as an ultimate objective of each human being. Law as *Dharma* cannot be separated from morality and culture-specific ethics in the broader sense of practices and social realities or relativities on the ground. To do so is to impose an anachronistic template of modern legal positivism to an ancient philosophy. This distinction holds true not only with regard to the West vis-a-vis the *Dharmic* theories (Hinduism, Buddhist and Jain) but also to the West in contrast to the Confucian¹¹ and Zoroastrian¹² accounts of law and morality.

Secondly, there is a major distinction in the idea of sovereignty in Austinian jurisprudence and the concept of kingship in *Dharmashastras*. In *Dharmashastras*, the King is subject to laws and not a sovereign over the laws. The King is merely the highest medium of enforcement of temporal law. The ideas like State “as a foundation of law or the norms” emanate from the sovereign power of the state or King and this idea is immanent in western thought. Therefore, it dictates “*Honour the State, the Root of Law and Wealth*”. Whereas *Dharma* as the foundational concept prescribes “*Honour the law (Dharma), the root of state and wealth*” (Singh, preface, v)¹³

Thirdly, corollary to the first and second distinction is Western emphasis over rights and Indian emphasis over duties. The right-based jurisprudence of the West needs to be contrasted with the concern for collective well-being, which is prescribed through the concept of *kartavya* and the concept of *Rna* or obligations in the *Dharmic* tradition. As the primary goal of Western system of law is to maintain social order, resolve disputes, and ensure justice, it prefers to do it often through the protection of individual rights and the enforcement of contractual obligations. On the other hand, the ultimate purpose of the *dharmic* way of life is to maintain and sustain the cosmic and social order, leading to peace, righteousness, and the holistic well-being of individuals and society. Law, in the sense of *Dharma*¹⁴, have all the elements viz., divine commandment, rules legislated through the institutions of State, and unwritten customs and usages of a particular society.

However, *dharmic* jurisprudence is not an isolated enterprise. It is not independent of the individual’s pursuit of the highest end- *Purushartha siddhi*. Therefore, laws cannot be bereft of the principles of *Artha*, *Kama*, *Dharma*, and *Moksha* or *Apavarga*. The substantial laws are ‘means’ (*artha*) to a higher end and which cannot be inconsistent with the integrity of *dharmic* existence. The various rules, regulations and norms in a society are only for the *Kamartha siddhi*. They balance the worldly desires of individuals (*Kama*) against the desires of others. *Kama* is an important ingredient of well-being and *dharma* makes that well-being grow beyond individual desire. *Dharma* in that sense makes us aware that individual

¹¹ In Confucian thought, morality and law are fundamentally intertwined, with morality taking precedence. The focus is on the “rule of virtue” over the “rule of law”. The ideal society is one where people are guided by moral example and ritual propriety (*Li and Ren*), not by coercive laws and punishments.

¹² Zoroastrianism links law or *Dena*, or the “path of righteousness,” and morality or *Asha* (truth, righteousness, order) through a cosmic duality of good and evil, where human actions have universal significance. The purpose of life is to choose good and fight evil, a principle that forms the basis of its ethical system.

¹³ See also Baxi’s ILI article *Chatrapati Singh and the Idea of a Legal Theory*.

¹⁴ The terms ‘Dharma’ and ‘Law’ have broad semantic ranges that overlap in part.

well-being is based on collective well-being. In this context, Indian jurisprudence prioritises duties over rights. The scarcity of means and the need for social order necessitates the fulfilment of desired ends through the means which are equitable and consistent with dharma. Kama which is in the individual dimension reaches the societal dimension of artha and dharma and ultimately the highest well-being of the individual or Moksha can be achieved, which again strips down to the individual dimension. The concept of Purushartha as individual desire to 'transcendence of desire' through the social dimensions of equitable means and righteousness explains the basis of Indian legal, political and social philosophy.

Fourthly, the above three distinctions are the by-product of the distinction between law as primarily a human construct (whether originating from the sovereign, or human rationality or customs and judicial decisions) in Western thought paradigm and law as inherent in the universe as *Rta* or cosmic order and revealed to mankind as *Shruti* in the *Dharmic* understanding. *Rta* is the natural order, rhythm, and truth that govern the universe and everything within it. It can be understood as the cosmic law of nature that maintains harmony and balance. *Rta* is not just a physical law; it's also a moral and ethical law that dictates the proper functioning of the cosmos and the 'right conduct' of all beings.

Thus, the understanding of law as "integrity of existence" in Indian jurisprudence, which is made explicit in the above account by highlighting its foundational difference with the jurisprudence developed in the West, is based on a unitary and integrated vision of man, life and world.

Conclusion

When the above diverse traditions with their unique civilisational perspectives are engaged in a dialogical enterprise, their foundational ideas are discussed and analysed, these ideas are integrated into a critical understanding of a philosophy of law. This process occurs through the examination of the historical, epistemological, and social context of these philosophical ideas. As a result, legal research and its outcome gets culturally rooted intellectual legitimacy. It also helps in identifying the strengths and limitations of different theories and models in explaining the basics of law.

Now if a question is asked about the possibility of this dialogical enterprise in our world torn with conflicts and differences, we need to look into the answer in Tagore's concept of 'surplus in man'. For Tagore, humans have infinite capacity to question and transcend their 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 altitudes, temperature, flora and fauna, and yet belonging to the same chain of hills'. He says, '*there are 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 the Indian Knowledge System with individual rights and modern democratic tradition and progressively engage oneself with the diverse civilisational perspectives towards philosophy of law. As the "problematique of jurisprudence" is not about finding a single, simple answer to the questions raised in philosophy of law, it is always better to grapple with their complexity, recognizing the different philosophical perspectives, and understanding how these debates shape legal systems and influence our understanding of justice and society.

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INDIAN LEGAL THEORY - PAST AND PRESENT*

India is a very ancient country with a great hoary past-rich in its cultural, intellectual, spiritual, political and legal heritage. It is India where for the first time an idealistic and pragmatic legal theory evolved based on certain values spiritual as well as material - *Dharma*, *Artha*, *Kama* and *Moksha*. Within the ring of *Dharma*, the life wheel of ancient Hindus moved for the attainment of prosperity (*Artha*), and for gratification of senses and desires (*Kama*) with a view to attain spiritual liberation or salvation (*Moksha*).

Early Law-givers

The ancient Indian Legal philosophers were not mere daydreamers or other-worldly but were universalistic, humanists, rationalists and above all moralists of the Supreme order who evolved a system of legal theory which was based on their conception of *Dharma*. Accordingly, law was always an instrument to maintain and promoted *Dharma*. Thus, ancient Indians evolved Codes of Laws based on higher values and ideals which governed in an integrative manner all civil, religious and other actions of men in society- be it King or his subject. One such example of code of conduct is the advice of Ved Vyas to Pandavas who consoled them in these words¹:

‘No virtuous man is strong enough to live in virtue at all times, nor any sinister bad enough to exist in one welter of sin. Life is tangled web and there is no one in the world who has not done both good and evil. Each and every one has to bear the consequences of his actions. Do not give way to sorrow.’

Foreigners and even some educated Indians are ignorant of the fact that India in the past nurtured a highly ordered and evolved legal theory as expounded by its great law givers-the holy sages like Manu, Marichi, Atri, Angira, Pulastya, Pulaha, Krati, Pracheta, Vasistha, Bhrgu, Narda, etc.

Sruti and Smriti and Inter-mixed Nature of Law

Srutis and *Smritis* form the greatest treasure house of Hinduism-which are considered immemorial (*Sanatana*), timeless (*anadi*) and eternal (*nitya*). Vedas belong to the class *Sruti* (or what is revealed or heard) are the original and primary source of Hindu system of law and are of divine origin. There is not much in them what may be called positive law. The nature of law in the Vedic age was of theological character which was described as *rita* for universal order and harmony. This corresponds to the natural law of the Western World which is still the basis of their contemporary legal theory.

The period of Vedic development was succeeded by the period of *Dharmashastra*. This period witnesses the crystallisation and concretisation of customary traditional law into the framework of *Smritis* (or what is retold, remembered and written). The era of *Dharmashastra* is described as the Golden Age of Hindu legal theory wherein there was a blending of religion and morality with law. They deal with the religious and moral law, the duties of the castes and Kings as well as civil and criminal law'. The observation in the Code of Manu that *Sruti*, the *Smriti*, *customs* and *sayings of virtuous men* and *one's own conscience* (self-approval) are the four sources of the sacred law is sufficient, to show that *Dharmashastra* were the inter-mixtures of law, religion and morality. In fact, moral and religious obligations were regarded by the exponents of *Dharmashastra* as of greater importance than mere legal obligations.

However, in the *Smritis* one can also see the emergence of the concept of law as distinct and separate entity from ethics and morality. Some of the *Smriti* writers provide a coherent and logical treatment to law in a positive way distinguishable from other non-legal values. Likewise, the commentators of

* S.N. Dhyani, *Fundamentals of Jurisprudence The Indian Approach* 48-75 (Central Law Agency, Prayagraj, 2023).

¹ Rajagopalachari, C., *Mahabharata* 58 Bhartiya Vidya Bhavan, Bombay 1979.

different *Smritis* were guided by certain normative legal rules in forming their opinion about law.² 'A principle of law, established in one instance should be extended to other cases also, provided there is no impediment'. 'Between rules general and special the special is to prevail'. If there be a contradiction between a *Sruti* and a *Smriti* the former is to be followed, but if there be no such contradiction, the *Smriti* should be acted upon'. 'If the two texts differ, reason must prevail in practice.'

Further, the *smriti* writers have demarcated the respective spheres of law and non-legal rules with remarkable clarity in three sections (*Kandas*) viz. *Achara*, *Vyavahara* and *Prayashchita*. (1) *Achara* or regulations relating to the performance of religious rites and ceremonies and general duties of men; (2) *Vyavahara* or civil laws relating to the protection of life and property with all their rules and practices and (3) *Prayashchita* or those relating to the atonement for various sins committed. But all these groups of laws, religious, civil and about atonement pass by one comprehensive term which is popularly known as *Dharmashastra*. There are a number of great law givers in Hindu Jurisprudence such as mentioned by Yajñawalkya,³ such as Manu, Atri, Vishnu, Harita, Yajñawalkya, Ushana, Angira, Yama, Apastamba, Samvarta, Katyayana, Vrihaspati, Parasara, Vyas, Sankra, Daksha, Gautama, Satatapa and Vasishtha.

Yajñawalkya Smriti-And Legal Theory

A perusal of Yajñawalkya Smriti indicates the existence of a highly developed legal theory with a system of rules of law (*Vyavahara*) in its strict sense in both substantive and procedural forms. The quintessence of these *Dharmashastric* legal theory is based on the existence of higher universal moral order based on truth, purity of means and non-violence which binds all men, all places and all times. It is indeed a code of duties comprehensive and secular in nature which attempted to enthuse all people for the subordination of *Preyas* to *sreyas* of material earthly possession to moral values - called *Dharma*.

Thus, positive law in ancient India was closely related to ethical and religious values of society and its culture. There is no record in Hindu *Smritis* to prove that law was based on any command of a sovereign body or of a superior law-making authority. It was neither based on a general habit of obedience to determinate persons but rather⁴, on a general acceptance of constituent rules, simple or complex, defining the manner in which the ordinary rules of the system are to be identified..... The acceptance of such fundamental rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course, evidenced by obedience to laws.

The generally accepted motive according to these *Smriti writers* was the observance of *Dharma* and the sanctions recognised by the people. Enforcement of law (*Danda*) in the nature of things proceeded from the Sovereign but one view of the genesis of legal institutes was that King and the law were created by the people. *Medhatithi* and *Vijnaneshvara* as also the *Mahabharata* and the *Arthashastra* of Kautilya maintain the view that law as enjoined in *Vedas* and *Smritis* was of popular origin". In substance the basis of ancient Indian legal theory was *Dharma* धारणात् धर्ममित्याहुः धर्मोधारयति प्रजाः which meant that power which brings individuals together and sustains them as a society and wherein each has realised his oneness with others in society. Indeed, such a law of *Dharma* could be model for universal legal order neither tinged by bigotry nor coloured by political or racial prejudices. It is like Stammler's natural law with a changing content i.e. सदाभाव सनातनः

The ideal of ancient Indian legal theory was the establishment of socio-legal order free from traces of conflicts, exploitations and miseries. The ideal which Rig Veda puts before humanity is that our intellect and wealth be for the good of humanity and universal peace i.e. शं नः पुरंधी शमु सन्तु रायः Similarly *Adi Sankara* the exponent of Vedanta Philosophy declares, "The Seeker who has realised the self sees the entire

² Dutta, M.N., The Dharma Shastra-Hindu Religious Codes, p. XIII, Cosmo Publication, New Delhi, 1978.

³ Dutta, M.N., The Dharma Shastra-Hindu Religious Codes, Introduction, I & II Vol. I, 1978.

⁴ See Setalvad, M.C., Law and Culture, pp. 20-21 (Bhartiya Vidya Bhawan 1965).

universe as the self. The *Upanishadaika* principle too stipulates the ultimate reality and unity of universal self with individual self is identification of the internal essence.

It must be stated that the Indian spirit has never been goaded by narrow and selfish notion of 'mine' and 'thine' but by the spiritual sparks of the supreme Lord. The *Kath Upanishada* and *Birhadaranyaka Upanishada* exhort pupil to meditate on the 'self as a measure spanning earth to heaven, and as identical with himself.'

INDIAN LEGAL SYSTEM

Western's misconceptions

However, deliberate misunderstanding about the nature of ancient Indian legal thought and polity was created by the Western scholars who were ignorant as well as prejudiced towards India and its law, language and culture. Especially in the sphere of law and polity they believed that India's contribution is zero. For example, J.H. Nelson described Hindu legal system as 'a mere phantom of the brain imagined by Sanksritists without law and lawyer without Sanskrit'. To Max Muller 'Hindus were a nation of philosophers. Their struggle was a struggle of thought, their past the problem of existence. It may, therefore, be justly said India has no place in the political history of the world. Another scholar Bloomfield in his works on Vedas observed: 'The life of Hindus is divided into four stages. Of religious discipline, the search after knowledge, the householder, the wanderer and the world renouncing ascetic. This is the theory of their life. There is no provision in such a scheme for the interest of the State. Dr. Albert Schweitzer believed that the Hindus were merely a spiritual society having nothing to do with practical affairs of social organization, economy and polity. He is of the view that the Indian way of life negates ethical and material life. Professor Dunning in his *History of Political Theories-Ancient and Medieval* says, 'Oriental Aryans never differentiate their politics from theological environment in which it is embedded even to-day. Moreover, the two-century old colonial rule over India was also responsible for creating a class of English educated people who were staunch crusaders against traditional values, ideals and institutions. Even Sir Henry Maine castigated ancient societies including Hindu society as '*status quo*' societies pointing out that they were not organised around nor did they contain a system of contract. Thus, Lord Macaulay's English as medium of instruction and source of employment had made 'India English in opinion, in morals and in intellect.'

The English-speaking Indian elites who were champions of foreign way of life also did great dis-service to the growth and development of indigenous law and legal system. Gandhiji rightly charged that our English knowing men have enslaved India'. In fact, English language alienated Indian masses-contemptuously called *natives* from their White rulers but also from educated Indians who had dismissed and discarded indigenous law, language and literature as irrelevant and unsuited to modern way of life and least fit to become official law and language for administrative purposes. Lord Sinha and Gokhale frankly said if Britishers were to leave India, the Indians would call them back before they reached Aden. In short, the British rulers, churchmen and bureaucrats failed to appreciate that there was an entity called Indian people having their own distinct way of life, language, law and legal institutions.

Free India and its Legal System

Even after over seven decades of our Independence no systematic effort has been made especially to study, analyse and evaluate particularly the basic fundamentals of indigenous law and legal theory as evolved and followed by legal philosophers in India before its replacement by modern English law in the nineteenth century. This new imposed legal system on India by English rulers was based on English model to achieve their socio-economic and political goals by introducing legal system to perpetuate colonial situation of subjection and exploitation. The whole reception of foreign law found in the statutes; law reports and administrative practices rested on the philosophy of *modernization* and on the assumption that the traditional society of India can develop faster on the basis of "*modern*" institutions. Accordingly English law and legal system was imposed by colonial rulers by a stroke of pen which systematically destroyed the

Indian social traditions, laws and moral values. India, thereby, began to be governed by new theories of Adam Smithian and Ricardian Political economy and analytical or positivist on system of John Austin. Such was the civilising mission of the foreign rulers and under its weight and influence India lost its soul and ancient heritage-with English educated Indians, English law, literature and language has become partly a hindrance in the rediscovery of original and pristine spirit of real Indian culture and law for establishing harmony in place of conflict, justice in place of injustice and development in place of stagnation for which the alien law and institutions are mainly responsible. Commenting on this, Justice V.R. Krishna Iyer aptly remarked,⁵ that 'Transplantation of English system cannot succeed except in a limited way in India. The variables are so many and the social situation and even physical setting so different that the colonial heritage is now a hindrance to socialist progress and development of our essentially Indian people oriented legal system. The all-too large gap, even conflict between law and life is possible due to this failure of Indian creativity'. The learned judge likewise made poignant observations,⁶ that 'unfortunately even after liberation many former colonies including India, did not shake off this neo-colonial jurisprudence.

The imperatives of Independence and the jural postulates based on new value system were embedded in the form of 'justice, equity and good conscience'. We had to part company with precedents of the British Indian period tying our non-statutory law to vintage English law christening it 'justice, equity and good conscience'. After all, conscience is the finer texture of norms woven from ethos and lifestyle of a community and since British and Indian ways of life vary so much that validity of an anglophilic bias in Bharat's justice, equity and good conscience is questionable today... Free India has to find its conscience in our rugged realities and no more in alien thought. In a larger sense the insignia of creativity in law, as in life, is freedom from subtle alien bondage, nor a silent spring nor a hot-house flower'.

There has been self-criticism in England and the USA about their respective legal systems. After great self-introspection Lord Devlin remarked "there is a need for comprehensive inquiry into the roots of our procedure backed by a determination to adapt it to fit the conditions of the welfare state".

Sir John Foster Q.C., Chairman of the Executive Committee of Justice the British branch of the International Commission of Jurists trenchantly observed. "I think the whole English legal system is non-sense." However, there is a class of modern Indians educated in western philosophy and way of life who adopt western manners, customs, ideas and mode of life and thought insist that India's progress consists in completely forgetting her past and are angry with everything that is Indian be it law or literature or language.

However, it must be admitted that the benefits of British jurisprudence in the form of rule of law prerogative writs and independence of judiciary were certainly shared and enjoyed by the Indians. Therefore, there is an imperative need of an objective assessment of legal values, norms and institutions both which India traditionally evolved and which it received from its Western rulers to judge their relevance as harbinger of a new social order. The scope of such study would encompass whole ambit of social, cultural and legal history of India-which of course is a challenging task.

Traditional Indian Legal Theory-Fundamentals

As already observed, contemporary Indian jurists too have been allergic to study indigenous law and traditions which they look down upon as archaic, anachronistic and purposeless venture. The cosmos of law has expanded to comprehend many disciplines and technology, and so lawmen must in turn, acquire new visions, new competence and new perception of the frontiers, lest they should be pushed aside as irrelevant or obstructive to progress. Generally, ignorance and sometimes prejudices made us to ignore and even condemn our rich composite legal heritage, customs, traditions and ideals in the moonshine of English legal philosophy. The present tensions in Indian legal theory are also due to conflicts in western

⁵ Mehr Chand Mahajan Memorial Law Lectures, p. 23 (476-77 Cyclostyled, Department of Law, Punjab University, Chandigarh).

⁶ *Rattan Lal v. Vardesh Chander*, AIR 1976 SC 589 at 597.

jurisprudence which stem from the controversy on the fundamental question of the nature of law and social system which interact upon each other. Such conflicts are basically the product of diverse philosophies of life political ideologies and political organizational systems which largely determine the ultimate values and purposes of life in such societies.

Viewed historically and morally, the traditional Indian legal theory is not a part of the family of western legal systems, yet its present institutional and doctrinal foundations have to a large extent been laid on the notion of British jurisprudence. The Indian jurists, therefore, have to evolve an integrative legal theory which should not be merely a carbon copy of English jurisprudence but should attempt to retain, reconcile and synthesize the basic social fundamental values of Indian society with those of contemporary western ideals and concepts which have been assimilated and adapted in our system keeping in view the moorings,⁷ of our indigenous culture, traditions and needs as is evident from *Isho Upanishada* ईशोपनिषद् which contains the essence of Hindu *Dharma* exhorts its followers as:

ईशा वास्यमिदं सर्वं यत्किञ्च जगत्यां जगत् ।

तेन त्यक्तेन भुञ्जीथा मा गृधः कस्य स्वधनम् ॥

which means, "this entire cosmos is immersed in God and so enjoy it by way of sacrifice without greed or desire. An attempt, therefore, is made to study the perspective of the fundamentals of traditional Indian legal theory in order to correlate extent of their relevance to the needs and goals of present-day Indian society.

(I) Positive Ideals and Social Harmony

The basic difference between Western way of life and law and ancient Indian way of life and law is that in the former there is a perpetual conflict between individual and society whereas in the latter there has never been any conflict between the two. In reality, the system of law in India has neither been too rigid nor absolute. Within the general framework it has been changing according to needs and developments of society. In fact, 'Hinduism',⁸ according to Dr. Radhakrishnan 'does not believe in any permanent feud between the human work of natural desires and social aims and spiritual life with its discipline and aspirations on the other'. Thus, essence of Indian law and culture has been harmony and unity within diversity-be the sphere of law or religion or society. The legal codes or the codes of social morality never suppressed or exploited the individual or his individuality yet at the same time they promoted corporate life in society in which man was enjoined to serve society, in his own interest and for the social good as well.

For Manu declares:

यावत् श्रियं ह्यत जठरं सावत् स्वत्वं हि देहिनाम् ।

अधिकं योऽभिमन्येत स स्तेनो दण्डमर्हति ॥

i.e., take whatever is essential for bodily sustenance. To take more is an act of theft and deserves to be punished. Thus, man is made a trustee of society wherein individual is enjoined to eschew his ego or arrogance or what is called in the west the spirit of self-aggrandizement and assertion which creates imbalance and disharmony in society. Another feature of Western jurisprudence is its emphasis on rights, and it nowhere stresses so much on duties. That is why we find so many conflicts and tensions between individuals and society.

The Hindu jurists tried to strike a balance between the two by generating a spirit of selfless service, tolerance and duty as important components of *Dharma*. Of course, religion is inseparably bound up with

⁷ *Surajmani Stella Kujur v. Durga Charan Hansdah*, AIR 2001 S.C. 938 at 939.

⁸ *The Hindu View of Life*, p. 79.

India's destiny. According to Vivekananda like Gandhiji after him disagreed with the view that religion has outlived its utility as an acme of social, spiritual and political regeneration. As Gandhiji put it '... the religious ideal has been flowing in India for thousands of years. It has permeated the atmosphere, has entered our very blood, tingled with every drop in our veins, has become one with our Constitution, has become the very vitality of our lives. Can you give it up without rousing the same energy in reaction without filing the channel, which that mighty river has cut out for itself in the course of a millennia? Do you want that the Ganges should go back to its icy bed and begin a new course? The Indian mind still finds it difficult to comprehend law and life except through the medium of religion.

According to Swami Vivekananda, the English man can understand religion through politics, the American through social reform. But we can understand even politics and sociology through religion. That is the theme, the rest are only variations in the national life-music. Thus, catholicity of outlook, and tolerance has permeated in all spheres of life-religious, social, political, economic and legal which fashioned them for a harmonious pattern of mutual goodwill and respect. However, there is a common feature enshrined both in Western and ancient Indian jurisprudence that is the existence of democratic nature of society with a secular law wherein the supremacy of law is maintained over all be it the sovereign or the people.

The question, therefore, arises - can we succeed in India in establishing a democratic, egalitarian and secular society by ignoring our ancient philosophy, traditions and law of course, in a modified and need-based form wherever necessary? Can we create a legal structure only on borrowed notions and experiences by dismissing our law and culture as archaic and an obstacle to development? Should we not examine the capacity of our indigenous legal system to solve the present-day conflicts which are dividing the people and society. Should we assume that our indigenous legal system is inferior and that of the West is superior?

A crisis has developed in India as the modern English educated elites are devoid of the knowledge of the ancient law and wisdom and the Sanskrit scholars of repute of ancient texts lack knowledge of modern legal theory and social sciences. In particular, western oriented lawyers, judges and jurists in India assume that ancient Indians had philosophic traditions devoid of any legal theory or judicial system. They wrongly represent that Indian philosophy and way of life was primarily concerned with individual effort to gain liberation (*moksha*). This isolation of the individual from society at large is overemphasized in certain aspects of Indian life and Indian philosophy. For instance, Buddhism and Jainism insisted on finding liberation away from the world. This led western thinkers to criticize Indians for their escapist way of life. This, however, is not correct. On the contrary the social dimensions of Indian traditions and philosophy have been positive, rational life affirming and respect for each other's views, and not blindly guided by so-called inspired person who cannot stand the test of reasoning based on Scientific investigation and analysis. Vivekananda declared,⁹

“It is better that mankind should become atheist through following reason than blindly believing in two hundred million gods on the authority of anybody.... The glory of man is that he is a thinking being..... If a religion is destroyed by rational investigation, it was not a religion but a superstition. All that was dross would be taken away and the essential parts would emerge triumphant from such an investigation.”

Indian life as depicted by Valmiki, Vyas, Kalidas, Shri Aurobindo, Ram Krishna Param Hansa, Vivekananda, etc., aims at striking harmony and fusion between moral and material, temporal and spiritual goals of individuals in society in order to achieve *Sat Chit Anand* (existence, knowledge and bliss).

Indeed, the ancient thinkers did not think it possible for a common man to attain *Moksha* (salvation) without attaining *Kama* (gratification of senses) and *Artha* (economic prosperity). In essence the Vedas-

⁹ Naravane S. Vishwnath, Modern Indian Thought, p. 92 (Orient Longman 1978).

Rigveda and *Atharva Veda* do not anywhere mention this world as a place of suffering, as something to be escaped. Such blatant lies or canard were spread by English people to sub-serve their political interests depicting India a country of monks devoid of law and politics.

The ideals of *Atharva Vedic* sages have been positive and looking forward to live happily for a hundred years. Indeed, in some hymns a happy, healthy and full life of a hundred years is described as immortality (*Amaratva*). The precepts of mutual inter-dependence, mutual co-existence and mutual harmony between man and society have been the foundations of Rigvedic Indian society. This vision of social unity of the Rigvedic man was within the parameters of social, cultural and racial diversity which he interacted. This higher ideal according to *Rigveda* is:

Meet together, speak together, Let your minds be of one accord, As the Gods of the old, being of one mind, Accepted their share of sacrifice.

This vision was the cardinal principle to establish harmony and stability in social life of those days by change of hearts of Aryans and non-Aryans way of life. This was the law or *Dharma* for directing and unifying the diversity of actions of men in society.

(II) Supremacy of Dharma or Law over King of State

No Indian ruler could claim with impunity and so brazenly as Alauddin Khilji of the medieval India and Louis XIV of France did that they were the State. Indeed, the ancient Indian lawgivers were also clear in their mind about the limitations of one-man's rule. They, therefore, enunciated the doctrine of partial or limited sovereignty assigned to the king to administer the country without legislative powers or rule making power whatsoever.

Hindu thinkers always held law or *Dharma* superior ruler to State or Government. The State was by no means a source of law as has been propounded by a number of European legal pundits like Hobbes and Hegel. Indeed, the kingship was a trust and the Indian kings like Ashoka and Harsha looked upon themselves in that light. Moreover, fear of popular revolt was another deterrent to tyrannical or gross misrule. *Mahabharat*¹⁰ sanctions rebellion against a worthless king. Indeed, *Manusmriti* enjoin a series of duties on the part of the king. It is the duty (*Dharma*) of the king to punish the guilty who violate or transgress *Dharma*.

The Hindu jurists, therefore, never depicted State as a 'necessary evil'. It was on the other hand considered necessary for the advancement of *Dharma*. 'Human beings can find security only in and through the State. Without a sovereign authority to establish law and order and maintain peace, stronger will swallow the weaker in the manner of fish'. It was, therefore, the paramount duty of the king to promote the cause of *Dharma*. If the law and order are not maintained by the King, the righteousness would soon disappear, unrighteousness would prevail everywhere. None would care for the code of ethics and morality. Sense of propriety and justice would be nowhere. Society itself would cease to exist. *Shantiparva* elaborately describes the nature of law, State and their relationship with individuals. *Ramayana*, *Taitereya*, *Brahman* and *Mahabharata* are also dominated by social, political and legal philosophy of Hindus which enjoin both upon the king and individuals to follow established laws (*Dharma*), without fear or favour with strict control over personal whims and desires.

In *Mahabharata*, there is a reference to social contract theory wherein king is appointed by God with the consent of the people and a *dandaneeti* (sanction or punishment) was created to punish those who violated *Dharma*. Manu too envisages the importance of punishment which is the Principal Raj Dharma of the King to protect the subject. For all purposes the King is the harbinger of a new era. Indeed, kingship was an instrument to promote public welfare, protect society and achieve the ends laid down by the law of

¹⁰ Acharya N.K., Cultural Polity of Hindus, p. 92 (1971).

Dharma. The existence of *Sabha* and *Samitis* was basic to give validity to the decisions of the King. It is true King exercised absolute powers-administrative and judicial-but subject to law of *Dharma* as interpreted by Brahmin scholars, and *Rishis* (saints). The decisions of the *Rishis* were, therefore, no less binding and valid for the king as the decisions of the Supreme Court of India in modern times. If the King did not care for the verdict of the *Rishis*, he would incur wrath of the people and of Gods. As *Manu* says *Dharma* when violated verily destroys, *Dharma* when preserved, preserves, therefore, *Dharma* should not be violated, lest the violated *Dharma* destroys us'. Thus, content of the sovereignty (kingship) of the state was force (*danda*) which guided and controlled the king for all practical purposes.

Thus, Hindus developed theory of Government and State called *Raja Dharma*. The *Arthashastra* and *Dharmashastra* give a detailed exposition of *Raja Dharma* under which protection of people and maintenance of social order are described as the vital duties of the State.

The *Rajanushasana parva* of the *Mahabharata* is a veritable treasure house of ideas on the *Dharma* of the King. It contains a series of multiple sayings on duties of the King and the virtues he ought to promote and sins and vices which he must eradicate with an iron will and hand. The ancient law-giver *Manu* in his monumental work *Manusmriti* again declares: तीक्ष्णश्चैव मृदुश्चैव राजा भवति संमतः । i.e. A ruler ought to be harsh or soft depending on the exigencies of the situation earns the good will and willing support of the populace. In other words *Dharma* enjoins the King not to observe and enjoin *मत्स्य न्याय* (unjust rule) and observe *Dharma* for *Dharma* protects if protected and destroys if it is destroyed i.e., धर्मो हेनं गुप्तो गोपाय । It further assures that it is through service and discipline that the King alone can conquer the whole universe-तपसा वै लोकं जयन्ति । *Arthashastra* declares that 'of a King, religious vow is his readiness of action; satisfactory discharge of duties is his performance of sacrifices, equal protection to all is his offer of fees' and the ideal King regards the happiness of his subjects as his own happiness which can be realised only through the observance and practice of *Dharma*.

In short, Hindu State or King was subservient to *Dharma*. He was only a custodian, executor and servant of the law and had no direct authority to make law, to interpret law. Whatever decrees or regulations he framed were supposed to be in accordance with sacred Law of *Dharma*. Chanakya or Kautilya, Yajñawalkya, Nārada, Manu, etc. categorically uphold this view and is further supported by eminent modern scholars like Prof. Rangaswamiyaengar, Dr. R.K. Mookerjee who also declared that king in ancient India was not free to make laws and was subject to law like any other individual.

(III) Rule of Law and Separation of Powers

In the West such concepts and theories were devised only after prolonged struggles and wars between people and their despotic monarchs in England and France during seventeenth and eighteenth centuries. Thus, quintessence of the doctrine of Rule of Law according to Dicey consists in 'the exclusion of exercise of arbitrariness, or prerogative or even of wide discretionary authority on the part of the Government. No person acting on behalf of the State can exercise power, unless he can point to some specific rule of law which authorised his act'. It means the acceptance of the paramountcy of the law which binds all rulers and the ruled and which no one can escape.

The ancient rulers observed the doctrine of rule of law-*Dharma* both in letter and spirit. They attached absolute validity to Law of *Dharma* and all other rules and actions acted upon were null and void if it were in conflict with the said higher law. The King, the State, the Government and the *Praja* (the people) are all subordinate to the law of *Dharma*. It is the Law (*Dharma*) which alone ruled and as already observed, the King was never above law but under law. The government of the ancient Hindus was, therefore, a government of laws and not of man'. The doctrine of separation of powers appears to be prevalent in the sense King (or executive authority) had no power to make new laws or to alter old ones. The King was invested with powers to inflict punishment (*danda*) not capriciously but constitutionally on

those who violated the law. Whatever minimal rule making powers the King enjoyed in the form of by-laws, executive orders or regulations were supposed to be in accordance with the sacred Law of *Dharma*.

In ancient India, the interpretation of law of *Dharma* did not rest with the King but with the *rishis* (saints) and the former was enjoined to abide by the expert advice,¹¹ of his ministers in matters of administration and from Judges in matters of adjudication and from *purohita* in matters relating to penances and vows. On questions of interpretation of doubtful points, the King was to be guided by the opinion of a *arishad* of learned men. The adjustment of *Dharma* to changing needs was to be brought about only by research and interpretation. The *parishad* custom (*charitra*, the practice of the elect (*sistachara*, *acharascha sadhunam*)) could be called for determination of the problem of reconciliation internal and external, of consistency and of suitability to all items and needs. In short, King was to rule according to *Dharma* which means both moral or civil law. *Dharma* was considered the force of force, or power to power. It is by *Dharma* that weak man rules the stronger, 'Wise ruler' says *Shukraniti*,¹² 'should not follow his own capricious will but accept the advice of his councillors.....a King's Council. Punishment should not be arbitrary, and trials should be held in public. The decision of the King should be in accordance with *Dharma*'.

It is significant to note that *Dharma Shashtras* were not only religious but legal in content making it absolutely clear that law is King of Kings and that no one is above law, even the King. He was the administrator of law and justice but never above law. If he swerved from the accepted laws of the land, he could be punished like any other citizen.

Likewise, *Brihadaranyak Upanishada* says that law is king of kings. This according to *Dharma Shastras*, no one is above the law, not even the King. It says law is ruler even of rulers and Kings. Therefore, there is nothing higher than the law. With the aid of the law even a weakling overcomes the strong.

(IV) Nature of Law-Broad-Based

It should be kept in mind that in all ancient systems the lines of jural developments were more or less the same and the distinction between a rule of law, a rule of nature, a rule of morality, and religion was not clear. The 'law books' of the Hindus, Hebrews, Chinese, Greeks and Roman provide detailed rules or code of moral behaviour laid down for all situations in life from birth to death.

The term *Dharma* was used by Hindu jurists in the most comprehensive terms which meant law, custom, usage, morality, virtue, religion, duty, piety, justice and righteousness. Manu-the law giver used the term in two-fold ways. In its widest sense, *Dharma* meant the absolute Vedic principles and the Codes of conduct derived from them. In its restricted sense the expression *dharma* signifies only to conduct prescribed for *Varna* System. He says all people irrespective of their status must adhere to five principles of universal morality. They are non-violence, truth, purity, control on organic desires and greedlessness in other's property and things. In addition, Manu enunciated more categories of duties of *Dharma*, namely, *Rajadharma* (duties of the King), *ashram dharma* (duties of individuals), *varna dharma* (duties in the hierarchical order as *Brahmana*, *Kshatriya*, etc.) *stree dharma* (duties towards women), *Dampatya Dharma* (duties towards married couples) and *apad Dharma* (duties in distress). Indeed, these moral duties provided the basis for the control and regulation of social and political life of the people in ancient India.

So far validity or bindingness of moral duties was concerned, the sanction for their enforcement or observance was implicit and inherent in the system itself as everybody was enjoined to act and follow the *Dharma* which represented the popular will of the community. There is no evidence of irresponsible, autocratic and despotic sovereign of Austin type in Hindu legal system with unlimited powers over subjects

¹¹ Aiyangar, K. V., Aspects of the Social and Political System of Manusmriti, p. 169 (1949).

¹² Jaganmohan Reddy, Quest for Justice, p. 197 (1970).

without any moral or ethical constraints whatsoever. Moral liberty and individual freedom were guaranteed within the framework of social law of *Dharma*.

Further, as Bryce observed,¹³ the sanction-the power of imposing penalties of the State is not always necessary to make laws or rules of conduct accepted by a community. We have instances of 'laws' behind which there is no State as originator or sustainer and in which breaches of such 'laws' are visited by public opinion with a power of implementation not inferior to that of State. We have outdistanced, in the light of comparative and historical jurisprudence, the Austinian conception of law'. But even in the Austinian sense, the *Dharmashastra* and the *smritis* can be said to have attained the rank of a law book in ancient and medieval India. The responsibility of an Indian King was personal, and it extended to all that befell on the people over whom he ruled.

It implied the supervision of the lives of the people and ensuring their conforming to established usages or moral rules. In this sense the specific duty of the King (*Rajdharma*) came to coincide with a knowledge of the duties of all in the kingdom. *Sarve Dharmah raja dharma pratishtah*-all duties are implicit in the duties of the King. It became a matter of pride for the Kings to excel in maintaining their *dharma* and to describe them as such. It should also be remembered that all the Kings were equally keen to enforce law or *dharma*.

In the face of the multitude of *smritis*, the Kings under their royal patronage prepared digests of *Dharmasastra* for resolving seeming contradictions in *smritis* and present a coherent picture of the *Dharma* which the people might follow, and King may enforce. When such digests or commentaries (like *Mitakshara*) were composed under royal direction and were upheld in the States in which they were first composed and afterwards in others can they be denied the title of laws? Among the Kings who composed *Nibandhas* of *Dharma* are Bhoja, Apararka and Prataparudradeva. Among the writers of *Nibandhas* commissioned by the Kings were *Vijnanesvara*, *Madhavacharya*, *Hemadri Kandesvara* and *Vachaspati*.

The need to follow the old law was its willing acceptance by the people as their *Dharma* who followed and observed it. It is behind the *Nibandhas* of the sixteenth and seventeenth centuries even when people were under foreign rule. It is significant that in case of three of the *Nibandhas* - those composed in the name of *Todarmal* and under orders of Warren Hastings and T.E. Colebrooke we have proof of the validity of the *smritis* even when India was ruled by foreigners who differed from the foreign conquerors of earlier times, in not adopting the religion of Indian and accepting its culture and ideals.

In short, the ancient Kings and people of India had claimed descent from Manu himself and delighted to bear the title 'the King who does not swerve from the Laws of Manu'. Even Kalidas in *Raghuvansha* describe *Dilip* as one who did not swerve even by a line from the path blazed out by Manu.

Finally, as in modern Russia effort was made to transform the society by establishing not only new ideology for the people but also to backward masses on new socialistic conceptions and beliefs so in ancient India under the wide wings of *Dharma* room was found for measures of the uplift of the communities and for their all-round material, cultural and spiritual elevation. The religious bias that we find in ancient systems of jurisprudence has its parallel in the economic or political bias of modern laws.

The greatest contribution of Hindu jurists of yore was the basing of law and polity firmly on the foundations of morality, true religion (*Manav Dharma*) and philosophy which is extremely relevant even in the twenty-first century.

(V) Ancient Ideal of Trusteeship-Its Relevance

¹³ J. Bryce, *Studies in History of Jurisprudence*, p. 334 (Vol. 1 Primitive Iceland).

It may be interesting to note that democracy, socialism and planning were better known to our ancestors than democratic West and former Socialist Russia. Today the *democratic* West is no longer at logger heads with Republic Russia because of the communistic attributes to property, free enterprise, personal freedom, etc., have ceased to exist. Likewise, the communist China and North Korea do not allow exploitation of man by man, concentration of wealth in the hands of few and misery for the majority of people in the name of personal freedom and democracy.

The modern Indian thinkers do agree that panacea of India's ills and poverty cannot be resolved by imitating blindly any particular way of life whether democratic socialism of the West or scientific socialism of Marx. We have to establish our social system and polity on indigenous values and ideals of course, without ignoring the basic legal and constitutional values we inherited from Britain as well as the modern crosscurrents and technological advancements. We have to diagnose India's ills and focus on basic needs and have to discover Indian solutions rather than lean on foreign systems or tools which the western educated Indian jurists try to impose because of their sub-conscious inferiority complex due to their indifference and ignorance of pristine Indian values regarding *Dharma*, *Artha Kama* and *Moksha* which are to be strictly observed, maintained and preserved in word and deed. These scholars so far have relied on the knowledge and ideas and experiences of the western thinkers and neglected to study the Indian thought and spirit in its entirety, as it involves the study of ancient texts in Sanskrit language and therefore, ignored or paid little heed to traditional Indian legal values and social ideals.

It should be kept in view that Indian view of society has been to eschew class war and postulate social harmony by reconciling the claims of conflicting interests from the standpoint of *Dharma* or higher law of morality. The acquisitive West has not been able to go beyond the motto of 'the greatest good of the greatest numbers'. However, it was the Indian thinkers, philosophers and jurists who were the first to think in terms of world unity and universal welfare. Indeed, long ago before the advent of so-called modern European civilisation and values set in the philosophers in India had delved into this vital question. The ideal of human unity and of a world free from traces of conflicts and misery had stirred the Indian hearts since time immemorial. Our one constant prayer all through the ages has been सर्वेऽपि सुखिनः संतु सर्वे संतु निरामयाः (Let everyone be happy, let everyone be free from all ills). Indian ideal of service and sacrifice always placed material acquisitions and possessions as offerings at the service of society. The *Ishavasya Upanishada* says: God permeates all creation whatever is left over by Him after offering Him, enjoy only that much. Do not rob what belongs to others.

Acquisition of material wealth was not ignored in ancient India, but it was never pursued in the manner as it is being advocated in democratic West and socialist China both of which worship the Mammon god without bothering for values, ideals and tolerance and respect towards each other. On the other hand, Hindus advocated the theory of trusteeship which commanded that out of all wealth only minimum should be used for self. To claim or to make personal use of more than that is verily an act of theft against society. Manu declared:

यावत् भ्रियेत जठरं तावत्स्वत्वं हिदेहिनाम् ।

अधिकं योऽभिमन्येत स स्तेनोदण्डमर्हति ।

(Take whatever is essential for bodily sustenance. To take more is an act of theft and deserves to be punished.)

Thus, the individual is only a trustee of society. It is only when he becomes a trustee that he can serve society better in a spirit of true service to God. Thus, people and society was incarnated as our God and to serve it was, the motto of our ancient heritage which requires serious consideration as a solution or substitute for positivistic western way of life, which is acquisitive, soul-less and non-liberative in nature.

(VI) Materialistic Ideals not Ignored

As stated earlier the basic philosophy of Indian way of life has been affirmative and action-oriented and not exclusively spiritual as is incorrectly misunderstood. In fact, countries which gave birth to St. Francis of Assisi, St. John of the Cross, Boehme, Pascal, Johan Bunyan are not less spiritual than India.

The Vedas describe earth as *Karmabhumi* (a place of action), *matribhumi* (like mother), which support life and where men and women can live happily on her bounty. They wanted long lives of a hundred autumns (*sharadah shatam*), much progeny and good health. The Vedic hymn of *Charaiveti* i.e. march on, march on from one level of prosperity to another is the keynote of the Vedic culture. Contentment with one's lot, indifference to material prospects, precepts to limit one's wants these are not found in Vedas. The Vedas praise possession of gold, cattle and other forms of wealth very highly. 'Revel in wealth respected' teaches *Rigveda*. *Yajurveda*¹⁴ says 'may we live for a hundred years without poverty'. *Manu* also says 'one should continue to seek prosperity till death'.

Mahabharata also echoes in the same manner and remarks¹⁵ 'one really becomes a man only when one is prosperous'. This is only to suggest that ancient Indians were quite alive of the need for and importance of wealth for the individual and society. They considered poverty as sin and attainment of wealth one of the supreme ends of life.¹⁶ This is not to suggest that there was no poverty in ancient and medieval India. The masses always lived in great poverty even when prosperous and stable kingdoms flourished. The upper middle class generally appropriated wealth and other material resources. This also does not mean that in India the legal system perpetuated economic inequality. Indeed, *Manu's Code* and *Kautilya's Arthashastra* suggested heavy taxation to support the impoverished masses.

The other notable feature of Indian social system has been of sharing of life and its privileges through the division of labour.

The ancient Indian scheme of social organization evolved a just desiderated compromise between individualism and socialism, only private enterprise and only State management, too little government and too much government. This compromise was affected by a clear demarcation of the rights and duties of each individual in successive stages of life and as an adult member of society. This is described as the permanent plan of ancient Hindu Law-maker *Manu* and not a five-year plan of or any other temporary plan of modern times.

Under this ancient Hindu scheme, society was to be divided into four functionally correlated professions as *Brahman*, *Kshatriya*, *Vaishya* and *Shudra* and this functional division was not regimented but workable and inter-changeable *inter se* without any doubt, difficulty and disorder depending on or the nature of life of work performed by individuals irrespective of birth or profession of parents. It is only the seers who pursued the path of truth to reach God are called *Brahmans* or *Rishis*- सत्यमेव जयते नानृतं सत्येन पन्थञ्च विततो देवयानः (*Mundakopanishad*).

(VII) India's Indigenous Values and the Modern Age

It can be argued how an ancient solution of *Manu* can solve the problems of present-day inequality and lack of opportunity in the twenty-first century. The problems of modern age were not and could not be foreseen or anticipated by ancient Indian thinkers and for this modern solution have to be found of course, fundamental principles should not be entirely ignored namely:

- (1) Indian religions and philosophy are not the cause of our economic poverty,

¹⁴ *Vitte Ramasva Bahumanyamanah-Rigveda (7-8-5).*

¹⁵ *Sriman so yavat bhavati, tavat bhavati pursuah.*

¹⁶ *Dhananmahuh param dharman.*

- (2) Hindus do not disparage money for without money (*Artha*) morality and pleasures are not possible. In fact, poverty is called sin (*Daridryam patakam* like);
- (3) Hindu culture is against capitalistic spirit for according to it economic end must always be achieved not only lawfully but morally also;
- (4) Hindu ethics condemns accumulation of money without limit;
- (5) It exhorts, of course, to acquire money purely for the sake of Dharma for spending it for public welfare;
- (6) According to Hindu scriptures high thinking and simple living are the best possible combinations, if possible;
- (7) Hinduism does not believe in conflict and discord and emphasises above all harmony between inner and outer self and peaceful co-existence between individuals, society and State inter se;
- (8) It is rational to enjoy comforts and limit comforts and luxuries according to one's means, desires, abilities, health and moral law. This means devote yourself to earning as if you are never going to die and spend what you earn as if you are going to die immediately.

Thus, Hindus have never been averse to progress, material prosperity and wealth. The Karma theory tries to make the world intelligible as a cosmos in which both the natural and moral laws prevail. It does not teach passivity or resignation to fate as is wrongly assumed, by both traditionalists and modernists curiously ignorant of the basic ethos of the true Indian spirit-the former advocating '*wither modernity*'; and the latter stressing '*wither traditions*'. It should be remembered that India always stood for cohesiveness and unity, consensus and synthesis between old and new values, ideals and needs. There is enough consensus among different shades of social and political leaders and elites that Indian legal theory and legal system should also reflect this spirit of Indian heritage.

It should be clearly understood that modern India alone cannot be governed according to the laws of ancient law-givers Manu, Kautilya or Sukra neither it can survive on British colonial laws and foreign inspired legal technology which are rootless and un-Indian in quality and content. We should be willing to adapt new ideas and ideals without losing our ancient legal values and social philosophy which always stood for harmony, tolerance and understanding in all spheres of human activities-what is called unity amidst diversity. It is these principles and philosophy that should strengthen roots of our unity, prosperity and progress ad *infinitum* (infinitely) in place of discord, tensions and dissensions that is seeping our national life. Let us remember in legal sphere also that only blind imitation of western legal ideas is a kind of national humiliation for such a practice would make us a mere carbon copy of others.

K.M. Panikkar the profound scholar of Indian history describes¹⁷ 'the meeting of East and West' in India in terms of trilogy of assimilation, tolerance, synthesis. He observed:

“..... the inheritance that India has stepped into is only partly Hindu and Indian. The inheritance from the West is no less important in many fields. Modern India does not live under the laws of Manu. Her mental background and equipment though largely influenced by persistence of Indian tradition, have been moulded into their present shape by over a hundred years of Western education, extending practically to every field of mental activity. Its social ideals are not what Hindu society had for so long cherished, but those assimilated from West and derived predominantly from teachings of Western social thinkers. In fact it will be exaggeration to say new Indian state represents ideals and principles which are the results of an effective even if imperfect, synthesis between East and the West.”

¹⁷ *The State and the Citizen*, p. 18 (1956).

(VIII) Ideal of Welfare State

It is true that Indian people have a deep awareness of the importance of spiritual values it is incorrect to say¹⁸ that Indians have 'innate disbelief in this world' and an 'unhesitating belief in other world'. Hindu life has always been motivated by *Dharma*, *Artha*, *Karma*, and *Moksha*. While *Dharma* and *Moksha* refer to moral and spiritual values of life, *Artha* and *Kama* are concerned with 'here and now'. The latter values indicate the attainment of wealth, riches, worldly prosperity for the fulfilment of social duties.

According to *Mahabharata*, as stated earlier, 'poverty is a state of sinfulness'. The performance of *Dharma* depends entirely on wealth. A man without wealth has neither this world nor the next nor can be called a full man. Kautilya says,¹⁹ 'wealth and wealth alone is important inasmuch as, charity and desire depend upon wealth for their realisation. According to him 'State should punish those who renounce 'the world without having satisfied the claims of family and society'. While money or wealth is of great supreme value it has not been the ultimate end of life for accumulation of money without limit (*lobha*) righteous has been most despicable thing in Hindu ethics.

Politically, the ancient Indians were never for any kind of confrontation between castes, classes and groups as we see today. The *Matsya-Nyaya* - the big fish swallowing the small - was never allowed by the State, classes and individuals. It was believed that economic development ought to be the concern of the State and an equitable division of the available wealth was a duty of a ruler. When the government was good there occurred a Ram Rajya.

Indeed, the State control and regulation of economy and community sharing of privileges has been a true Indian tradition even in ancient India. The traces of state socialism can be found in *Arthashastra* in which a positive role is envisaged for the State. Kautilya²⁰ shows great fear of big corporations and recommends strict control over them. On positive duties of the King (interchange ability used for State) Manu says it is the duty of the State to support education, learning and honour and make gifts to learned people'. The State should do many things for the welfare of people as it was the State which was the usherer of an era i.e., राजा हियोगमुच्यते (Manu).

According to Dr. Kane,²¹ in ancient India 'though there were no Acts of Parliament guaranteeing services to the people, the public opinion, the view of the eminent writers and the practice of the best Kings created an atmosphere in which it was thought that it was imperative for the King representing the State to encourage learning, to give employment to those who were unemployed'. In fact from the ancient times to Gandhiji and Vinobaji there has been a continual silent change in the outlook and characteristics of Indian society with clearly marked epochs-the first epoch began with philosophical and ideal speculation replaced by new ideal of chivalry, war and other heroic traditions which led to confusion and uncertainty in India during the medieval period.

With the advent of British the mercantilist class dominated the Indian scene which found support in *laissez-faire* policies and practices. The modern era is dominated by a new thinking wherein the country is mainly wedded to the welfare of scheduled castes, scheduled tribes, industrial and rural labour and other economically backward sections of Indian society. This may be called the fourth epoch which is the era of *Daridra Narayan* who are sadly neglected even by their backward leaders despite constitutional reservations, safeguards and protection by the State.

Moreover, because of our long contacts whatever English law and political institutions have been assimilated and adopted to suit our conditions like the *rule of law*, *parliamentary democracy* and *independence of the judiciary* cannot be outright rejected. At the same time existing borrowed Indian legal

¹⁸ Max Muller: *Lectures on the Origin and Growth of Religion*, p. 378 (1899).

¹⁹ *Arthashastra*, Trans, by R. Shamashastry, p. 12

²⁰ Kautilya, *Arthashastra* IV, 2.

²¹ Dr. Kane, P.V., *History of Dharmasastra*, Vol. III, p. 52.

system has perpetuated poverty, penury, human degradation besides creating political, social and economic imbalances within India resulting in erosion of moral values, violence, disorder and antipathy towards our present legal system. The only panacea for such a situation is to evolve a new legal theory of our own based on revitalized old ideals of mutual cooperation, understanding, tolerance, dignity, equality and economic justice which is also the main thrust of contemporary legal theory which has stamped out religious, beliefs and convictions and has confined to and responded to challenges of secularism and reconciling it to the claims of human dignity, liberty and moral values. But in the ultimate analysis secularism itself derives substance from our religious, cultural and moral values of a polity and ought to be compatible with religious beliefs of the people. These new goals ought to be achieved by the new legal system by incorporating them and interpreting them to suit our present-day requirements.

(IX) Human Rights Jurisprudence

In the aftermath of the collapse of the Soviet Union, the failure of the Marxist ideology and end of the cold war the twenty first century witnessed a new powerful swing towards open government in politics, liberalisation in economy and human rights oriented social order necessitating a new national, social and political order. Such common shared ideals, values and concepts which are followed by all people and nations are based on the matrix of democracy, human rights, independence of the judiciary, equal justice, fairness and non-discrimination. In such an environment the individuals as well as the States are gradually becoming less prone to ideological tensions, mistrust, fear and insecurity. Consequently, the impact of such far reaching global changes had its effect on Indian polity, economy and law.

India's already constitutional human rights framework in the nature of fundamental rights and directives coupled with universal human rights philosophy have led to the emergence of human rights jurisprudence having great legal, pedagogical and ideological implications for the survival of free individual and free society. For human rights cannot exist without the rule of law the prerequisite of which is democratically elected government through free, direct, impartial and universal suffrage. This has given a new edge to individuals as well as judiciary to haul up the government for its infringement or non-action in the area of human rights and fundamental freedoms.

However, for about three decades the judicial process could not respond in equal measure in safeguarding human liberty or social justice as is evident from *A.K. Gopalan* (1950), *R.C. Copper* (1978), *Golak Nath* (1979) and *Shiv Kant Shukla* (1976). It is only in the post - Emergency era that judges like A.S. Anand, Kuldeep Singh, K.T. Thomas (1976) Krishana Iyer, Bhagwati, D.A. Desai, O. Chinnappa Reddy, Ranganath Misra and others interpreted law more radically and progressively with a slant towards protection of the interest of the weak and the poor. But the judicial process so far has not taken the bull by the horns. It is only in the late 1990s when the executive or legislature declined to play their legal and constitutional role or did not have the adequate political will as in the *Mandal*, *Ayodhya*, *Common Civil Code cases* etc. the judiciary adopted a more vigorous and aggressive stance in the resolution of controversial issues concerning social justice, secularism and national integration.

The traumas *hawala issue*, *Cavery water dispute*, *the housing allotment scams*, and other scandals have made the Supreme Court the last hope for regenerating new moral and legal values by punishing and exposing the corrupt politicians and bureaucrats reminding them the supremacy of law. 'Be you ever so high, the law is above you' is the clear message of new jurisprudence emerging through judicial explosion,²² adumbrating multiple moral, legal and humane values as enshrined in the basic features of philosophy of the Constitution.

The Apex Court has been consistently building new linkages of a new egalitarian democratic and free society in consonance with new universal, socio-political and economic order by evolving the concepts

²² *Delhi Judicial Service Asso. Tis Hazari Courts v. State of Gujarat*, AIR 1991 SC 2176; *Khedat Mazdoor Chetna Sangathan v. State of MP*, AIR 1995 SC 31; *In re Vinay Chandra Mishra*, AIR 1995 SC 2448.

such as open government,²³ independence of the judiciary,²⁴ right of speedy trial,²⁵ right to life,²⁶ right to information,²⁷ democracy,²⁸ non-discrimination²⁹ on grounds of sex,³⁰ caste, religion etc. conservation of humane environment,³¹ new moral, social and political values³² etc. is the signature tune of new legal theory to suit the requirements of new social and moral order which is still in the womb of times to face the challenges and problems that we may face in the twenty-first century.

All these developments in Indian law are indicators of a powerful movement in legal theory towards the emergence of a new legal philosophy the human rights³³ jurisprudence. Such is the judicial response to the contemporary needs of times weaving a common moral law by tilting the beam of the scale of justice in favour of common man denied so long and so far by the society, State or its instrumentalities of what is their legitimate due liberty, dignity, equality, fairness etc. as human beings. An illustration of this legal philosophy in regard to protection of civil rights of the oppressed is one such testimony of judicial exposition and creativity in the domain of civil rights for establishing a new society in India.

In 1852 Frederick Douglas, leading Black abolitionist of slavery, had described his agony on the eve of America's Independence Day thus:

"This fourth of July is yours, not mine. You may rejoice. I must mourn. To drag a man in fetters to the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony..... I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary..... The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me."

Same was the poignant agony of the Indian Scheduled Castes, Untouchables, for short *Dalits* on the eve of August 15, 1947, Indian Independence Day, *The Preamble* of the Indian Constitution imbued among its people with pride of being its citizens is an integrated *Bharat* with fraternity, dignity of person and equality of status. But casteism, sectional and religious diversities, and parochialism are disintegrating the people..... Adaptation of new ethos and environment are, therefore, imperatives to transform the diffracted society into high degree of nobility for establishing an egalitarian social order in Secular Socialist Democratic Bharat Republic. Untouchability' of the *Dalits* stands an impediment for its transition and its bane and blot on civilized society'.

²³ *S.P. Gupta v. Union of India*, AIR 1982 SC 149 at 234.

²⁴ *In re: Vinay Chandra Mishra*, AIR 1995 SC 2448; *G.C. Kanungo v. State of Orissa*, AIR 1995 SC 1655.

²⁵ *Abdul Rehman Antulay v. R.S. Nayak*, AIR 1992 SC 1701.

²⁶ *Consumer Education Research Centre v. Union of India*, AIR 1995 SC 992; *State of Maharashtra v. Manubhai Pragaji Vashu*, AIR 1996 SC 1.

²⁷ *Secretary Information and Broadcasting v. Cricket Asso. W.B.*, AIR 1995 SC 1236; *L.I.C. v. Manubhai Shah*, AIR 1993 SC 171.

²⁸ *R.C. Poudiyal v. Union of India*, AIR 1993 SC 1805; *Nilabati Bahera v. State of Orissa*, AIR 1993 SC 1963; *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 624.

²⁹ *Neela Mathur v. LIC*, AIR 1992 SC 392.

³⁰ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 624.

³¹ *Banglore Medical Trust v. B.S. Muddappa*, AIR 1991 SC 1902; *D. Vyas v. Ghaziabad Development Authority*, AIR 1993 All 57.

³² *M.J. Sivani v. State of Karnataka*, AIR AIR 1995 SC 548. 1995 1770, *Mohd. Aslam v. Union of India*, AIR 1995 SC 548.

³³ *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 634 at 638.

In *Ashok Kumar*,³⁴ Justice Ahmadi vividly echoes the concern of the Apex Court regarding protection of liberty of the individuals when he observes:

"Liberty is the life line of every human being. Life without liberty is 'lasting' but not 'living'. Liberty is, therefore, considered one of the most precious and cherished possession of a human being. Any attempt to take liberties with the liberty of a human being is visited with resistance."

It may be stated that the human rights jurisprudence is neither mystical nor metaphysical and cannot be subordinated to religious or spiritual edicts wherein human beings suffer oppression at the hands of tyrannical regimes of the medieval age or of the fundamentalist regimes of the Islamic world including Pakistan, Afghanistan, Bangladesh, Saudi Arabia etc. To positivists human rights law is a vanishing point of jurisprudence and to Marxists human rights cover only limited social and economic content devoid of other equally essential basic political freedoms and human liberties which Marx and Lenin had repudiated as bourgeois a perception for perpetuating class antagonism. Thus, prior to collapse of the communist system and ideology human rights were either an ideological explanation or mere abstract paper tiger rules never taken seriously for actual enforcement. However, today with the establishment of liberty democracies of western model the philosophy of human rights has become a world-wide movement generating political democracy with social equality through rule of law.

In India, the Supreme Court has blazed the trail of human rights and have woven human rights jurisprudence³⁵ to suit the socio-economic realities of India. The Apex Court has time and again reiterated the pivotal role of law and lawyer in the new economic order of the new emerging twenty-first century. The Court rightly observed,³⁶

'Law is no trade or briefs of the litigants nor merchandise. In the days ahead legal aid to the poor and the weak, public interest litigation and other rule of law responsibilities will demand a whole range of responsibilities from the Bar. Indeed, the hope of democracy is the dynamism of the new frontiers men of the law in this developing area.... [and cater] such free service to the community in rural sector as part of the profession's tryst with people of India.'

³⁴ *Ashok Kumar v. Union of India*, AIR 1991 SC 1792 at 1793.

³⁵ *A.D.M. Jabalpur v. Shiv Kant Shukla*, AIR 1976 SC 1207, *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

³⁶ *Ramon Services Pvt. Ltd. v. Subhash Kapoor*, AIR 2001 SC 207 at 213.

CUSTOMARY DISPUTE RESOLUTION MECHANISM IN BHARAT

Seema Singh & Madhu Yadav

Introduction

Disputes are not new, neither the Dispute Resolution Practices. Bharat had very rich customary dispute resolution mechanism since time immemorial and now they are popularly known as ADRs. Bharat's approach to resolving conflicts has long been shaped by its rich and traditional knowledge system, rooted in philosophical traditions that emphasize principles of *Dharma*, *Ahimsa*, *Samvada* and *community harmony*. *Rule of Dharma* was the Grundnorm, and justiciable behaviour was the duty of every citizen. Amicable solution of the dispute was the first objective of Justice System and punishment was the last resort.

These *Dharmic Values* have shaped Bharat's mediation processes by providing a comprehensive and community methods for dispute resolution. The rich tradition of community-based dispute resolution in Bharat expands nearly three millennia, encompassing nearly fifteen centuries before and after the dawn of the Common Era. Amartya Sen attributes Bharat's democratic aspirations for peaceful existence to collaborative traditions and public reasoning inherent in Bharatiya ethos.¹

The ancient philosophies and customary practices of Bharat are significantly relevant in today's modern world as well, as it still offers as guidance for resolving the disputes. This enduring legacy reflects the dynamic nature of ancient Bharat civilization, which consistently evolved to address evolving social difficulties rather than being stagnant in time. Throughout Bharat's diverse geographical and cultural landscape, informal mechanisms for resolving local disputes have constituted an integral part of community life since inception of this civilisation. This organic approach to justice found to be deeply rooted in local customs and traditions that has manifested in diverse forms across various regions of Bharat. It reflects the pluralistic nature of Bhartiya society. The system had continuously evolved to accommodate specific local values, customs, and social structures.

Foundation of Bhartiya Philosophies

- *Dharma*
- *Upanishads (800 to 400 BCE)*
- *Epic Age-Ramayana and Mahabharata*
- *Smritis*
- *Arthashastra*

While ancient India nurtured a decentralized, community-driven justice system, this trajectory faced significant disruption with the onset of colonial rule, which reshaped the legal landscape in ways that distanced justice from the people.

In ancient Bharat, the legal order even the King was bound by the Rule of Dharma. King's duty was to administer equitable justice in his kingdom and acting according to the rules of *dharma* as it was laid down in *smritis*. The fulfilment of their duties and responsibilities by ancient Bharat rulers was of vital importance for the stability and organised development of the society and to the happiness of individuals in the state. The term *vyavahara* is used in ancient legal literature to denote *law and law suits*. The procedures to deal with disputes were elaborately described in *Naradasmriti*.

In ancient times, *Dharmashastra (Smritis)*, 9th Century AD, is considered to be a sacred Hindu law books for the resolution of disputes. Some of the notable works include sutras of *Apastamba*, *Gautama*, *Baudhayana*, and *Vasistha*.² This era is also known as the era of *Manusmriti*, *Yajnavalkya Smriti*,

¹ Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity* (London, Penguin books Ltd., 1st edn., 2005).

² Dr. Dil Muhammad Malik, "Ancient Dispute Resolution through Informal Processes: ADR" 2 *JLSS* 81-82 (2020).

Vishnumriti, and *Narada Smriti*³ which provided profound information concerning the resolution of disputes at that time and later on which replaced the earlier books. *Yajnavalkya Smriti* is divided into 4 types of court *Shreni* (for Artisans), *Puga* (for traders), and *Kula* (for family) which only tried issues related to civil cases and appeals from these were heard by Judges (*Highest Court*), who were appointed by the King.⁴

Customary dispute resolution in Bharat has a rich heritage. Our ancient scriptures such as the Vedas and Upanishads, which were centred on amicable and communal dispute resolution based on Dharma (righteousness) and ahimsa (non-violence). Our Historical epics such as *Ramayana* and *Mahabharata* with figures like Vibhishan, Angad, Hanuman and with figures like Lord Krishna respectively, also emphasises on the dispute resolution through dialogue and settlement, having an instrumental role as a mediator, these figures depict how community leaders were able to bring the conflict parties to the dialogue table and direct them to mutually acceptable settlements.

In 4th century BCE Kautilya's *Arthashastra* formalized customary dispute resolution and institutionalised community-based arbitration as the central conflict resolution mode. This ancient work institutionalised not just customary norms but procedural norms as well that highlighted equality, justice, and community participation while resolving conflict. The *Arthashastra* acknowledged the efficacy of indigenous wisdom and customary law in conflict resolution and thus afforded scholarly legitimation to grassroots justice process that had taken hold in.⁵

Institutionalization of panchayat justice is the most enduring and precious heritage of ancient Bharat governance for contemporary dispute resolution. Panchayats comprised respectable local villagers and were considered to be the fundamental institutions for conflict resolution at the grass-root level with values of collective wisdom, participatory decision-making, and restorative justice. The enduring nature of the panchayat system demonstrates the system's inherent compatibility with social values of Bhartiya Society and the system's potential for conflict resolution at grassroot level.

It can be observed that the history of Bharat to resolve disputes by employing local customs and values through community driven mechanisms in ancient India remains the foundation of contemporary dispute resolution practices. It offers valuable insights into traditional methods of resolving conflicts while also maintaining the social harmony, utilising the process for consensus-based resolutions. The next section will study the customary practices ingrained in Bharat's ancient philosophies and legal thought.

Historical Foundations

The roots of customary dispute resolution in Bharat can be traced back to as old as Vedic times of approximately 4000 to 1000 B.C. The Aryans at that time primarily used to invoke the unwritten law of divine wisdom, reason, communal harmony and prudence, which they held was valid for heaven and earth as well. From here we could trace the origination of philosophies for the resolution of disputes which we could be witnessed to be followed even today.⁶ The ideal of justice (Nyaya) was held central for the maintenance of cosmic order (rta) and social order(dharma). Ancient Bharatiya society refined methods for conflict resolution beyond punitive measures, looking at restoration of social order and moral justice. The earliest references to dispute resolution can be traced in the Rigveda, where the ideal of the concept of the *sabha* (assembly) and the *samiti* (council) emerged as democratic institutions for collective decision-making and conflict resolution. The assemblies functioned as chambers where the dispute was deliberated upon by learned members of the community including the elders, scholars and eminent citizens. The

³ Dr. Dil Muhammad Malik and Dr. Abida Hassan, "Ancient Dispute Resolution through Informal Processes: ADR" 2 *JLSS* 75 (2020).

⁴ Amita Dhanda, "Legal Order in a Violent World" 27 *JILI* 131 (1985).

⁵ R.P. Kangle, *The Kautiliya Arthashastra*, 7.1.35 (University of Bombay Press, Bombay 1972).

⁶ Mediation Training Manual of India, available at, https://nalsamediation.nic.in/file/20072021_05.pdf (Last Visited July 10, 2025).

Atharvaveda further elaborated on the role of these institutions, describing how they served as platforms for both legislative and judicial functions.

The scarcely available ancient Bharat literature shows the cultural co-existence of many people for many centuries. Even today Bharat is considered a country of vastly diverse cultural people living together. This reality of ancient and contemporary Bharat somewhere necessitated the adoption of many of the collaborative dispute resolution methods in the modern mediation process. Bharat has the oldest cultural history of over 5000 years and a recent history of 1000 years in which Bhartiya culture has absorbed the changes and influences of the aggression by the invasion of central Asia, Arabia, Afghanistan, and West Bharat like Britain. Even today the 28 states of Bharat have varying social and traditions.⁷

Mediation, arbitration and Panchayats were preferred methods of dispute resolution in ancient Bharat, reflecting the society's emphasis on maintaining relationships and social cohesion rather than merely determining winners and losers. The institution of panchayat, derived from the Sanskrit term meaning "assembly of five," represented a decentralized system of justice administration where respected community members would hear disputes and arrive at mutually acceptable solutions.⁸ These bodies possessed both adjudicatory and mediatory functions, often beginning with attempts at reconciliation before proceeding to formal adjudication.

Dharmashastra (code of conduct) followed the Vedic approach and witnessed scholastic jurists, who developed the philosophy of basic laws that recognized and were based on existing usage and customs of different communities which also included resolution of disputes by non-adversarial indigenous methods.⁹ One of example is be tribunal which was set up by brilliant scholar, Yagnavalkya which consists of Kula, Shreni, and Puga. Another scholar Parashar opined that certain issues should be determined by parishad or association or assembly of learned. This association decided the matter based on the principles of justice, equity, and good conscience. The modern legislative theory of resolving disputes by domestic forum can find its origin in an ancient customary law in Bharat.¹⁰ Another Bharat ancient jurist, Patanjali said "Progress comes swiftly, in mediation for those who try hardest, instead of deciding who was right, and who was wrong".¹¹

Another ancient concept of satyagraha, though later popularized by Mahatma Gandhi, had its roots in ancient Bharat philosophy where truth (*satya*) was considered the ultimate arbiter of disputes. Ancient texts emphasized the importance of witness testimony (*sakshi*), documentary evidence (*lekha*), and circumstantial evidence (*karyapramana*) in establishing facts, while also recognizing the limitations of human perception and the possibility of error in judgment.¹²

Ancient Bharat legal thought also recognized various forms of alternative dispute resolution, including the practice of *prayschitta* (atonement) for certain offenses, which focused on rehabilitation rather than retribution. It could involve things like fasting, chanting mantras. Giving donations of performing rituals. The system acknowledged that different types of disputes required different approaches, with commercial disputes often resolved through merchant guild arbitration, while matrimonial disputes were typically handled within extended family structures with the intervention of respected elders.

Our ancient Bharat philosophies provide profound framework for the dispute resolution to give preference harmony and moral duty over adversarial process, which is toxic in nature. At the core of these philosophies lies the concept of *Dharma* that establishes the path of justice and righteousness along with development of dispute resolution ideals that should stand upon fairness and social balance for communal

⁷ Kapil Kapoor, *Indian knowledge systems* (Indian Institute of Advanced Study, Shimla & D.K. Printworld (P) Ltd., New Delhi, 1st edn., 2005).

⁸ G.S. Ghurye, *Caste and Class in India* (Popular press Bombay Pvt. Ltd, Bombay, 2nd edn., 1969).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² J.D.M. Derrett, *Religion, Law and the State in India* 89-134 (Oxford University Press, Bombay, 1st edn.,1999).

coexistence. The Vedas and Upanishads emphasises on the importance of truth, obligation and self-awareness in resolution of disputes while promoting ethical negotiation and reconciliation. The *Ramayana* through Lord Rama's commitment to Dharma and resolving both personal and community disputes exemplifies the history of justice while illustrating the ideal ethical approach to dispute resolution. The *Mahabharata* through the figures of *Krishna*, *Bhishma*, *Yudhishtira* provides deep understanding that dispute resolution should prioritise morality and moral duty. The *Dharmashastra*, defines the legal principle for dispute resolution process that includes mediation, arbitration, and communal justice. Kautilya's *Arthashastra* offers pragmatic approach to look at the conflict resolution, blending the concept of diplomatic strategic governance with legal efficiency to ensure stability and prioritising the state's interest. Bharatiya traditions have emphasised on restorative justice that recognises disputes as a destruction within the society, unlike the adverse legal system that focuses on victories of individual. In ancient Bharat Restorative Justice was not just about punishing the wrongdoers but about making things right for the victim and the whole community. These ancient philosophies continue to influence contemporary dispute resolution in Bharat. The revival of ancient principles in contemporary dispute resolution strategies will bring the light to everlasting significance of negotiation and moral dedication and approach to justice, which will have conciliatory approach and will create the win-win situation for both the parties involved.

Colonial Disruption and Adaptation

The downfall of customary practices started with the advent of British rule. The British set up courts for adjudicating civil and criminal cases. These courts were entirely staffed by officials that prohibited the participation of public in justice administration. The parallel system of laws and courts were established by the company in the eighteenth century. The British Raj eroded the role of panchayats as traditional institutions of justice administration. Legislation enacted in 1860, including the Indian Penal Code (IPC), Criminal Procedure Code (CrPC), and Contract Act, combined with Baden-Powell's framework for land revenue settlements, replaced customary law. Collectorates and courts assumed authority from caste/village panchayats to enforce the rule of law. The influence of the IPC and CrPC. on the adaptation of European concepts of equality in Bharat is hardly considered.¹³ British laws sidelined the customs and usages of the common people. The focus shifted from community feeling to individual rights as envisaged by British law.

Ravinder Kumar in his *Western India in the nineteenth century: a study in the social history of Maharashtra*¹⁴ examines the manner in which traditional system of adjudication carried out through the Panchayats was disrupted British courts and their legal frameworks. *Kunbis* (agriculturists) were granted some degree of protection under the pre-existing panchayat system. They were acquainted with the traditional authority's working structures and were familiar with the notion of social equity upheld by them. However, *vanis* (agents of money lenders) were at more advantageous position than the *kunbis* due to doctrine of freedom of contract and its pre-eminence ingrained in the judicial process. To regain their right to survive *Kunbis* made use of conciliatory provisions introduced in Deccan Agricultural Debt Relief Act, 1879. The British legal system codified the laws that resulted in procedures that were unfamiliar to the ordinary people and were not in conformity with the codes and rules of local traditions and customs.¹⁵

Nyaya Panchayats used to decide the disputes in accordance with prevailing customs. Village elders often wielded significant influence in these Nyaya panchayats. Sanctions were often in the form of monetary penalties, social ostracism or outright banishment from the village. But Britishers preferred their own system which was focussed more upon punishment and less on rest-orating balance. Mahatma Gandhi consistently advocated for a boycott of law courts and endorsed village panchayats for resolving disputes

¹³ Dr. Laju P. Thomas, "Dispute Resolution in Rural India: An Overview", 2 *Journal of Legal Studies and Research* 101 (2019).

¹⁴ Ravinder Kumar, *Western India in the nineteenth century: a study in the social history of Maharashtra*, (London, Routledge & K. Paul, 1968).

¹⁵ *Ibid.*

aiming to prevent impoverished poor peasants from travelling long distances to towns in pursuit of justice, thereby saving their time and hard-earned money while also be preventing from being taken advantage by lawyers. According to Professor N.G. Ranga, “our masses would not be able to play their rightful part in our democracy without this foundation stone of village Panchayats.”¹⁶ Gandhi in his work *India of my dreams* stated “In Panchayat Raj only the Panchayat will be obeyed, and the Panchayat can only work through the law of their making.”¹⁷

The judicial functions of the panchayats are integral to the village system which in many regions of Bharat been rooted in indigenous administration from times immemorial¹⁸. The British government appreciated the advantages of the village courts yet was reluctant to grant them absolute power. In the long run, Bharat established an institutional framework in her quest for public participation. British authorities established their courts to resolve the disputes and people too realized that the authority of the State was supporting these courts overage old and traditional village panchayats¹⁹. Consequently, the importance of the panchayats gradually started losing over the time. In 1920, numerous legislations were enacted in consequence of the recommendations from different states. There was an absence of systematic oversight over the administration of justice in villages. Despite colonial attempts to undermine indigenous mechanisms, customary forms of adjudication persisted in numerous regions, demonstrating their enduring tenacity and profound cultural foundations.

Customary Methods and Practices of Dispute Resolution in Different Regions

During the Vedic period, *Sabha* or *Samiti* was considered to be a popular court where the disputes were resolved by community rather than the King.²⁰ However, these court authorities were limited to resolve civil disputes only and had no authority over criminal cases. The disputant parties were called *Prasnin* (Plaintiff) and *Abhiprasnin* (Defendant) who used to bring their disputes before *Sabha* for the resolution. *Madhamasi* was more like a mediator or arbitrator rather than a judge who attempted to resolve conflicts rather than imposing punishments.²¹

Prior to arrival of Britishers, *Panchayat* were local self-governing bodies that were created to resolve the disputes peacefully at village level. Conflicts were often brought before the five respected elders, whose decisions were usually accepted by the parties involved due to the social consequences of non-compliance, such as excommunication or exclusion from religious and communal activities.²² The village headman known as *Gram Council of Village* elders known as *Ghosh* and the leader known as *Gramini* were in charge of collecting state dues and mediating disputes among the disputed parties.²³

Having explored the foundational principles and institutional frameworks that define customary dispute resolution in Bharat, it becomes essential to examine how these mechanisms manifest differently across regions. Bharat’s immense cultural, ethnic, and linguistic diversity means that customary justice systems are not monolithic as they are shaped by local customs, historical legacies, governance structures, and spiritual traditions unique to each community.

¹⁶ Paramjit Singh (Judge), “Competing Modernities: Ambedkar, Village and Manu” 10, Paper presented at the 13th Dr. Ambedkar Memorial Lecture, Centre for the Study of Social Systems School of Social Sciences Jawaharlal Nehru University, New Delhi (2016).

¹⁷ M.K. Gandhi, *India of My Dreams* 97 (Navajivan Mudranalaya, Ahmedabad, 1st edn.,1947).

¹⁸ Law Commission of India, “114th Report on Gram Nayalaya” (1986).

¹⁹ Granville Austin, *The Indian Constitution: A Corner Stone of the Nation* 50-96 (Clarendon, Oxford University Press, 1999).

²⁰ Shriram Yerankar, “Village Administration in Ancient India” 65 *The Indian Journal of Political Science*, 87-100 (Jan-March 2004).

²¹ Kumar Ashutosh and Amit Kumar, “Alternative Dispute Resolution - An Ancient Indian Practice as an alternate to realize Sustainable Development Goal - 16” Special Issue *Dehradun Law Review* 101 (2024).

²² *Ibid.*

²³ P.V. Kane, III *History of Dharmashastra* 230 (Bhandarkar Oriental Research Institute,1946).

Here we will make a comparative description of some regions and some tribal-caste groups, symbolizing the pluralistic forms of traditional adjudication and incorporation thereof into social life. From constitutionally protected tribal councils in the Northeast to Panchayats in the northern plains each model embodies a different worldview and mechanism of adjudication.

Our Constitution provides for special provisions under Schedule 5 & 6 for the Scheduled Areas. Schedule 5 is for the Administration and Control of Scheduled Areas and Scheduled Tribes and outlines the nitty-gritties that the Tribal advisory council shall be constituted in each State with Scheduled Areas within them. Schedule 6 of the Constitution is for the Constitution of District and Regional Councils in the Tribal Areas in Assam, Meghalaya, Tripura and Mizoram. The councils are vested with the making of laws for the tribal areas within the limit of the authority.

Bharat's diversity is blessed with umpteen number of indigenous tribes who maintain their own system for conflict resolution in the form of customary practice and the statutory legal system. Their customary judicial system followed by them is not based upon the model of retribution but restorative justice and reconciliation. Let us see the customary practice followed by the few tribal communities in their region throughout the Bharat with the view to resolving their conflicts.

Gond Tribal Justice System

Gonds people account for over 15 million in Central and Eastern Bharat, possessing one of the most developed traditional legal systems in Bharat. Their judicial structure, referred to as the Panchayat or Gramme Sabha system, is primarily based on religion, nature conservation, and social cohesion. In the decentralised Gond legal system village councils made up of elders and local leaders use various methods of resolving disputes through conciliation, mediation, Oaths and Ordeals and Social Sanctions. Some noteworthy methods are mediation through "Jatra" (dispute resolution via storytelling, worshipping deities, performing rituals etc) "Ghotul" (Youth Dormitory where they learn harmonious living and managing minor conflicts and gender-inclusiveness) and "Khapri" (participation of both men and women from the society for conflict resolution to reach a solution that is agreeable to all side). Community involvement is illustrated by the "Gramsabha" method which has retained traditional values even as modern communication technologies are incorporated. In spite of the conflicts created by formal integration with the legal system, the Gond community has been able to navigate contemporary challenges within their customary laws without giving up cultural markers. The Gond's traditional legal system provides valuable insights on non-traditional methods of dispute settlement. It emphasises on social harmony, restorative justice, and community involvement.

Santhal Mediation Framework

In Santhal tribe of eastern Bharat, the dispute is resolved by methods like *Manji* and *Manjhi-Pargana*. This process involves involvement of respected members of the community to resolve the matter through mediation. The disputes typically resolved through *Manjhi-Pargana*, involves entire community in dispute resolution. In this system the village head is known as *Manjhi Hadam*. If a dispute could not be resolved at the village level by the *Manjhi* it is referred to *Desh Manjhi* (involves Manjhis of 5-8 villages). For more complex disputes or appeals from *Desh Manjhi*, the matter goes to *Pargana*, consisting of 15-20 villages, and the head is called as *Parganaait*. *Dighri Parishad* is known as the highest council. The *Manjhi Pargana* system handles both civil and criminal matters. The community provides various suggestions to ensure that parties reach at amicable solution while mediator encourage party to have a dialogue and assist them to reach a resolution. The Santhal system prioritizes reconciliation over punishment, emphasizing restorative justice through compensation and community harmony restoration.

Khasi and Jaintia Hills Dorbar System

The traditional justice system of Khasi and Jaintia lies in their local self-governing bodies, known as *Dorbars*. The Dorbar system consists of three levels of governance system is a community-based conflict resolution in Meghalaya among Khasi and Jaintia tribes. *Dorbar Shnong*, a village council at the lowest

level led by the Headman or *Rangbahshnong*, next level is *Dorbar Raid*, that is headed by *Sirdar*, and after that at the highest level the *Dorbar Hima* headed by *Syiem (King)*.²⁴ *Dorbar* follows traditional customs and practices to resolve the disputes and acts as a mediator to resolve the disputes through dialogue and consensus building.

Nokma system in Garo Hills

Garo is second largest tribe in Meghalaya. Before arrival of Britishers, to resolve conflicts, a hierarchical structure of customary practices is followed that embodies the principle of restorative justice system and communal harmony rather than punitive measures.²⁵ In multi-tiered system, there is *A'King Nokma*, who holds control over the clan usually assisted by *Sardars* to manage day to day administration of the village. These *Nokmas* and *Sardars* are under direct supervision of the District council.²⁶ The responsibility for maintaining law and order used to be laid with the *A'kingNokma* (village headman) and his Council. The *Nokma* is considered to be the peacemakers as they were the first to be approached for resolving petty quarrels, theft, adultery, divorce, etc., or any other quarrels. Justice was delivered by following age old traditional methods such as '*Bobilinga*' or '*Gro dinga*' and *be-enmalua* that involved public discussion for settlement of disputes. Over the time, these methods became more structured and lead to formation of village councils known as '*Melaa*' or '*Bichal*' led by *Nokma* alongwith respected elder members of the community. The outcomes of these community were considered to be final and strictly implemented. *Nokma* used to play a crucial role in justice administration and governance of the village embodying well established customary practices woven into the cultural and moral fabric of the community.²⁷ The *Nokma* system of conflict resolution was efficient and highly used due to its community centric approach. Rooted in local customs and values, it offers quick and cost-effective resolutions without the complex formalities or delays of the modern legal system.

Bhil's Nyaya Panchayat System

The Bhil tribe commonly found in the areas of Rajasthan, Madhya Pradesh, Gujrat and Maharashtra have strong and preserved history of self-governance rooted in customary and cultural practices. The indigenous justice system was often referred to as "Nyaya Panchayat" or "Gram Panchayat", structured around a village headman, known as *Patel or Gameti* and a council of elders. It emphasized on Mediation as a method to resolve conflicts peacefully and uphold communal harmony. In the central Bharat, Bhils settle the disputes through practice known as '*Chapai*', a community gathering or meeting often held to discuss important matters to resolve disputes. It also involves various rituals and ceremonies to be performed in order to restore understanding and peace between the parties. This system follows the approach of reconciliation rather than retribution. Meanwhile, in western Bharat, the panchayat system is followed to resolve the conflict. This approach seeks to mend the damage caused by conflict and focused on building interpersonal relationships.²⁸

While regional practices as discussed above offer a vivid glimpse into prevalent localized justice system, contemporary practices have witnessed a conscious revival and formal recognition of these systems within Bharat's modern legal framework in the name of ADRs.

Contemporary Recognition of Customary Practices

²⁴ Priyankar Upadhyaya and Anjoo Sharan Upadhyaya, *Traditional Institutions of Dispute Resolution in India: Experiences from Khasi and Garo Hills in Meghalaya* (Bergh of Foundation, 2016).

²⁵ Bishnanand Dubey and Nishi Kant Bibhu, "Revitalizing Indigenous Justice: Mediation in India's Tribal Justice System" 12 *International Journal of Research in Management & Social Science* 28 (2024).

²⁶ Milton S. Sangma, *History and Culture of the Garos* 138-155 (Today and Tomorrows Printers and Publishers, New Delhi, 1st edn., 1981).

²⁷ Mothis M. Sangma, "The Traditional Institutions of A-kingNokmas as A Part of Rural Governance in Meghalaya: Some Observations" 6 *Shrinkhla Ek Shodh parak Vaicharik Patrika* 278 (2019).

²⁸ *Supra* note 28.

Bharat's contemporary dispute resolution landscape has a rich interplay between the formal justice system and deeply rooted customary practices of dispute resolution. For centuries, Bhartiya society had evolved its own cultural and communal modes of settling disputes, such as through village Panchayats, elders' councils, and informal community meetings. These mechanisms focused to address not only the immediate issues but to preserve social and cultural harmony and relationships, prioritizing on restorative justice over adversarial battles. With the diversity of Bharat, these customary practices have naturally evolved to uphold the cultural ethos with respect and harmony making them commendably effective in making the means to justice accessible to the community members.

During colonial era, Britishers began to take over and intervene into these practices, emphasizing to have written procedures making access to justice less accessible or inaccessible, particularly in rural and marginalized communities. However, the resilience of customary practices ensured their continuity, often as parallel structures to formal courts. Upon gaining independence, the Bharat state recognized the importance of these community institutions, especially through constitutional provisions like Article 40,²⁹ which encouraged the formation of village Panchayats as self-governing bodies. This constitutional support laid the foundation for integrating customary dispute resolution mechanisms into the formal legal framework, especially for those sections of society less able to navigate the formal judicial machinery. The 73rd Amendment, enshrining Articles 243-243O and the Eleventh Schedule, giving Panchayats explicit authority over aspects of social justice and grassroots dispute resolution. In regions with significant tribal populations, the Fifth and Sixth Schedules (under Articles 244(1) and 244(2)) respectively, to honour traditional governance and judiciary of tribal areas, safeguarding their distinctive legal and cultural frameworks.

The tribal communities of Northeast and East Bharat such as the Nagas in Nagaland, the Khasi and Garo in Meghalaya, and the Gonds in Central Bharat offer especially illustrative examples of customary justice. Here, village courts and councils (like Nagaland's traditional courts, Khasi Dorbars, and Garo Nokma councils) follow oral, participatory procedures that allow community elders to resolve disputes with a focus on restoring harmony, rather than imposing punitive judgments. These processes derive legitimacy both from community respect and, in several cases, specific constitutional protections, most notably Article 371A³⁰ in Nagaland which shields customary law and practice from external legislative interference so long as they meet general standards of justice.

Contemporary reforms in laws have directly or indirectly sought to reinstate and legitimize these mechanisms at a national level. One notable development is the enactment of the Mediation Act, 2023, which aims to promote mediation as an institutionalized and legally recognized process for settling civil and commercial disputes. This law authorises individuals from local communities' members to serve as mediators and grant enforceability to mediated agreements. The Act codifies mediation processes while still accommodating local customs. The Act bridges the gap between age-old tradition and modern legal needs, making justice more accessible and less daunting for the common person.

Another significant effort has been the establishment and proliferation of Lok Adalats (People's Courts) across the country. As per Legal Services Authorities Act, 1987, Lok Adalats bring together disputing parties in a non-adversarial forum where settlement is not only encouraged but often guided by respected community members, judges, and lawyers functioning in roles similar to traditional Elders Panchayat.

Arbitration and Conciliation (Amendment) Act, 2025, has broadened the scope of ADR by encouraging institutional arbitration and conciliation. While its main focus is to attract international business and investment, yet it is attentive and respectful to Bharat's traditional methods of consent-based resolutions of dispute. These legislative advancements not only promote customary practices, but also

²⁹ The Constitution of India.

³⁰ The Constitution of India.

provide for the greater legal clarity, regulation, and enforcement so as to give greater trust and legitimacy to the disputing parties who might otherwise be reluctant to opt for informal settlements per se.

Judgments by courts over the years have demonstrated practical approach for mediated and customary settlements of dispute, as long as they are fair, equitable, voluntary and in line with basic rights. Courts at several occasions have accepted settlements mediated locally and awards by Panchayats without demur, for example in the case *Vytla Sitanna v. Marivada Viranna*³¹ wherein the award by the Panchayat was upheld by the Supreme Court. This approach by the court has given a formal recognition and an element of enforceability while indicating that the judicial process itself values indigenous solutions for indigenous problems.

The current recognition of customary practices in dispute resolution reflects both a respect for the country's cultural traditions and a practical response to the dynamic demands of a modern and diverse democracy. This depicts that a legal system can be both grounded in Bhartiya tradition and also be adaptive to dynamic needs of the society, by integrating traditional knowledge, to provide justice that is not only done, but seen to be done, across its diverse communities.

Historical artifacts reflect the living traditions as it integrates customary dispute resolution mechanisms and it becomes more evident to testify that these historical artifacts are living traditions and customs of Bharat. The concluding section will reflect as to how living traditions and customs of Bharat continue to shape the dispute resolution mechanism in contemporary practices.

Conclusion

In conclusion, the evolution of customary dispute resolution in Bharat demonstrates a notable journey of resilience and adaptation. Originating from ancient philosophies of dharma and communal harmony, traditional institutions like Panchayats and tribal councils served as significant instruments for peace building and dispute resolution for decades. The disruption made by colonial legal frameworks significantly affected these organic, community-oriented mechanisms, substituting the communal practices with formal codified statutes that often used to disengage the very communities and community members, they were aiming to benefitting. However, as per the discussion here, the essence of *samvada* (dialogue) and collaborative approach towards the settlement persisted. The approach even today has rejuvenated and adapted itself in response to the complex needs of a diverse and evolving society. At present, these tradition practices provide practical, accessible, and cost-effective justice at the grassroots level and also embrace the principles of restorative justice that aligns with international standards. The chapter asserts that the enduring tradition of customary dispute resolution is a dynamic resource for addressing present and future challenges to justice and` social cohesion in Bharat.

³¹ (1934) ILR57MAD749.

RTA AND KARTAVYA: THE INTERLINKING JURISPRUDENCE

Seema Singh

Introduction

Pause for a moment and consider the delicate balance of your natural existence. Just imagine what would happen if the sun failed to rise, rivers ceased their flow, or the very cells in our bodies suddenly declared themselves exhausted? The result would be a swift and absolute collapse of our existence. This catastrophic imagination reveals a profound truth: the universe is sustained not by chance, but by the relentless and harmonious fulfillment of its *Kartavya*. Every celestial body, every natural phenomenon, and every living cell has a natural obligation to perform its *Kartavya*, to maintain the cosmic order.

Rta is a Cosmic Law which governs nature¹ and *Kartavya* sustains the same. If a breakdown in cosmic law, in nature's duty, brings instant devastation, what then, if in society majority of individuals abandon their obligations for a relentless pursuit of their own rights? A society where individualism eclipses a sense of collective responsibility is bound to reach on the verge of its collapse. We survive and thrive precisely because most of us, like the cosmos itself, uphold our duties to protect and provide for not only ourselves, but for others.

Thus, here in this paper we will discuss a central, philosophical question relevant for the entire cosmic order: Is *Kartavya* the true epicenter of both- universal existence and human civilization? This line of inquiry compels us to re-evaluate our fundamental assumptions about established societal norms.

A legal and social framework that is exclusively focused on individual rights creates a fragmented and adversarial environment, much like a body where each cell demands its own autonomy without fulfilling its function. This myopic view risks undermining the very interdependence that is the foundation of both natural and social order. To truly understand a sustainable and harmonious society, we must shift our focus from a rights-centric perspective to a *Kartavya* rooted perspective. This philosophical exploration will decode the concept of *Kartavya* jurisprudence, examining its profound underpinnings and its vital relevance in our constitution and the modern world.

Kartavya as Dharma & Duty

While often used interchangeably, *Kartavya* and *Duty* are not synonymous with their true philosophical framework. *Kartavya* is a more profound and internalized concept, representing a natural obligation that is intrinsically linked to the concept of *Dharma*, morality and the Cosmic Order.

Dharma is the positive inherent nature of a thing. It's not a burden imposed from the outside, like statutory duties. Providing fruits, shelter and shadow are the *Dharma and Kartavya* both for a tree, similarly quenching thirst and flowing is the *Dharma and Kartavya* both for her, similarly Sun, Mother Earth and so on. It proves the deep interlinking of *Dharma and Kartavya*.

Traditionally, Bharatiya (Indian) society was structured around the fulfillment of one's *Dharma*. This cultural orientation meant that individuals were guided by an inner moral compass rather than external legal compulsion.² The adherence to *Kartavya* created a self-regulating society where individuals' actions were not just for personal gain, but for the maintenance of a harmonious whole.³ In this way, *Kartavya* is a

¹ Prof. S.N. Dhyani, *Fundamentals of Jurisprudence: The Indian Approach* 111 (Central Law Agency, Prayagraj, 4th edn., 2023).

² Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 575-576 (LexisNexis Publication, 1st edn., 2022).

³ *Ibid.*

spiritual imperative, a conscious choice to live in alignment with one's true nature and contribute to the cosmic order.

The Shift from *Dharm-Kartavya* to Rights-Based Governance

Bharat has witnessed a prolonged history of invasions and social disruption, which created fertile ground for the systematic exploitation by the invaders. The modern form of government imposed by the British marked a profound philosophical shift in the Indian subcontinent.⁴ The British model, rooted in the European struggles between the king and the Church, was fundamentally rights-centric, establishing the ruler - be it a King, Queen, or government - as the supreme authority and a 'provider' and 'protector' to a dependent populace.⁵

This system, driven by the assertion of man-made law, over cosmic or customary law, centralized power and rights in the hands of the ruler. The subsequent introduction of a codified, modern judicial system supplanted the traditional, duty-based framework of Bharatiya society. This transition from a king-ruled system to a democratically elected government and organized bureaucracy, paradoxically, cultivated a new form of dependence of the citizens over the democratically elected government, where instead of being guided by an internalized sense of *Dharma and Kartavya* (duty), society gradually began to see the state as the primary guarantor and provider of rights. This shift tragically transformed a *Kartavya*-based Bharatiya model into a rights-centric, independent India, where the law focuses on individual claims often overshadowing the collective responsibilities that were once the bedrock of social harmony.

Bharat, as a civilization, stands unique in its historical journey, having experienced the full spectrum of societal structures. We have witnessed the profound harmony of a *Kartavya*-based society, where individual obligations were the bedrock of collective well-being, and we now navigate the complexities of a rights-based society, which took root during a period of foreign influence. This dual experience presents us with a rare opportunity to engage in a deeply philosophical and introspective inquiry.

As a successful and independent democracy, India must now critically examine the globally recognized *right-duty jural co-relate model*. This model, while providing a framework for individual liberties, often fosters an adversarial relationship between the citizens and the state, and between individuals themselves. We must ask whether this model truly serves the essence of our civilization?

In contrast to the western right-duty jural co-relate,⁶ we have time-tested, ancient concept of the *Kartavya-Adhikar*. Here, *Adhikar* (rights) are seen not as inherent entitlements but as natural outcomes of fulfilled *Kartavya* (duties). The right to be protected, for instance, is a natural consequence of the ruler's duty to protect. This model fosters a sense of mutual responsibility and shared destiny, where the fulfillment of one's duty ensures the rights of all.

Cosmic Law, *Rta* and Relevance of *Kartavya*

The fundamental purpose of law is to establish order and regulation within society. To truly grasp the essence of law, we must examine its origins and necessity. While we often define law as a set of human-made rules, its roots can be traced to a more fundamental concept: the inherent, self-imposed regulations that govern the universe itself, often called Cosmic Laws.

These Cosmic Laws are the original regulations that ensure the smooth functioning of the cosmos. They are so foundational that they are often cited in human legal systems as Natural Law.⁷ In essence, they

⁴ Seema Singh and Vinayak Sharma, "Exploring the concept of Dharma in Bharatiya Jurisprudence: With special reference to Rule of Law" 7 *Kamkus Law Journal* 34 (2023).

⁵ *Id.* at 65.

⁶ N.V. Paranjape, *Studies in Jurisprudence & Legal Theory* 373 (Central Law Agency, Prayagraj, 10th edn., 2023).

⁷ *Supra* note 1 at 110-115.

act as the ultimate standard, or Grundnorm, against which all other laws are measured.⁸ When human-made laws fail to deliver justice, courts often turn to the principles of Natural Law to interpret the rules and reach a conclusion. This highlights the enduring importance of these ancient principles, even in our modern legal landscape.

To truly grasp natural law, we must first explore the cosmic law that governs the universe. Understanding the intention behind these cosmic laws is akin to understanding the mindset of a legislature when interpreting human-made laws. However, the origin of the universe and its creator remains a profound mystery, with scientists still debating the matter.

One of the most widely accepted theories related to the creation of Universe is the Big Bang theory. This theory suggests that the universe began as a singularity - an incredibly hot and dense point containing all the matter and energy of the cosmos. Approximately 13.8 billion years ago, this singularity rapidly expanded and then cooled. This process led to the formation of fundamental particles, which some might metaphorically call "God Particles," and eventually to the atoms, stars, and galaxies we see today.

Charles Darwin's theory of evolution is often misunderstood to be a theory about the origin of life, when in fact it's a theory about the evolution of species after life has already begun. Darwin's work, particularly in *On the Origin of Species*, focuses on the mechanism of natural selection, which explains how existing life forms change over time, giving rise to new species and sharing a common ancestor. This theory suggests that simple organic molecules formed from inorganic compounds, then self-assembled into more complex structures, eventually leading to the emergence of living cells.

Interestingly there is a fascinating point about the parallels between ancient Indian texts and modern scientific theories. It's true that *the Rigveda*, one of the most ancient human texts, offers a complex and compelling account of the universe's origin that, in some ways, resonates with contemporary scientific thought.

The *Purusha Sukta*, *Rta* and Cosmic Unity

The *Purusha Sukta*⁹ is a hymn within the *Rigveda* that presents a profound explanation for the creation of the cosmos. It describes *Purusha* as a primordial cosmic being who is the source of all creation. This being is revered as the ultimate architect of the cosmic order.

According to the *Sukta*, the various elements of the universe - from the sun and moon to the different social orders - originated from different parts of *Purusha's body*. This narrative is not meant to be taken literally but rather serves as a powerful metaphor. It emphasizes the fundamental unity of the universe and the interconnectedness of all things. Everything is a part of this singular, cosmic being, which highlights a philosophical view that the cosmos is a unified, living entity.

This Vedic perspective offers a unique lens to view the universe' origin - not as a random event, but as a purposeful and unified act of creation from a single, foundational source. It's a foundational text in Vedic philosophy, providing deep insights into the nature of the cosmos and the origins of social structures, all while promoting a sense of cosmic harmony.

The *Purusha Sukta* also presents a mythological narrative of creation where the universe, including various deities and social classes, originates from the body of *Purusha*. It's a foundational text in Vedic philosophy, offering insights into the nature of the cosmos and the origins of social structures. Here are some hymns of *Rigveda* explaining the same.

The hymn as found in the tenth mandala (book 10), hymn 90 of the *Rigveda*:

⁸ *Ibid.*

⁹ *Rigveda*, X.90.

सहस्रशीर्षा पुरुषः सहस्राक्षः सहस्रपात । स भूमिं विश्वतो वृत्तत्यतिष्ठदशाङ्गुलम् ॥1॥

पुरुष (ब्रह्माण्ड) के हजार सिर, हजार आँखें और हजार पैर हैं। हजार असंख्य का प्रतीक है, जो उस सर्वव्यापी पुरुष की सर्वव्यापकता की ओर संकेत करता है। वह संसार को चारों ओर से आच्छादित करता है, अर्थात् सृष्टि के प्रत्येक कण में व्याप्त है, और दस अंगुलियों द्वारा दर्शाई गई दस दिशाओं में भी फैला हुआ है।

*The Purusha (universe) has a thousand heads, a thousand eyes and a thousand feet. Thousand is a symbol of innumerable, which indicates the omnipresence of the omnipresent Purusha. He pervades the world from all sides, i.e. pervades every particle of creation, and also extends in the ten directions represented by the ten fingers.*¹⁰

It's an incredibly thought-provoking parallel to draw between the ancient concept of the Purusha Sukta and the modern scientific theory of the multiverse. This ancient idea of a single, encompassing source giving rise to all of reality can be seen as a philosophical precursor to the multiverse theory. This modern scientific concept, also known as many worlds, posits that our observable universe is just one of many, possibly infinite, universes existing within a larger "meta-universe." Just as the Purusha Sukta suggests that all of creation originates from and is part of the one cosmic being, the multiverse theory suggests that all possible realities may exist, stemming from a larger, singular structure. This striking resemblance highlights how humanity, across vast spans of time and in different cultural contexts, has grappled with the same fundamental question: how can such a vast and diverse cosmos arise from a single origin?

पुरुष एवेदं सर्वं यद्वत्तं यच्च भव्यम् । उतामृतत्वस्येशानो यदन्नेनातिरोहति ॥2॥

पुरुष ही वास्तव में यह सब (सृष्टि) है; जो भूतकाल में था और जो भविष्य में होगा, वह सब अर्थात् सम्पूर्ण सृष्टि उस महान् प्रभु (पुरुष) के अमर तत्त्व से गुंथी हुई है; जिसका आहार बनकर (अर्थात् जिसके अमर तत्त्व में समर्पण द्वारा भस्म हो जाने पर) मनुष्य स्थूल जगत से ऊपर उठकर अमर हो जाता है।

*In reality, Purusha is all this (creation); all that was in the past and all that will be in the future, that is, the entire creation is interwoven with the immortal principle of that great Lord (Purus); by becoming His food (that is, by surrendering and becoming consumed in His immortal principle), man rises above the gross world and becomes immortal.*¹¹

This Sukta describes the cyclic journey of all living and non-living beings which are born and die being the part of that immortal Purusha who just keep changing his form from energy(invisible) to mass (visible, physical) and mass (visible, physical) to energy(invisible). It also explains Einstein's theory of relativity and Krishnas' description of immortal soul as prescribed in Bhagavad Gita.

एतावनस्य महिमातो ज्यायश्च पुरुषः । पदोऽस्य विश्वा भूतानि त्रिपादस्यामृतं देवी ॥3॥

पुरुष शब्दों द्वारा व्यक्त की जा सकने वाली समस्त महानता से महान है। उसका एक अंश ये समस्त (दृश्यमान) लोक बन गया है, और उसके तीन अंश उस परमब्रह्म के अमर लोक में स्थित हैं।

*The Purusha is greater than all the greatness that can be expressed in words. One part of Him has become all these (visible) worlds, and three parts of Him are situated in the immortal world of the Supreme Brahman.*¹²

¹⁰ Rigveda 10.90.1, available at: <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc839599.html> (last visited on July 10, 2025).

¹¹ Rigveda 10.90.2, available at: <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc839600.html> (last visited on July 10, 2025).

¹² Rigveda 10.90.3, available at: <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc839601.html> (last visited on July 10, 2025).

According to the modern science $\frac{3}{4}$ of the Universe is made of Dark energy, which is a mysterious force driving the accelerated expansion of the universe, and $\frac{1}{4}$ of familiar baryonic matter we can observe, which includes stars, planets, and everything else made of atoms. Baryonic matter is the "ordinary" matter we are familiar with. This includes all the protons, neutrons, and electrons that make up atoms, which in turn form everything we can see stars, planets, gas clouds, and all life. Despite its apparent abundance in our everyday experience, baryonic matter accounts for only a tiny fraction of the universe's total composition.

त्रिपादोर्ध्व उदैत्पुरुषः पदोऽस्येहाभवत्पुनः । ततो विश्वं व्यक्रमत्साशान्ने अभि ॥4॥

पुरुष के तीन भाग ऊपर (दिव्य लोक में) हैं, और उनका एक भाग बार-बार सृष्टि बन जाता है। वहाँ, सृष्टि में, वे सभी सजीव (जो खाते हैं) और निर्जीव (जो नहीं खाते) प्राणियों में व्याप्त हैं।

The three parts of the Purusha are above (in the divine world), and one part of them repeatedly becomes creation. There, in creation, they pervade all living (those who eat) and non-living (those who do not eat) beings.¹³

In a way *Purusha* of *Purushsukta* is a manifestation carrying infinite Universe, all the solar system and all of us as a part of its body. As in our body Ether element is invisible similarly the large portion of *Purusha*'s body is invisible in the form of dark energy and whatever is visible is the slight portion of his total existence. In *Sankhya Darshan* the same is known as *Purush* (Consciousness) and *Prakriti* (Nature).¹⁴

So according to *Purushsukta*, *Purusha* is the cause of origin of Multiverse and life and being the part of manifestation of same *Purusha* we are bound to follow same set of rules as multiverse and nature follows. Being the part of that invisible dark energy, all visible and invisible things keep following a certain cosmic law in which they are created and destroyed being the ultimate part of *Purusha*. This Cosmic law is known as *Rta*. As in the modern man-made law, law is the command of sovereign,¹⁵ being the small part of infinite multiverse the *Rta* is the command of Supreme consciousness the *Purusha*. If we violate man-made law the sovereign punishes us. Similarly, if we violate the *Rta*, *Purusha* will punish us. In crux man-made laws must be in alignment to the cosmic laws known as *Rta*. In other words, in case of conflict between man-made law and Cosmic/Natural Law, the Cosmic Law must prevail.

Our *Rishis* understood this Cosmic Law and called it - *Rta*. This *Rta* is naturally reflected in all those words which carries *Ri* (ऋ) in its pronunciation like *Rta* (ऋत)– *Rishi* (ऋषि), *Prakriti* (प्रकृति), *Ritu* (ऋतु), *Trigun* (त्रिगुण), *Rina* (ऋण), *Stree* (स्त्री), *Purush* (पुरुष), *Kartavya* (कर्तव्य), *Adhikar* (अधिकार) etc. Thus, they all are and are supposed to be aligned with comic law. This Cosmic law, the *Rta* is the law made by *Purusha*, is the law of universe, the law of nature. This *Purusha* is present in all the living beings, in each of us in the form of consciousness. In behavior the same cosmic law appears in the form of *Kartavya* followed by *Adhikar*. So, it is totally opposite to modern day right-duty corollary.

Rta & Kartavya

According to *Nyaya Sutas* proclaim, 'कर्तव्यानां सम्यक् पालनं राज्यं वर्धते' - a nation flourishes when its citizens steadfastly uphold their duties. This enduring principle underscores that rights can only exist within a strong culture of duty. As we discussed above in Bharatiya thought, the origin of law is considered divine, and *Dharma* is the oldest school of thought. *Kartavya* is an integral and significant aspect of *Dharma*, closely aligned with divine law and the laws of nature, the *Rta*. *Rta*, is the fundamental principle that governs and

¹³ Rigveda 10.90.4, available at: <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc839602.html> (last visited on July 10, 2025).

¹⁴ Satishchandra Chatterjee & Dhirendramohan Datta, *An Introduction to Indian Philosophy* 238 (Rupa Publication, 7th edn., 2024).

¹⁵ *Supra* note 6 at 31.

sustains the universe, encompassing all that exists. *Rta* represents the principles of divine wisdom that regulate all phenomena, both in the heavens and on Earth. Importantly, the concept of *Rta* also signifies the ultimate source of justice, a guiding principle for human conduct.¹⁶

Rta ensures the continuity of natural order, maintaining the essential functions of nature that sustain human life. This includes the regularity of phenomena such as rainfall, plant growth, daylight, and the cyclicity of the seasons. In essence, *Rta* embodies the natural and cosmic laws of existence, the fundamental laws of nature that govern all principles based upon *Kartavya*. Nature is neither self-centric nor right centric. It follows the path of *Kartavya* where it performs its duty towards us irrespective of our visible reluctance duty towards it.¹⁷

Rta in its essence, is the supreme truth and the sustaining force of the universe. Its antithesis, '*an-Rta*,' signifies destruction. Therefore, everything in the universe possesses an inherent tendency to exist in harmony with this perceived universal order, rather than causing disruption. Any behavior of human being which is not aligned with *Rta* brings destruction. *Kartavya* is aligned with *Rta*, while demanding only Rights omitting performance of *Kartavya* is *an-Rta*, which is against the supreme cosmic rule.¹⁸

In the history of Hindu jurisprudence, the *Dharmasastras*, comprising both *Dharmasutras* and *Smritis*, placed significant emphasis on established customs and practices. This era saw the development of a comprehensive body of rules addressing right and wrong, as well as rights, duties, and obligations, with a notable focus on the latter two. *Dharma*, as a practice, came to define an individual's privileges, duties, and obligations, highlighting a primary emphasis on obligations over rights or *Kartavya* over *Adhikar*.

As discussed above *Rta*, *Kartavya* and *Dharma* are closely knitted. This is the reason that *Dharmashastra* prescribes *Kartavya* for all, and one of its significant features concerning the legal system is the detailed exposition of the principles governing the Monarch's role. This is rooted in the belief that *Dharma* underpins all world events; in its absence, the strong would subjugate the weak. *Dharma* prescribes special duties for human beings to protect those who are weak,¹⁹ who cannot raise their voice for their protection; to protect the rights of every inanimate and animate object created by the supreme divine from mountain to river, from plants to animals and from sky to earth. Thus, *Dharma* is fundamental to both individual conduct and the maintenance of collective security against anarchy. The temporal Ruler is ordained to uphold the supremacy of *Dharma*, deriving authority from a divine origin in accordance with the established cosmic order and perpetual in nature. However, this divine origin does not imply that the Ruler is absolute or infallible. Essential ceremonies like initiation signify the Ruler's connection to the divine, and the divinity attained through various sacrifices underscores their shared nature with the divine.

Dharmashastra prescribes *Duty for all*. One of the important features of *Dharmashastra*, in relation to its legal system, is the detailed elucidation of the principles regarding the role of the Monarch. Under the authority of *Dharma*, the temporal Ruler is designated to uphold the supremacy of *Dharma*.²⁰ According to *Dharmashastra*, the king has obligation to follow his *kartavya* of administration to the kingdom, with a primary focus on the welfare of the people. *Praja-sukham* (Happiness of citizens under good governance),²¹ is measured by the degree to which the governed prospers. The king is also responsible for protecting the kingdom from external threats, a task accomplished through the strategic application of the four *Upayas*: *sama* (conciliation), *dama* (gifts), *danda* (punishment), and *bheda* (division). To effectively manage these responsibilities, the kingdom should establish several key institutions in the form of its ministries.

¹⁶ *Supra* note 1 at 110-115.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Supra* note 2 at 10.

²⁰ *Supra* note 2 at 579.

²¹ Kautilya Arthashastra, 1.19.34.

On other hand *Kartavya* of *Praja* or *Prajadharma* represents the ethical bedrock upon which a harmonious society is built. The *Dharmasastra* asserts that these duties are not mere social conventions but are universal, foundational principles of righteous living that transcend the individual's *Varna* (social class) and *Ashrama* (stage of life). *Kartavya* of citizens towards their Nation, Society and Family, be a *Dharma* abiding citizen, contributing to the welfare of the community through volunteering and paying taxes are few examples of *Prajadharma*. Citizens should be virtuous, *ahimsak* (non-violent) and *sadachari* (truthfulness) in their behaviour. Their spiritual progress and the cultivation of an inner life aligned with cosmic order was also their prescribed *Dharma*.

By practicing these virtues, individuals contribute to their own spiritual evolution while simultaneously fostering a just and peaceful society. For instance, *indriyanigraha* (control of the senses) is not just a personal discipline; it leads to a clear mind capable of discerning right from wrong, benefiting both the self and the community. Similarly, *daya* (mercy) and *danam* (charity) are expressions of the interconnectedness of all beings, a core tenet of Hindu thought. These duties collectively form a path towards *moksha* (liberation) by purifying the mind and actions, thereby ensuring that every person's life is a reflection of divine order.

In the political philosophy of *Rajaniti*, the ruler's highest duty is to create a political order that mirrors the cosmic order of the *Vedas*. This means actively addressing problems in society and punishing those who threaten stability. This obligation is the core of *Rajaniti*. A key component of this is *Dandaniti*, a doctrine centered on the prevention of societal transgressions. It focuses on suppressing activities that disrupt social peace and, when necessary, enforcing compliance through the appropriate application of punishment.

In Sanatan or Eternal political philosophy, *Rajaniti* is the art of governance, where a ruler's administration of justice is not merely a secular function but a sacred duty to align the earthly kingdom with the divine cosmic order (*Rta*) outlined in the *Vedas*. The ruler, acting as the guardian of *Dharma*, is tasked with actively maintaining societal harmony by addressing all societal ills and enforcing righteousness.

In this philosophical framework, an individual's transgressions against their prescribed duties are viewed as more than just legal offenses. They're considered spiritual debts (*Rina*) owed to *Prakriti*, the fundamental matrix of all existence, which disrupt *Rta*, the cosmic order. The ruler, through *Dandaniti*, acts as a cosmic accountant, imposing fines (*Danda*) to settle these spiritual debts.

Punishment, in this context, is a powerful metaphor for atonement. The fines collected serve to compensate *Prakriti* for the harm caused by a transgression, which restores the sacred balance. At the same time, this system of fines is pragmatic, as the wealth collected enriches the royal treasury and reinvested into the state, to fund the army, public works, and the welfare of subjects - all of which are considered manifestations of *Prakriti* and are essential for maintaining a well-ordered universe. Therefore, the ruler's actions in punishing transgressions fulfill both a spiritual duty to restore cosmic harmony and a practical duty to sustain the kingdom's material well-being.

The legal system described in the *Dharmasastras* is based on the idea of natural jurisprudence. This idea comes from the concept of *Purusha-Prakriti* found in the *Rig Veda*. The importance of *Purusha* in the *Rig Veda* has led some scholars to believe it's where *Sankhya* philosophy originated. In *Sankhya*, *Prakriti* is seen as the feminine principle and the partner of *Purusha*. This concept of *Prakriti* is a core part of the *Dharmasastras'* legal system.

Kartavya vs Contractarian Theory

In traditional Bharatiya philosophy, individuals were bound by their *Kartavya* or *Dharma*, which aligned with the natural order. This system emphasized obligations towards nature, and citizens paid taxes to the king primarily for the protection of the land and the upholding of *Rta*, the cosmic law. This approach differs significantly from the existing Western Contractarian theory.

Modern Western contractarian theory emerged from a conflict between the king and the church, resulting in a separation of powers where each held supreme authority in their respective domains. This led to the king becoming the most powerful entity, with the notion that the king could do no wrong, effectively establishing the king's supremacy. In contrast, the Bharatiya model posits the supremacy of divine law, with the king serving as an instrument to implement.²²

The modern Rule of Law is characterized by several key principles: supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. While the concept of the Rule of Law has roots extending back to the Magna Carta, the doctrine of separation of powers can be traced to Aristotle. The development of the modern understanding of the Rule of Law has been significantly influenced by the works of scholars such as Lon Fuller, Joseph Raz, Jeffery Jowell, Jeremy Waldron, John Locke, and Thomas Paine. In contemporary legal systems, the Rule of Law also intersects principles of parliamentary sovereignty and the protection of fundamental rights.²³

In Western philosophy, the concept of 'Law'—as understood by entities ranging from international organizations like the United Nations to individual nations, and from legal scholars to the general public—primarily refers to "Man-Made Law."²⁴ This law is created by a human authority, which could take the form of a king, a parliament, a dictator, a democratically elected government, a president, or any similar figure of authority. A central question in this context is how this powerful law-making authority is established? Contractarian theory provides a key explanation, describing it as arising from a contract between the sovereign and the individual, based on mutual considerations.

In contrast to the West, the Bharatiya concept of sovereignty and justice is distinct. Here, the parties to the "contract" differ from the "Contractarian theory"; they are Nature (Divine) and the individual. The core principle is reciprocity: individuals are expected to protect Nature, and in turn, Nature sustains them. Nature, in this framework, is duty-centric, the ultimate provider, and thus holds the position of sovereign. The king's role is that of a representative of Nature, bound by its commands, which are widely known as the Dharma of the King.²⁵

Though prevailing legal philosophies often emphasize the supremacy of human intellect, in reality human intellect has limitations. In contrast, the Bharatiya tradition posits the supremacy of Nature's intellect, recognizing its ultimate authority. This is reflected in the global judicial reliance on natural law to address the inadequacies of human-made laws. Concepts such as natural law, due process, and the law of good conscience resonate with the principles of *Dharma*. The Supreme Court of India's motto, "*Yato Dharmasya Tato Jayah*" (Where there is Dharma, there is Victory), embodies this, and the powers granted under Articles 32, 136, and 142 are intended to uphold it. Essentially, *Dharma*, reflecting cosmic order and inherent righteousness, forms the foundational principles that underpin any constitution.²⁶

Conclusion

In Bharatiya philosophy, *Dharma* transcends the limitations of codified law, guiding the sovereign's responsibility to protect not only land, animals, birds, rivers, forests, and the environment, but the entire cosmos. *Dharma* profoundly influences various branches of jurisprudence, including environmental, restorative, compensatory, and animal rights jurisprudence. As such, *Dharma* represents the ultimate ethical framework, with the judiciary serving as an instrument to uphold it through the legal system.

²² *Supra* note 4 at 65.

²³ *Supra* note 4 at 34-65.

²⁴ *Supra* note 4 at 61.

²⁵ *Supra* note 4 at 62.

²⁶ *Supra* note 4 at 66.

Contemporary rights-centric societies, with their emphasis on individualism and self-interest, often exacerbate conflict within families, communities, and nations. In contrast, a society guided by the principles of Cosmic Law or Dharma fosters harmony and well-being. *Kartavya*, as an inherent aspect of *Dharma*, emphasizes one's duties and obligations, and fulfilling these duties can resolve many of the conflicts arising from an excessive focus on individual rights.

To foster peace, harmony, and trust, we are bound to create a *Kartavya*-based society, an ideal echoed in the Constitution of Bharat. The aims and objectives enshrined in its Preamble reflect our collective responsibility; this is the true essence of 'We, the People of India'. Concepts such as sovereignty, justice, liberty, equality, and fraternity are not mere words, but the very vision and mission that our Constituent Assembly established for us all.

While Fundamental Duties represent specific obligations, *Kartavyam* transcends them, embodying a more profound, cosmic, and indeed, divine sense of purpose and responsibility. The current juncture calls for a delicate balance. We must not abandon the hard-won principles of a rights-based society, but we must also reconnect with our civilizational roots. It is time to infuse the modern legal framework with the profound wisdom of *Kartavya*, creating a jurisprudence that honors both individual rights and collective duties. This synthesis is not just an academic exercise; it is a spiritual and societal imperative for the continued flourishing of our nation.

LAW CONCEPTS IN KAUTILYA'S ARTHASHASTRA: A DHARMIC LEGAL FRAMEWORK FOR GOVERNANCE AND ITS MODERN-DAY RELEVANCE

Radhakrishnan Pillai*

1. Introduction

The Arthashastra written by Kautilya in the 4th century BCE, is one of the oldest surviving manuals on governance and public administration in the world. While it is primarily perceived as a text on economics and political science, its detailed treatment of legal concepts makes it an invaluable legal document of ancient India. The Arthashastra's legal framework comprises a comprehensive framework of jurisprudence that explores criminal law, civil disputes, commercial regulations and administrative procedures with remarkable intricacies. Kautilya's philosophies exhibit pragmatic approach to justice that reconciles moral principles with practical governance needs emphasizing social stability and state security. The treatise also elucidates the relationship between *Dharma* (moral law) and *Rajadharma* (royal duty), illustrating how ancient Indian legal thought integrated ethical principles with statecraft. These legal provisions, while rooted in historical context, provide significant insights into essential issues of governance, justice, and the rule of law that remain pertinent in contemporary legal discourse. This paper aims to examine the various facets of law in the Arthashastra and reflect on their significance in the past and relevance today.

2. Legal Philosophy in the Arthashastra

Kautilya's legal philosophy is rooted in pragmatism, utility, and Dharma. Law, according to him, is an instrument of social order that supports the goals of the state: preservation of peace, economic prosperity, and protection of the people. While *Vedic* literature emphasised *Dharma* (righteousness), Kautilya emphasized *Vyavahara* (legal process), linking the two with *Niti* (practical policy). This tripartite lens reflects a unique Indian jurisprudential framework. 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 wellbeing of the state and its citizens. 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.

3. Sources of Law

The *Arthashastra* mentions four primary sources of law, these sources form a hierarchy where each later source supersedes the authority of the earlier ones:

- *Dharma* (Sacred law): Based on *Vedas* and *Smritis*
- *Vyavahara* (Evidence): Based on witnesses
- *Charitra* (History): Social conventions and community norms
- *Rajashasana* (King's edict): Royal decrees having the force of law

Among these, *Rajashasana* is supreme in Kautilya's hierarchy, giving the king discretionary power to override other sources when necessary for state welfare. These four pillars of law operate as: *Dharma* being the governance of eternal truth governs the world, *Vyavahara* establishes the facts through witness testimony, *Charitra* draws from the wisdom of the people following historical traditions, and *Rajashasana* embodies sovereign authorities through Royal decrees and commands having the force of law.

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The King who administers justice according to *Dharma*, *Vyavahara*, *Charitra* and *Rajashasana* will be able to conquer the entire world by the four quarters (*Chaturantámmahím*). It is discussed that whenever there is conflict between history (*Charitra*) and the sacred law (*Dharmashastras*) or the evidence (*Vyavahara*) and the sacred law (*Darmashastras*), then the issue must be resolved in accordance with the sacred law (*Darmashastras*). But whenever sacred law (*Dharma*) is in conflict with rational law (*Dharmanyáya*=king's law), then latter shall be held authoritative, for the reason that we no longer have access to the justification for how a particular shastra was derived from dharma as there the original text (on which the sacred law has been based) is not available.

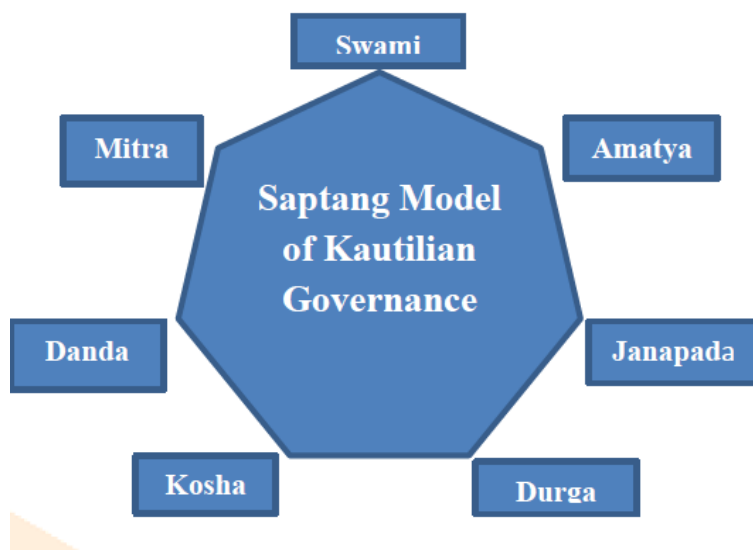
4. Structure of Courts and Legal Officials

The Arthashastra outlines a well-organized judicial system, including:

- *Dharmasthiya* Courts: These were the Civil courts that mostly dealt with civil disputes relating to marriage, inheritance, trespass, labour, contract and other civil aspects of life. These courts were presided over by the *Amatyas*. Their main function was to dispose of the disputes arising out of violation of traditional rules and regulations. They had the authority to impose nominal fines.
- *Kantakasodhana*: Criminal courts, particularly for economic crimes. *Kantakasodhana* courts specialize in criminal cases, particularly economic offenses and serious crimes. These courts used to deal with matters that caused disturbance to peace. As per arthshastra these courts took cognizance of not only of offences against the States but also violations of the law by officials in the discharge of their official duties. The *Kantakasodhana* courts served as comprehensive regulatory tribunals that addressed both commercial misconduct and criminal offenses, intervening in cases ranging from fraudulent trading practices and unfair labor conditions to serious crimes like theft, robbery, and sexual offenses.
- Chief Judge (*Pradvivaka*): Presides over important disputes.
- King as Supreme Judge: Final court of appeal

Other officials like *Amatyas* (ministers) and *Antapala* (border magistrates) also handled judicial functions. Kautilya stressed accountability, record-keeping, and swift justice.

5. Saptang Rajya in Arthashastra



1.1 Revisiting Philosophy of Governance in Kautilya's Arthashastra by Dr. Sanhita Rahul Joshi, Assistant Professor, University of Mumbai

Kautilya described the structure of the state in his *Saptang* theory or *Saptangrajya*. These seven elements are sequentially mentioned in the text structure of the *Arthashastra*. This sequence starts with *Swami* in Book 1. *Amatya*, *janapada*, *durga*, and *kosha* are covered in Books 2 to 5. *Danda* and *mitra* are dealt with in Books 6 to 14. According to *Arthashastra*, these seven elements combine together to form a state. These seven elements combine to form a state. Kautilya believed in organic theory of state. As per him there cannot be a country without people and there is no kingdom without a country. The seven elements of state as described by Kautilya are as below:

1. Swami or the King

It is the most important limb of the state. King is the sovereign ruler of the kingdom. He is created by the different blessings of Gods like Indra, Yam, Fire, Sun, Water, and Air. He is the person responsible for protecting the social order. He is a symbol of justice. The head of the state. Kautilya emphasizes that the ruler must be just, intelligent, and decisive. The king's character and conduct are considered the most important factor in the state's prosperity, and his responsibilities include protecting the kingdom, upholding justice, and ensuring the welfare of his subjects.

2. Amatya or the Minister

Manu advised his king to be careful in the formation of council of ministers because such ministers constitute the government. The king should appoint 7 or 8 carefully examined ministers who are learned, brave, and skilled in the use of weapons. The king should discuss with ministers the matters of peace and war, conditions of the kingdom, wealth, protection of the territory, etc. The selection of ministers based on merit, loyalty, and competence is crucial for effective administration.

3. Janapada or the People

The king should have permanent territory. This element refers to the state's land and its population. A prosperous Janapada is characterized by fertile land, abundant natural resources, a hardworking populace, and social harmony.

4. Durga or the Fort

For the safety of the king a town fortified by desert or water or even trees or by armed men or by mountains. The king should live in such a town that is well protected. A well-fortified capital city and other strongholds are essential for safeguarding the kingdom from external threats and maintaining internal stability.

5. Kosha or Treasury

Kosha is the treasury of the kingdom. The king should appoint trustworthy men to take charge of kosha which involves both the income and expenditure of the kingdom, collection of revenue, location of mines, especially gold mines, etc. A strong treasury, built on efficient tax collection and prudent financial management, is necessary to support the state's activities, including the army, public works, and welfare programs.

6. Danda or Sena or Coercive Power of State

Without a sound defense system there cannot be the existence of state. The king should appoint a strong army to protect himself from the external attacks. A well-trained, disciplined, and loyal army is essential for both deterring aggression from other states and maintaining law and order within the kingdom.

7. Mitra or Friend

As per this theory, the king should have an ally for his own safety to maximize its own interests. The alliance is considered to be good only when the interest of both the parties is aligned. Those allies who are weak today may be strong tomorrow. Kautilya recognized that political isolation is

a weakness. Forming strategic alliances is important for mutual support, trade opportunities, and enhancing the state's influence and security.

5. Types of Law and Legal Procedure

The Arthashastra categorizes law into 18 Tirthas or titles of law, similar to modern civil and criminal codes:

1. Non-payment of debts
2. Deposits and pledges
3. Rescission of sale and purchase
4. Ownership and division of property
5. Breach of contract
6. Resumption of gifts
7. Non-performance of agreement
8. Disputes between partners
9. Boundary disputes
10. Disputes about fields
11. Theft
12. Robbery and violence
13. Assault
14. Defamation
15. Adultery
16. Duties of man and wife
17. Inheritance
18. Gambling and betting

Procedurally, Kautilya emphasized oral and written evidence, witness testimony, and cross-examination, with provisions for perjury and forgery. Kautilya's Arthashastra has given prime importance to the evidence in judicial proceedings. He says "For whether a complaint is lodged first or last, it is the evidence of witness that must be depended upon. In the absence of witness the circumstances connected with the quarrel in question shall be taken as evidence".¹ Conclusive proof was essential before sentencing a person. This doctrine is followed in Indian jurisprudence as "innocent until proved guilty". This concept is relevant in today's time too. According to Arthashastra, the testimony of witnesses was considered to be more reliable than the documentary evidence.

For the procedure of trial the year, the season, the month, the fortnight (paksha), the date, the nature and place of the deed, the amount of the debt as well as the country, the residence, the caste, the gotra, the name and occupation of both the plaintiff and the defendant both of whom must be fit to sue and defend (*kritasamarthavasthayoh*), having been registered first, the statements of the parties shall be taken down in such order as is required by the case. These statements should then be thoroughly scrutinized.

For perjury, Kautilya's Arthashastra takes notably moderate stance on the punishment as the different schools of Arthashastra had recommended various kinds of punishment, more or less severe. Disagreeing with them, Kautilya limits punishment to recommend only a fine of 24 panas for giving false evidence and 12 panas for refusing to give evidence (3.11.48-49). This relative leniency may reflect his concern that imposing overly harsh penalties could discourage individuals from coming forward as witnesses. Furthermore, he also does not quite approve of the rule in 3.11.88 which makes a witness liable to pay the decretal amount for refusing to give evidence, though this cannot be proved and left open to interpretation.²

¹ R. Shamashastry, Kautilya's Arthashastra, p 279.

² R.P Kangle, Arthashastra, P.220.

In normal circumstances, a judge cannot take up a case unless a formal complaint is brought by the aggrieved party. However, in the matters concerning the temples, Brahmins, ascetics, women, minors, the elderly, the sick, or orphans, the *dharmastha* (judge) is empowered to initiate proceedings *Suo moto*, if these individuals do not themselves approach the court. In such cases, it is expressly stated that disputes involving these groups must not be dismissed by citing lack of jurisdiction (*deśacchala*), by deferring them (*kālacchala*), or by rejecting them on the basis of adverse possession (*bhogacchala*). The *dharmastha* (Judge) is to put questions to the two parties as well as to witnesses when these have to be called in because the defendant is contesting the claim. The *dharmastha* (judge) is to pronounce judgment after listening to both parties and weighing all the evidence produced.

6. Punishment and Penal Theory

The Arthashastra, is a treatise which means “science of wealth.”³ 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. Danda is considered as one of the seven essential elements, i.e., Saptanga of a strong state according to Kautilya. The king has a duty to maintain a balance between Danda and other elements like diplomacy (Sama), gifts (Dama), and internal discord amongst enemies (Bheda) for effective statecraft.

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, 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.⁴

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.⁵ 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 (*Ati dand, Sam dand and Nuoon dand*) 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

³A. K. Sen (1987, p. 5), Kautilya's Arthashastra is the first book on economics.

⁴Jurisprudence-II, Case Material, Faculty of Law, University of Delhi (p.185).

⁵A. 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

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.⁶ Deterrence was one of the primary goals of punishment with a purpose to instill fear in potential offenders and prevent them from committing crimes. This was achieved through the swift and certain application of justice. Kautilya also emphasized **Rehabilitation**, where minor offenders were sometimes given a chance to reform

Kautilya's penal system is based on complex interplay between monetary and physical punishments. According to him, law and order by the government can be maintained through punishments. Kautilya's main purpose to impose punishment was to deter crime and reform the wrongdoer. As per him, punishment when awarded with due consideration people become devoted to righteousness and it works productively of wealth and enjoyment. While punishment, when ill-awarded or under the influence of greed and anger or owing to ignorance, excites fury even among hermits and ascetics dwelling in forests, not to speak of householders.⁷ When law of punishment is not in place, the proverb of fishes (*matsyanyayamudbhavayati*) comes into play meaning thereby, in the absence of a magistrate (*dandadharabhave*), the strong will swallow the weak, but under his protection, the weak resist the strong.

Different types of punishments were prescribed in *Arthashastra* like **Fines (Dhana Danda)**: prescribed especially for economic crimes and minor transgressions. The amount of the fine could vary depending on the severity of the crime, the status of the offender, and the damage caused. **Corporal Punishment**: causing physical pain and was used for more serious crimes. The *Arthashastra* details a number of gruesome methods, including whipping, caning, and mutilation (e.g., cutting off a tongue for defaming the king). The text also outlines rules for torture, specifying that certain individuals like pregnant women or children shouldn't be tortured, and that torture should not result in death. **Imprisonment**: when offenders could be confined to jails, often with hard labor, as a means of removing them from society and preventing them from re-offending.

Death Penalty: was reserved for the most heinous crimes, such as treason, murder, and certain forms of adultery. The methods of execution were often brutal, including burning alive, beheading, and being torn apart by bulls. The text also mentions a "simple death" for offenders who were not considered "cruel." **Exile: Banishment from the kingdom, Public Humiliation**: Social punishments, like branding a symbol of a crime on a person's forehead, were also used to mark offenders and strip them of their social standing.

Kautilya identified four purposes of *danḍanīti* as follows:

- **Acquisition of the non-acquired**- it aims to acquire territory, resources, and wealth not possessed yet.
- **Preservation of the acquired**- Once acquired the State will seek to preserve and protect it.
- **Augmentation of the preserved** – State focus to make endeavors to increase or enhance the wealth and resources it currently holds.
- **Fair distribution of the augmented** – People must receive the benefits and wealth gained through augmentation are to be distributed justly and fairly among the people.

In Kautilya's *Arthashastra*, the king has the discretion to judge each case, considering intent in order to ensure fair and proportionate punishment. However, misuse of this power is highly condemned. Kautilya emphasizes that punishment must be balanced not too severe to incite resentment nor too lenient to invite disorder this highlights the importance of justice guided by *dharma* and *Nyaya*.

7. Contract Law and Civil Disputes

⁶ Jurisprudence-II, Case Material, Faculty of Law, University of Delhi (p.187).

⁷ R. Shamasastri-Kautilya's *Arthashastra* (1915) (p.13)

Kautilya's *Arthashastra*, particularly Book 3 "Concerning Law," presents one of the earliest and most systematic legal frameworks governing commerce, contracts, and financial responsibility in the ancient world. It provides detailed rules on business partnerships, suretyship, rescission and restitution, fraud, and misrepresentation, while also anticipating certain modern commercial law ideas such as fiduciary duty, misuse of trust, and force majeure.

In case of business relationships, contracts, both oral and written, were legally binding. Breach of contract was punishable based on Nature of the contract, Damages incurred, public interest. In the *Arthashastra*, *vyavahāra* primarily refers to a transaction entered into by two parties. Therefore, the term does not ordinarily apply to disputes like *sāhasa* (assault or violence), *kalaha* (quarrels) or *pāruṣya* (abuse), which, though involving two parties, are not transactions in the contractual sense. It is in context of *vyavahāra* the sense of transactions based on mutual agreements that the question of their validity or invalidity arises. A transaction becomes invalid (and thus illegal) if the circumstances under which it was concluded are defective.

For a transaction to be valid it must have been entered into by people who are competent to do so and must be physically present in person at the time of the agreement. As a rule, they should generally have been entered into in the open and by daytime and should be free from secrecy or fraud. Fraud and misrepresentation were treated as serious commercial offenses. Contracts founded on deceit, secrecy, or false statements were declared void, with penalties imposed both on the perpetrator and any complicit witnesses. Acts such as using false weights, adulterating goods, or otherwise cheating customers were similarly condemned and punished.

A suit filed by the plaintiff on the basis of an invalid transaction means not only the loss of the suit and the usual fine prescribed for loss of suit, but also a heavy fine in addition for relying on an inadmissible transaction. Each partner was bound by principles of mutual obligation and fair conduct, and disputes were settled according to justice and the need for restitution. Even witnesses present at the time of such a transaction are subject to be fined (3.1.2-15). This can be described as outlining the *law of contracts*.

The *Arthashastra* also elaborated on suretyship, placing liabilities on guarantors for the debts of the principal debtor and, in some cases, extending such liability to heirs or co-debtors. This ensured that contractual obligations were met, and creditors were protected, reinforcing trust in financial relations through the doctrine of joint responsibility.

On rescission and restitution, Kautilya permitted cancellation of contracts in cases of fraud, incapacity, or illegality. Such rescission was followed by restitution, meaning both parties were restored to their original positions to prevent unjust enrichment. This ensured that defective or fraudulent agreements did not confer unlawful benefit to any party.

While Kautilya did not use the modern term "fiduciary duty," his laws clearly embody its essence. People entrusted with another's property, whether agents, managers, or partners, were expected to act in good faith and not misuse their authority or assets. Any breach that caused loss to the principal required compensation. The *Arthashastra* also acknowledges situations akin to force majeure, accounting for cases where contractual performance became impossible due to factors beyond a party's control, such as natural calamities, transport delays, or loss of goods during shipment. In such cases, liabilities could be reduced or waived.

Kautilya further instituted broader market regulations to safeguard trade fairness, prevent monopolies, maintain quality standards, and protect consumers. As highlighted by translators like R. Shamasastri and commentators such as L.N. Rangarajan, these laws demonstrate an advanced and rational economic legal system, remarkably aligned with many modern commercial principles.

8. Property and Inheritance Law

The description of property disputes and inheritance laws in Kautilya's Arthashastra primarily mentioned in Book 3, "Concerning Law," especially chapters on division and special shares of inheritance. It contains distinction of joint family property from Self-acquired property, outlining inheritance rules that depend on factors like lineage, gender, and marital status. Self-acquired property of a son is not subject to division among family members, unless by means of parental resources. However, property that has been acquired using joint ancestral property, sons and grandsons, up to the fourth generation from the original ancestor are entitled to specific shares (*aṃśabhāgaḥ*) in that property. This is because the family line (*piṇḍa*) is considered to remain continuous and uninterrupted (*avichchhinnah*) up to the fourth generation. When the family line broken (*vicchinna-piṇḍa*) that is, the descendants spread beyond four generations and then all such heirs are entitled to equal shares in the property.

In the absence of male heir, it has been prescribed that the his brothers or persons who have been living with him shall take possession of his movable property (*dravyam*), and his daughters, (born of marriages other than the first four), shall have his immovable property (*riktham*). If a deceased man leaves only daughters behind and these daughters are born from marriages contracted as per the customs of any of the first four kinds of approved forms of marriage then such daughters can inherit the property. If neither daughter nor son are eligible then the father of the deceased, if alive, shall become the heir and inherit the property. If father is also not living, then the inheritance shall pass to the brothers of the deceased and the sons of those brothers. A father, while distributing his property when alive, shall make no bias in dividing the property among his heirs. Father shall not deprive any of his sons of his shares without any sufficient reason. In event of father being deceased, the eldest son shall extend his support to the younger brothers unless they are of bad character.

Adoption was allowed as a legal method to ensure lineage and inheritance. As per Kautilya's Arthashastra, if a person has been married before they become fallen (fallen from caste, persons born of outcaste men, and eunuchs) and their line is at verge of extinction, their relatives may beget sons for them, who then receive proportional inheritance shares. This implies a form of legal and social adoption. This practice is meant to preserve the family lineage and inheritance rights by allowing relatives to raise sons on behalf of those whose family line might otherwise end.

In Kautilya's Arthashastra, land disputes, encroachments, and boundary issues are primarily resolved through a mix of evidentiary procedures including inspection (*pariksha*), witness testimony, and documentary evidence. The judicial process emphasizes careful examination of facts presented by the disputing parties, supported by physical inspection of the land in question and testimonies from credible witnesses to ascertain rightful ownership or boundary delineations.

9. Corporate and Commercial Law

The Arthashastra advanced insights into corporate functioning and economic regulation, reflecting highly state-supervised commercial structure. *Arthashastra* assigns recognition to guilds (*Shrenis*) as legal entities with specific rights and responsibilities. These guilds operated within internal governance to regulated manufacturing standards, maintain ethical codes, and control prices and quality among their members. They also used to act as assemblies for resolving disputes internally, and their verdicts could not be questioned or challenged in royal courts. Guild leaders represented their members before the king and managed issues including taxation and market conduct, effectively functioning as early corporate bodies with legal standing.

Kautilya's Arthashastra also extensively regulates business monopolies, weights and measures, licensing, and price control. The government rigorously watched and enforced regulations to curb the practice of cheating by false weights or adulteration, with severe fines for offenders, when found guilty. The measures were taken to discourage and control the exercise of creating monopolies or cartel, promoting fair competition and consumer protection. Price ceilings were set after giving due considerations to cost, production, taxes, and transport. This aided the king and the administration to maintain stability in the market and while also safeguarding the consumers from exploitation.

The Superintendent of Commerce had a very crucial role to play in managing and regulating the supply, pricing, and distribution of merchandise within the kingdom and in foreign trade. His primary duty is to ascertain rise and fall of the demands and rise or fall in the price for all kinds of various merchandise, that may have been produced on land or in water and may have been transported either by land or by water path. He had the authority to decide the optimal timing for distribution, centralization, purchase, and sale, ensuring market stability and consumer protection.

Chapter 7 titled as “The Business of Keeping up Accounts in the Office of Accountants” of book 2 of Kautilya’s Arthashastra details out that role of the Superintendent of Accounts and states that he must maintain a well-organized accounts office and shall keep precise records of every department’s activities, profits, losses, wages, taxes, prices, and trade details, both domestic and foreign. Monthly and annual audits are mandatory, with accounts verified through inspection, precedent, arithmetic checks, and espionage. It also contains a provision for rewarding the Officers who used to aid in increasing the net revenue but often penalized severely for delays, falsification, double entries, omissions, or manipulation. Fines vary according to severity, with schools of law prescribing penalties from equal to 20 times the loss. Accountants must submit sealed books on time; failure invites heavy fines. Verification of receipts, expenditure, and net revenue is done annually on *Vyushṭa* day with reference to place, time, source, and officers responsible. The king is urged to punish fraud but reward capable superintendents who protect and enhance revenue.

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 people 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.”⁸ Kautilya considers economic crimes bribery, hoarding, cheating more dangerous than violent crimes.

10. Role of the King in Legal Administration

The king is the source, enforcer, and protector of law. Arthashastra defining the role of king states that if the king is energetic, diligent and active then his people will also be the same as him. But if he is careless or negligent then his people will also mirror that energy and they will also end up wasting and undermining king’s achievements. Hence, the king shall always be wakeful and mindful.

When in court, he shall never cause his petitioners to wait at the door, for when a king makes himself inaccessible to his people and entrusts his work to his immediate officers, he may be sure to engender confusion in business, and to cause thereby public disaffection, and himself prey to his enemies.⁹ His responsibilities include:

- Sitting in court daily to hear cases
- Appointing and supervising judges
- Ensuring justice without bias
- Protecting the weak

⁸ Jurisprudence-II, Case Material, Faculty of Law, University of Delhi (p.191).

⁹ R. Shamasastri-Kautilya's Arthashastra (1915) (p.51).

The Arthashastra warns that a king who fails to uphold justice will lose legitimacy. The concept of “*Dharmaraja*”—a just ruler—was central to Kautilya’s vision.

11. Ethical Dimensions: Dharma, Nyaya, and Niti

Kautilya’s Arthashastra weaves three pillars of governance, that is ***Dharama Nyaya and Niti*** which creates a comprehensive framework that serves both individual’s and collective rights. Dharma represents the ethical code rooted in ancient *Vedic* traditions and concept of *Rta*. The path of dharma, embodies, righteousness, morals, ethics, duties, and values that promote harmony in society. As per *Arthashastra*, ***Dharma*** set out the moral boundaries for the law and governance to ensure that states powers are exercised in line with ethical and moral principles of ***Dharma***. Principles of ***Nyaya*** can be found to be adopted in the Arthashastra in the practice of both the procedure and the outcome. These includes chance of fair trials, Impartial adjudication, adherence to established legal policies and proportionality of punishment. *Nyaya* safeguard fairness and by upholding ***Nyaya*** King guarantees every decision to be legally sound, procedural, correct morally, justified, and free from impartiality. ***Niti*** is a pragmatic governance approach which is used to strategize policy administration, political maneuvering to strengthen the king and the state. It is a pragmatic approach in which rulers navigate complex issues such as war, diplomacy, management of resources, crime control with a strategy. However, *Niti* does not operate in absolute. It has to be framed within the boundaries of *Dharma and Nyaya*.

Kautilya brilliantly balanced all three and made misunderstand that Neeti without Dharma then Nyaya risk tyranny, Dharma without Neeti, may become idealistic and impractical, Nyaya without Neeti might be too rigid to adapt to practicality. Kautilya’s vision was that the kings embody this balance by acting strategically for the protection of the states, security, and prosperity. Thus, the framework ensures that Law is not only about command and control but also emphasizes harmonizing the individuals’ rights with stability, security, and prosperity of the collective rights.

12. Comparative Perspective with Modern Law

Aspect	Arthashastra	Modern Law
Source of Law	Dharma, Vyavahara, Charitra, Rajashasana	Constitution, Statutes, Precedents
King’s Role	Supreme judge and legislator	Separation of powers
Legal Categories	18 Titles of Law	Civil, Criminal, Commercial, etc.
Procedure	Oral/written, witnesses, punishment	Due process, fair trial, appeals
Punishment	Danda (Deterrence, Retribution, Reform)	Mostly reformatory or restorative

While modern legal systems on a clear separation of powers among the legislature, executive, and judiciary emphasize safeguarding individual rights and personal freedoms, Kautilya’s Arthashastra emphasised state-centric utility and moral order that serves the stability, security, and prosperity of the state. His framework placed the ruler at apex combining political authority, administrative control, and judicial

oversight in a single office. Kautilya Arthashastra lays out a comprehensive legal system with the king as the supreme judge and legislator, embodying the highest judicial authority. The sources of law include Dharma (moral and cosmic order), *Vyavahara* (legal procedure), *Charitra* (conduct), and *Rajashasana* (royal edicts), supported by a constitution-like framework, statutes, and precedents.

13. Contemporary Relevance

An ancient Indian treatise, Kautilya's Arthashastra, on statecraft, law, and governance is starting to get more popularity in contemporary discourse, particularly within courses on Indian jurisprudence where it is now recognized as a foundational text. It offers multifaceted legal insights and umpteen valuable perspectives on several critical issues faced by modern governance and legal systems. One of the primary the issue is corporate governance and anti-corruption for which Kautilya suggests and outlines the importance of transparency, accountability, and strict supervision of officials and agents of the state. These principles are in line with contemporary frameworks that aim to curb menace of corruption and also enhance the ethical conduct in government bodies and private corporations. Arthashastra advocates for rigorous policies with respect to auditing, severe penalty for fraud and embezzlement, and the need for an optimum system of checks and balance still pertinent today.

Kautilya's triad model of leadership has intricately weaved the concepts of Dharma (moral order) and Nyaya (justice) into the pragmatic governance principles of Niti (policy). As per this, the rulers and the lawmakers are expected to act not only with strategic acumen but also with a deep sense of moral responsibility and justice. Hence, Arthashastra provides a structure of leadership that not only balances real politic with aspirational governance but also while balancing encourage leaders to pursue dharma-based ethics to uphold state's welfare.

Furthermore, Arthashastra's restorative justice model focuses on restorative and reformative approach to *Danda* rather than holding on to purely retributive measures. This approach promotes social welfare with an aim to reintegrate the offenders into mainstream and maintain social harmony. The approach strongly resonates with contemporary approaches in criminal justice system that seek alternatives to punitive justice alone. Lastly, the treatise's approach to public policy rooted in dharma and pragmatism offers a unique blend of moral philosophy and practical administration.

Incorporating the principles and values of Arthashastra into Indian jurisprudence curricula will enrich the understanding of legal and political philosophy by connecting ancient wisdom with modern governance challenges. It fosters appreciation of India's intellectual heritage while providing enduring lessons on leadership, justice, and policy that remain profoundly relevant in today's legal and administrative environments.

14. Conclusion

Kautilya's Arthashastra offers a rich, complex legal framework that blends pragmatism, ethics, and strategic governance. Far from being a relic, its insights into law continue to inspire legal scholars, political thinkers, and administrators alike. Understanding its principles could lead to a more holistic, values-based approach to lawmaking and governance in contemporary times. The article reaches the conclusion that even in modern times, the relevance of Arthashastra has not increased but has remained the same, especially in the arena of international affairs and warfare. Kautilya's insights possess enduring relevance that will go a long way in the future as well. Kautilya's Arthashastra is foundational work on economics, government, and statecraft. It promotes an administrative and strategic framework for legal foundation as well, with a focus on pragmatic governance, legal efficacy, and state stability. Hence, the integration of these teachings of Arthashastra in today's legal and regulatory framework will provide a strategic and comprehensive approach that demonstrates how intellectual rigor, combined with strategic flexibility, can transform our legal system from arbitrary decision-making into a systematic pursuit of equitable and sustainable decisions.

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RĀJYOTPATTI: FROM MATSYANYAYA TO DHARMA-BASED RULE

Ruchi Rawat

The *Shantiparva* of the *Mahabharata*, particularly the *Rajadharmanushasana Parva*, stands as a foundational text on ancient Indian statecraft, where *Pitamaha Bhishma*, in dialogue with *Yudhishtira* in the aftermath of the Kurukshetra war, centrally addresses the core questions regarding the origins and nature of the state in ancient Indian political tradition. Drawing upon his lifetime of experience and extensive knowledge, the *Shantiparva* systematically explores the rationale for the state, its ultimate purpose, and its essential characteristics. The epic describes the words *Raja* (King) and the *Rajya* (State) as so closely linked that the state is considered to come into existence only with the advent of the king. It depicts the institution of the state as a divine necessity to ensure security and justice for humanity in response to *Matsyanyaya*,¹ a condition marked by lawlessness and anarchy, which led to the extinction of *Dharma* and the gradual deterioration of social order as it took hold among people at the end of *Satya Yuga*.² We find two distinct theories on the origin of the state in Chapters 59 and 67 of the *Shanti Parva*; first the Divine Origin Theory, and second, *Dharma-Samvida* (*Dharma* based Contract theory) which aligns with the modern Social Contract Theory, though with important contextual and philosophical differences. These theories extensively explore the entire process of social evolution, starting from its roots in the original state of nature, incorporating both divine creation and the concepts of a coronation oath or popular agreement.³

1. The Divine Origin Theory

Yudhishtira, in Chapter 59 of the *Shanti Parva*, asks *Bhishma* two distinct questions: How did the title of king (*Rajan*) come into existence,⁴ and why does one person rule over others who are equally intelligent and courageous, even though all are subject to the same life cycles and share similar physical and mental attributes?⁵ *Bhishma's* response to these questions provides a thorough account of the creation of the state (*Rajya*), kingship, and the foundation of royal authority. He began by describing the pre-political phase of human society, during the earliest *Satyuga* (Golden Age), where people lived righteously in the society without the need for a state, as –

न वै राज्यं राजाऽऽसीन च दण्डो न दाण्डिकः ।
धर्मैव प्रजाः सर्वा रक्षन्ति स्म परस्परम् ॥ १४ ॥
पाल्यमानास्तथान्योन्यं नरा धर्मेण भारत ।
खेदं परमुपाजग्मुस्ततस्तान् मोह आविशत् ॥ १५ ॥
ते मोहवशमापन्ना मनुजा मनुजर्षभ ।
प्रतिपत्तिविमोहाच्च धर्मस्तेषामनीनशत् ॥ १६ ॥⁶

“In the beginning, there was neither any kingdom (Rajya) nor a king (Raja), no punishment (Danda) nor anyone to impose it. All the people governed themselves by following Dharma

¹ *Matsyanyaya* – A condition wherein the strong oppressed the weak (Large fish swallowing the smaller fish).

² *Shantiparava* (Chapter 231), describes in detail the *Yuga Cycle* (*Chaturyuga* or *Mahayuga*), composed of four ages- *Krita/Satya* (Golden age), *Treta* (Silver age), *Dvapara* (Bronze age), and *Kali* (Iron age); each with its own unique characteristics and progressively declining duration.

³ U. Ghoshal, *A history of Hindu political theories: From the earliest times to the end of the first quarter of the seventeenth century A.D.* 174 (Humphrey Milford, Oxford University Press, 1923).

⁴ *Mahabharata Shanti Parva*, 59:5. (Geeta Press, Gorakhpur, 2013).

य एष राजन् राजेति शब्दश्चरति भारत । कथमेष समुत्पन्नस्तन्मे ब्रूहि परंतप ॥ ५ ॥

⁵ *Id.* at 59:6-8.

तुल्यपाणिभुजग्रीवस्तुल्यबुद्धीन्द्रियात्मकः । तुल्यदुःखसुखात्मा च तुल्यपृष्ठमुखोदरः ॥ ६ ॥

तुल्यशुकास्थिमज्जा च तुल्यमांसासृगेव च । निःश्वासोच्छ्वासतुल्यश्च तुल्यप्राणशरीरवान् ॥ ७ ॥

समानजन्ममरणः समः सर्वैर्गुणैर्नृणाम् । विशिष्टबुद्धीन् शूरांश्च कथमेकोऽधितिष्ठति ॥ ८ ॥

⁶ *Id.* at 59:14-16.

(their duty), and in doing so, they protected each other's rights. All the people were nurtured and nourished by Dharma. However, after some time, they began to experience great hardship in carrying out this mutual protection. Gradually, a sense of delusion clouded their minds. When all individuals were overtaken by delusion, they lost the ability to judge right from wrong, leading to the downfall of their Dharma.”

Bhishma describes how society gradually deteriorated. Men became increasingly envious, desiring what was not theirs. This desire grew into lust, which brought forth anger and greed, eventually unraveling order and plunging society into chaos. As religious practices deteriorated in the human world, the study of the *Vedas* gradually disappeared. With the disappearance of Vedic knowledge, noble deeds and acts of fame also diminished. In response to this, fear overtook the minds of the gods. Frightened by the destruction of the Vedic traditions and religious order, they sought refuge in *Brahmaji* (the supreme lord/ creator),⁷ addressing him collectively, they expressed their deep concern over the loss of *Sanatan* (eternal) Vedic wisdom, due to the impurities of greed (*Lobha*), attachment (*Moha*), and other vices within the human realm. They lamented that the disappearance of Vedic chants, glory and righteousness (*Dharma*) had diminished their divine essence, making them akin to mortals.⁸

After much deliberation, *Brahma* saw that society could not thrive without laws enforced by a ruler. Therefore, at the request of the Gods, he created the system of *Dandaniti*, the science of punishment/chastisement, to establish law and order in the world. To codify this system, *Brahma* composed a scripture comprising one hundred thousand chapters, infused with his divine wisdom, detailing the principles of Dharma (virtue), *Artha* (profit), and *Kama* (pleasure) in great depth, collectively referred to as *Trivarga*. The fourth principle, *Moksha* (salvation), differs in both its purpose and characteristics transcending the worldly concerns of the other three.⁹

Brahma, further explained to all the other deities that everything in this universe, from moral duties to material desires, including Virtue, Profit, Pleasure, and Salvation, will be overseen by this principle of chastisement, ensuring the proper functioning of the Cosmos in all aspects of existence –

दण्डेन सहिता ह्येषा लोकरक्षणकारिका ।

निग्रहानुग्रहरता लोकाननुचरिष्यति ॥ ७७ ॥¹⁰

“The law of chastisement that accompanies this *Niti* (policy) is the protector of the whole universe. It will be enforced everywhere, diligently punishing the wicked and extending grace to the righteous.”

After the creation of the *Dandaniti*, the lord of *Uma*, divine and multiform *Shiva*, first studied and mastered it followed by *Indra*, *Vrihaspati*, and *Shukracharya*. With the *Dandaniti* established, the Gods approached *Vishnu*, asking him to select a king to govern the masses. *Vishnu*, through his divine energy, gave birth to *Virajas*, but *Virajas* refused to take over the reign, desiring instead to seek *Moksha*. *Virajas'* descendants including *Krittimat*, *Kardama*, and *Ananga*, all upheld *Dharma*. *Ananga's* son, *Ativala*, married *Sunita*, the daughter of *Mrityu*, and their son, *Vena*, became the King. However, driven by his

⁷ *Id.* at 59:21-22.

विप्लुते नरलोके वै ब्रह्म चैव ननाश ह । नाशाच्च ब्रह्मणो राजन् धर्मो नाशमथागमत् ॥ २१ ॥

नष्टे ब्रह्मणि धर्मो च देवांस्तासः समाविशत् । ते त्रस्ता नरशार्दूल ब्रह्मार्ण शरणं ययुः ॥ २२ ॥

⁸ *Id.* at 59:24-25.

भगवन् नरलोकेऽथ ग्रस्तं ब्रह्म सनातनम् । लोभमोहादिभिर्भावैस्ततो नो भयमाविशत् ॥ २४ ॥

ब्रह्मणश्च प्रणाशेन धर्मो व्यनशदीश्वर । ततः स्म समतां याता मर्त्यैस्त्रिभुवनेश्वर ॥ २५ ॥

⁹ *Id.* at 59:29-30.

ततोऽध्यायसहस्राणां शतं चक्रे खबुद्धिजम् । यत्र धर्मस्तथैवार्थः कामश्चैवाभिवर्णितः ॥ २६ ॥

त्रिवर्ग इति विख्यातो गण एष खयम्भुवा । चतुर्थो मोक्ष इत्येव पृथगर्थः पृथग्गुणः ॥ ३० ॥

¹⁰ *Id.* at 59:77.

intense desires, *Vena* abandoned Dharma and acted unrighteously towards all forms of life. The rishis expelled him and killed him through the power of their mantras. From *Vena's* thigh came the *Nishadas*, the tribal inhabitants of the mountains. But from his right arm emerged *Prithu*, a noble figure who mirrored Indra in his strength and wisdom. *Prithu* was well-versed in the *Vedas*, warfare, and the principles of governance. He pledged to the Rishis that he would uphold Dharma and the *Dandaniti* as a ruler of the mortal realm. *Prithu* is revered for leveling the uneven land in the earth with his bow and is celebrated as the eighth incarnation of *Vishnu*. The gods, sages, and other celestial beings gathered to crown him as the king of the world. Because of his protection of the Brahmanas from harm (*Kshati*) earned him the title of *Kshatriya*. *Prithu* made the Earth prosperous through righteousness and elevated its glory; as a result, it came to be known as '*Prithvi*' by countless people. *Prithu* made this earth prosperous through righteousness and elevated its glory; as a result, it came to be known as '*Prithvi*'. (See *Shanti Parva* 59:81-126) ¹¹

Similarly, the Western tradition formulated the "Divine Right of Kings" theory, which fundamentally differs from the ancient Bharatiya concept. According to the Divine Right of Kings, the monarch derives authority directly from God and is thus accountable only to God, not to any earthly body such as the people, parliament, or even the church. James I of England was a prominent advocate, asserting in 1609:

*"The state of monarchy is the supremist thing upon earth: for kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called gods."*¹²

This doctrine claims that subjects are bound to obey the king unconditionally and unquestioningly follow all of his commands, regardless of whether his actions are just or unjust; resistance is seen as defiance of the divine order. If a king is tyrannical, unfortunately the people have to live under the rule of a wicked king; the king is not to be blamed, as it is believed that God has placed such a sovereign over them due to their own sins, and resisting him would amount to a sin against God.¹³ Therefore, obeying the commands of that wicked king becomes the ultimate duty of the people, regardless of his nature or actions. As a result, loyalty to a wicked monarch becomes the ultimate religious duty, effectively removing any accountability of the ruler to the populace.

However, *Bhishma's* views are contrary to this opinion. According to *Bhishma*, the king is not a representative or agent of God on earth. He is indeed divine, but his divinity is based on his virtuous character. He is accountable for his actions, and his orders hold authority only when they align with *Dharma* (the law). Orders that violate *Dharma* are invalid, and the king himself is confined by the boundaries of *Rajadharma*, with no authority to exceed these limits. Thus, *Bhishma's* theory of the divine origin of kings holds a distinct place in the history of ancient *Bharatiya* political traditions, where the state is believed to have a divine origin, and the king is considered a divine being (*Devansh*) who takes human form and rules on earth in accordance with *Dharma*.

2. Dharma-Samvida (Dharma based Contract)

In Chapter 67 of the *Shanti Parva* of the *Mahabharata*, *Bhishma* offers an alternative explanation of the origin and role of the state, grounded in political obligation rooted in a Dharma-based contract. However, it is important to note that ancient Indian texts on polity and scriptures scarcely enunciated a theory directly akin to the Western concept of the Social Contract. This difference arises from the fact that the Indian intellectual tradition developed in a different historical and cultural environment, following a distinct

¹¹ K.M. Ganguli, *The Mahabharata of Krishna Dwaipayana Vyasa* 4164- 4166 (Motilal Banarsidass, 1896).

¹² James I of England's "Speech to Parliament (1609)," edited by Frank Luttmer.

¹³ Glenn Burgess, "The Divine Right of Kings Reconsidered" 107(425) *English Historical Review* 837-861 (1992).

philosophical trajectory. Nevertheless, certain parallels can be observed, particularly in the *Dharma-Samvida* (Dharma-based Contract theory) and the notions of political obligation expressed by ancient Indian scholars like *Bhishma* and *Kautilya*. What is most crucial to emphasize here is the evidence of a governmental contract between the people and the ruler.¹⁴ While the Social Contract theory, arises from a different time and philosophical tradition, is predominantly associated with the works of Western philosophers like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, the roots of such ideas can, however, actually be found much earlier in the *Mahabharata*, which was written long before these Western philosophers developed their theories. Based on the accounts in the *Shanti Parva* section, it appears that *Bhishma* believed humans passed through three significant stages.

- 1) The first stage was when humans lived in an ideal stateless society (pre-political or *Krita Yuga* with *Sattva Guna*),¹⁵ where society existed without any institutionalized political authority or sovereign power. People naturally lived in harmony according to *Dharma* (the rule of right conduct), acting virtuously and being dutiful and protective of others' rights.¹⁶
- 2) However, after a certain period of time, when *Krita Yuga* transitioned into *Treta Yuga*, under the influence of *Rajas* and *Tamas*¹⁷ *Gunas*, infatuated by desires, attachment, greed, pride, arrogance, and anger, people began to lose their virtues and became covetous, lost chastity, forgot righteousness, and failed to perform their duties rightfully. In the absence of centralized authority, this disturbed the peace and led to the decline of *Dharma*, ultimately giving rise to the second stage of *Matsyanyaya* (the law of the fish) or *the State of Nature*, wherein the fear of anarchy became deeply rooted. In such a condition, the strong preyed upon the weak, resulting in social disorder and chaos.¹⁸
- 3) In response to this chaos and disorder, the establishment of authority became necessary to preserve society, as it was realized that society could not thrive without laws. Thus, the third stage emerged, where, as a remedy, royal authority (the king) was instituted, giving rise to the institution of kingship or the state, where rulers were entrusted with the responsibility to safeguard *Dharma*, enforce justice, and maintain social order.

There is much in common that can be noted between *Bhishma's* state of *Matsyanyaya* and Hobbes' *State of Nature* as described in his famous work *Leviathan*, where he characterizes man as "*Solitary, poor, nasty, brutish, and short*".¹⁹ In this *State of Nature*, life without a sovereign is a "*time of war*," where "*every man has a right to everything, even to another's body*," and "*the condition of man... is a condition of war of every one against everyone*."²⁰ Without a sovereign/state, individuals live in constant fear of violent death and cannot place their trust in one another. It is important to note here that, for Hobbes, fear is the primary force driving human actions in the *State of Nature*, which led humans to develop self-interest and the instinct for self-preservation to overcome it. Hobbes' theory posits that self-interest is the fundamental driving force behind human development. In contrast, *Bhishma* suggests that the foundation

¹⁴ Mishra, Kaushal Kishore, "The Study of Ancient Indian Political Traditions", 65 *The Indian Journal of Political Science* 9-20 (2004).

¹⁵ The entire creation is governed by *Triguna* (three *Gunas* (qualities): *Sattva*, *Rajas* and *Tamas*. The emotions of man are subjected to these *Triguna*, with each *Guna* contributing distinct characteristics that influence an individual's thought, emotion and behavior. Here, *Sattva* is the *Guna* of wisdom, purity, and tranquility, representing clarity of mind, emotional stability, and the higher consciousness that enables self-awareness and compassion.

¹⁶ Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 575-576 (LexisNexis Publication, 1st edn., 2022).

¹⁷ *Rajas Guna*, embodies energy, drive, and desire. While *Rajas* are necessary for action and motivation, an excessive influence of this *Guna* results in restlessness, anxiety, aggression, and emotional turbulence. *Tamas* represents darkness, ignorance, and inertia. When *Tamas* dominates the mind, it leads to lethargy, confusion, ignorance, and often manifests in more severe conditions like depression or apathy.

¹⁸ David Slakter, "On Mātsyanyāya: The State of Nature in Indian Thought", 21 *Asian Philosophy* 23-34 (2011).

¹⁹ Thomas Hobbes, *Leviathan* 65 (J. M. Dent & Sons Ltd, London, 1914)

²⁰ *Id.* at 67.

of human civilization, particularly in the formation of social and political structures, lies not solely in the pursuit of self-interest, but in the mastery and transcendence of internal vices.

In chapter 67, *Yudhishtira* inquires about the primary duty or responsibility of a kingdom. *Bhishma* responds by emphasizing the critical importance of coronating or electing a ruler as the foremost duty of a kingdom and its citizens. He argues that the absence of a ruler leads to a state of anarchy (*arajakata*), which destabilizes society and makes it susceptible to exploitation by thieves, oppressors, and external threats.²¹ He clarifies the role of a King or State as a guardian of *dharma* (righteousness) and the enforcer of order. The necessity of having a ruler or law (order) is emphasized by demonstrating how a society without an acknowledged ruler, accepted by the citizens, leads to the decay of social order. *Bhishma* illustrates a society afflicted by *Matsyanyaya*, a condition that arises in the absence of a ruling authority (before the emergence of State/King), where might makes right; the stronger overpower the weaker as mentioned that –

राजा चेन्न भवेल्लोके पृथिव्यां दण्डधारकः ।
जले मत्स्यानिवाभक्ष्यन् दुर्बलं बलवत्तराः ॥ १६ ॥
अराजकाः प्रजाः पूर्वं विनेशुरिति नः श्रुतम् ।
परस्परं भक्षयन्तो मत्स्या इव जले कृशान् ॥ १७ ॥²²

“If in this world there were no kings on earth wielding the rod of chastisement, then just as in water large fish devour the smaller ones, so too would the strong exploit the weak. In ancient times, in consequence of anarchy, the people oppressed each other, leading to mutual destruction.”

During *Matsyanyaya*, social disorder takes over, leading people to seize what isn't theirs, lose their chastity towards women and disrupt human relationships. This environment makes it nearly impossible to carry out the daily state of affairs. To improve the situation, the people made an agreement amongst themselves for restoring the order; *Bhishma* describes how the community came together and formulated specific rules to govern their behavior, stating:

*“He who speaks harshly or becomes violent in temper, imposes severe punishment, engages with other people's wives, or takes others' wealth – such people should be cast out from society. Thereafter, in order to build confidence among people of all castes, they created a mutual agreement, and by following it, they all began to live peacefully.”*²³

However, this agreement failed to work. They realized that they could not manage their affairs on their own and needed someone to govern them. Distressed by the absence of order, the people collectively approached *Brahma* and expressed their plight, saying-

यं पूजयेम सम्भूय यश्च नः प्रतिपालयेत् ।
ततो मनुं व्यादिदेश मनुर्नाभिनन्द ताः ॥ २१ ॥²⁴

“O Lord! We are perishing without a king. Please appoint a ruler who has the strength to govern, someone whom all of us will honor together and who will look after us.”

²¹ Supra note 4 at 67:2.

²² *Id.* at 67:16-17.

²³ *Id.* at 67:18-19.

समेत्य तास्ततश्चक्रुः समयानिति नः श्रुतम् । वाक्शूरो दण्डपरुषो यश्च स्यात् पारजायिकः ॥ १८ ॥

यः परस्वमथादद्यात् त्याज्या नस्तादृशा इति । विश्वासार्थं च सर्वेषां वर्णानामविशेषतः ।

तास्तथा समयं कृत्वा समयेनावतस्थिरे ॥ १९ ॥

²⁴ *Id.* at 67:21.

Brahma then proposed *Manu* as king of mortals. *Manu*, however, declined, saying that ruling over men is extremely challenging, as they are naturally deceitful and full of greed.²⁵ Even so, the people persuaded *Manu* by promising to contribute 1/50th of their animals, 1/50th of their gold, and 1/10th of their crops to grow his treasure.²⁶ They further promised that those who are most skilled in weaponry would follow *Manu*, just as the gods follow *Indra*.²⁷ In return, they requested the king's protection and pledged that a quarter of the merit gained by his protected subjects would be given to the king.²⁸ Upon such a plea by the people, the great and courageous King *Manu*, agreed to accept the position of king.

Thus, from the account of *Bhishma* mentioned above, it is clear that the origin of the state is rooted in the people's acceptance of the king's authority, with the primary objective of establishing a stable and well-regulated social order. To achieve this, political power was established, and the people granted the king only those powers that were necessary and appropriate for governing the state. The core idea behind this notion was that a ruler should be benevolent toward his subjects, rather than autocratic. This aligns with Locke's theory of the social contract, wherein individuals surrender all rights to the state, except for three fundamental ones- life, liberty, and property; enabling the state to establish order and discipline within society. Here, if a ruler abuses their authority, the people retain the right to remove him from power. Thus, both *Bhishma* and Locke shared similar views that the state should not be characterized by absolute authority. According to *Bhishma*, the king's powers are limited and the king is obligated to rule in accordance with *Dharma* (righteousness). In contrast, Hobbes' views differ significantly from both *Bhishma* and Locke, as he advocates for absolute power of the sovereign. According to him, individuals surrendered all their natural rights to the ruler for self-preservation, and these rights could not be reclaimed. In this way, while Hobbes is a strong supporter of absolute sovereignty, on the contrary, *Bhishma* rejects the absolute authority of the king. According to him, obedience to the king's command is only justified as long as it aligns with *Dharma*. His philosophy asserts that *Dharma* transcends both the king and the state, emphasizing that the ruler must govern in accordance with *Dharma*. In this regard, his theory provides a more rational framework than many Western political philosophies, as it prioritizes the supremacy of *Dharma* (righteousness) over the authority of the sovereign.

It is also noteworthy that both the theories of state, as mentioned above, have different objectives. While the first theory (in Chapter 59) aims to restrict royal power, the second theory, in its given context, emphasizes the significance of royal power. By detailing the evils that arise in the absence of a king, it underscores the need for royal authority. In addition, the duties imposed on the people are greater than those imposed on the king. From the perspective of ancient *Bharatiya* political philosophy, the theory of *Dharma* based Contract (*Dharma-Samvida*) should be regarded as the most thorough explanation for the emergence of the state. As this theory incorporates both the king and the citizens, where the king acts as the sovereign and the people as the subjects (*Praja*). Hence, the *Dharma-Samvida* should unquestionably be seen as a major and innovative contribution of ancient *Bharatiya* philosophers to political thoughts, still relevant in present time.

²⁵ *Id.* at 67:22.

बिभेमि कर्मणः पापाद् राज्यं हि भृशदुस्तरम् । विशेषतो मनुष्येषु मिथ्यावृत्तेषु नित्यदा ॥ २२ ॥

²⁶ *Id.* at 67:23-24.

तमब्रुवन् प्रजा मा भैः कर्तृनो गमिष्यति । पशुनामधिपञ्चाशद्विरण्यस्य तथैव च ॥ २३ ॥

धान्यस्य दशमं भागं दास्यामः कोशवर्धनम् । कन्यां शुल्के चारुरूपां विवाहेषु द्यतासु च ॥ २४ ॥

²⁷ *Id.* at 67:25.

मुखेन शस्त्रपत्रेण ये मनुष्याः प्रधानतः । भवन्तं तेऽनुयास्यन्ति महेन्द्रमिव देवताः ॥ २५ ॥

²⁸ *Id.* at 67:27.

यं च धर्मं चरिष्यन्ति प्रजा राजा सुरक्षिताः । चतुर्थं तस्य धर्मस्य त्वत्संस्थं वै भविष्यति ॥ २७ ॥

IDEA OF STATE AND LAW IN RAMARAJYA

Vinayak Sharma & Ruchi Rawat

INTRODUCTION

From the unchecked expansion of state power to the erosion of civil liberties, our age is characterized by a deep sense of moral and political uncertainty, where societies across the globe find themselves at a critical juncture, grappling with the disintegration of community values and the collapse of traditional normative state frameworks that once guaranteed cohesion, welfare, and protection to citizens. Within this context of systemic fragmentation and socio-political dislocation, there emerges a pressing intellectual quest to reimagine the governing framework of the state, capable of rescuing humanity from prevailing conditions of alienation, marginalization, and dehumanization by reinstating human dignity at the center of civilizational development. This has given rise to a resurgence of debates within contemporary social science discourse concerning the nature of an Ideal State, rooted in fundamental questions about its responsibility in addressing a wide range of issues including politics, administration, education, culture, equity, morality, coexistence, language, and global ambitions; and, more broadly, reaffirming the ethical foundations of collective human life.

Since the very beginning of human civilization, the state has occupied a central position in social and political thought, interpreted in diverse ways across various intellectual traditions. Within the dominant (Western) academic narrative, we have been taught that the Greek political thinker Plato is widely credited with introducing the first systematic conception of the “Ideal State” in his seminal work *The Republic*,¹ where Justice, Education and Communism was at the center of his core argument. For him, that state is ideal, where philosophers are the rulers. However, when we closely examine Plato’s idea of the ideal state, it reveals its fundamentally utopian character. Far from being a practical model of governance, it was deeply influenced by his disillusionment with the democratic structures of Athens, especially after the execution of his mentor, Socrates.² The concept of the philosopher-king, central to his political thought, was his philosophical critique of democracy that was politically unrealistic and famously accused of laying the intellectual foundation for totalitarianism.³ Despite these significant fault lines,⁴ Plato’s ideas have continued to occupy a central position in academic discourse, largely due to the historical dominance of Western intellectual traditions. Challenging these long-standing biases within the social sciences, this chapter seeks to present the ancient Indian conception of the ideal state as exemplified by the model of *Ramarajya* - a vision that is neither apolitical nor irrational but fundamentally state-centric and representative of a highly sophisticated body of political thought, arguably more advanced than that of the West.

¹ *The Republic of Plato* (Oxford University Press, 1945).

² Julia Annas, *An Introduction to Plato's Republic* 5-6 (Clarendon Press, Oxford, 1981).

³ Karl Popper, *The Open Society and its Enemies* 138,153 (Routledge and Kegan Paul, London, 1962).

‘Totalitarian morality overrules everything, even the definition, the Idea, of the philosopher.’

‘...nobody but Plato himself knew the secret of, and held the key to, true guardianship. But this can mean only one thing. The philosopher king is Plato himself, and the Republic is Plato's own claim for kingly power...’

⁴ Karl Popper, *The Open Society and its Enemies* (Introduction by Alan Aryan) (Princeton University Press, Oxford, 1994) ‘...that Plato divided the human race into mindless sheep and philosophically enlightened shepherds; he was the originator of historicist fantasies and myths about racial destiny that fed straight into nineteenth-century authoritarianism..’

Ramarajya can be defined as the just and welfare-oriented rule of Prabhu Shri Rama as depicted in *Valmiki Ramayana*, one of the great Hindu epics, narrating the life of Prabhu Shri Rama, the seventh avatar of Lord Vishnu.⁵ If one defines a welfare state as one fundamentally committed to the well-being of all citizens, where the ruler is morally obligated to serve the public good, remains open to criticism, and is accountable to the people, then *Ramarajya* fully embodies those ideals. Valmiki in *Ayodhya Kanda* of his *Ramayana* defined *Ramarajya* as-

An ideal state where there was no sorrow of widowhood, no fear from dangerous creatures, and no trace of illness,⁶ where crime was non-existent, thefts and acts of violence were unheard of, and no one engaged in immoral conduct,⁷ where people lived long, healthy lives, with abundant progeny and without grief,⁸ where the entire populace was devoted to Rama, and mutual respect prevailed; no one harmed another,⁹ where nature, too, was in perfect balance- trees remained ever fruitful, rains fell as needed, and the breeze was gentle and pleasant,¹⁰ where all four varnas (Brahmins, Kshatriyas, Vaishyas, and Shudras) were content, free from greed, and dutifully engaged in their prescribed responsibilities,¹¹ where truthfulness, moral conduct, and religious adherence defined the character of the people,¹² making Rama's kingdom a model of an ideal and Dharma-based society.

Though often misunderstood in modern discourse as merely a mythological or religious concept, *Ramarajya* presents a political vision of ethical governance grounded in *Dharma* and *Nyaya*. As in the famous book- *Marxwaad Aur Ramarajya*, Sri Swami Karpatri Maharaj stated the definition as-

*Ramarajya is a form of governance rooted in the principles of Dharma as prescribed in the scriptures (Sastra). In such a rule, the will, interests, and consent of the people are given utmost importance.*¹³

Moreover, this system is also known by names such as *Ishwarrajya* (God's kingdom), *Dharmarajya* (kingdom of righteousness), *Ramarajya*, impartial *Dharma*-based state, spiritual

⁵ *Srimad Bhagavata Mahapurana*, 1.3.24 (Gita Press, Gorakhpur, 2017).

मत्स्यं मृगयामि चन्द्रं कुर्म कपिलं तथा । वराहं चतुर्मुखं च नरसिंहं च महात्मनः ॥

वामनं च रामं चैव बालकृष्णं तथा तथा ॥

⁶ *Srimad Valmiki Ramayana (Part I and II)*, Yuddha Kanda, 128/98 (Gita Press, Gorakhpur, 2021).

न पर्यदेवन्विधवा न च व्यालकृतं भयम् । न व्याधिर्न भयं चासीद्गामे राज्यं प्रशासति ॥६८॥

⁷ *Id.* at Yuddha Kanda, 128/99.

निर्दस्युरभबल्लोको नानर्थ कश्चिदस्पृशत् ॥६९॥

⁸ *Id.* at Yuddha Kanda, 128/101.

आसन्वर्षसहस्राणि तथा पुत्रसहस्रिणः । निरामया विशोकाञ्च रामे राज्यं प्रशासति ॥९०९॥

⁹ *Id.* at Yuddha Kanda, 128/100.

सर्वं सुदितमेवासीत्तौ धर्मपरोऽभवत् । राममेवानुपश्यन्तो नाभ्यर्हिसन्यस्परम् ॥९००॥

¹⁰ *Id.* at Yuddha Kanda, 128/102.

नित्यमूला नित्यफलास्तरवस्तत्र पुष्पिताः । कामवर्षी च पर्जन्यः सुखस्पर्शश्च मारुतः ॥९०२॥

¹¹ *Id.* at Yuddha Kanda, 128/104.

ब्राह्मणाः क्षत्रिया वैश्याः शूद्रा लोभविवर्जिताः । स्वकर्मसु प्रवर्तन्ते तुष्टाः स्वैरेव कर्मभिः ॥९०४॥

¹² *Id.* at Yuddha Kanda, 128/105.

आसन् प्रजा धर्मपरा रामे शासति नानृताः । सर्वे लक्षणसम्पन्नाः सर्वे धर्मपरायणाः ॥९०५॥

¹³ Swami Karpatri Maharaj, *Marxvad Aur Ramrajya* 9 (Gita Press, Gorakhpur, 1999).

"शास्त्र धर्म नियन्त्रित शासन ही रामराज्य है इसमें प्रजाकी रुचि तथा सम्मति का पूरा ध्यान रखा जाता है।"

governance, and *Dharma*-controlled administration. It has been successfully experienced not just for thousands or millions, but for billions of years where all kinds of freedom and harmony coexist, thus avoiding conflicts.¹⁴

We find mention of the concept of *Ramarajya* (the reign of Rama) at three distinct places in the *Valmiki Ramayana*. The first reference appears in the *Bala Kanda* (Canto 1), where the sage Narada narrates a concise version of Rama's story to Valmiki, covering events from Rama's birth to his return to Ayodhya and subsequent coronation, thus encompassing both past and present events. Following this, in six verses, Narada offers a glimpse into the future, describing the nature of his political reign, in which the principal features of *Ramarajya* are outlined. The second and most detailed description of *Ramarajya* is found in the *Yuddha Kanda* (Canto 128), where Valmiki elaborates on the actual state of the kingdom under Rama's just and prosperous rule, rooted in *Dharma* and cosmic order. The third reference appears in the *Uttara Kanda*, where Bharata recounts the characteristics of Rama's reign as a philosophical archetype of righteous governance, signifying its lasting impact and continued resonance as a paradigm of Ideal Governance. Notably, across all three accounts, the depiction of *Ramarajya* remains largely consistent, emphasizing similar ideals and features of governance that we will discuss in detail in next section.

By analyzing the nature and characteristics of statecraft and legal order in the *Valmiki Ramayana*, this chapter aims to position *Ramarajya* as an indigenous political system- one that not only predates but, in many respects, transcends Western conceptions of the ideal state. Long before the emergence of Greek political philosophy or the modern liberal welfare state, ancient Indian thought, as instantiated in the reign of Maryada Purusottama Shri Rama contemplated a *Dharmika* political order whose primary objective was the universal welfare (*sarvajana hita*) of all beings. In this vision, the ruler is not merely an administrator or policymaker, but a moral exemplar (*Dharma-parvartaka*) who actively upholds and implements *Dharma* through just, compassionate, and righteous governance. Unlike the modern welfare state, which is largely rooted in secular, materialist, and rights-based paradigms, *Ramarajya* integrates spiritual, ethical, duty-based and metaphysical dimensions into the structure of political life. It presents a holistic model in which justice, duty, freedom, and welfare are not only treated as competing goals, but as mutually reinforcing components of a well-ordered and ethically grounded polity. *Ramarajya* can thus be presented as an alternative to the Western liberal welfare model of governance that has often proven ill-suited to India's unique historical and cultural context. Indigenous problems require indigenous solutions. The model of *Ramarajya*, reflecting an Indic vision of ideal governance rooted in civilizational values, offers a framework capable of addressing contemporary challenges in a culturally resonant manner.

STATE OF AYODHYA: RAMARAJYA AND GOVERNANCE

For centuries, the *Valmiki Ramayana* has been primarily regarded as a literary work of religious and spiritual significance. However, beyond this, when we go through the text in depth, it gives us a detailed description of the various dimensions related to the state and politics of Ayodhya prevailing at that time, including the form of government, roles of the king, ministers, administrative mechanisms, social organization, economic systems, principles of good governance (*Sushasan*), foreign policy, and even perspectives on life and the afterlife. Central to this political vision is the concept of *Ramarajya*- a system of Welfare oriented governance model in Ayodhya

¹⁴ *Id.* at 115.

during the lifetime of Lord Rama, which has been revered for centuries as a model of a welfare state and good governance in India. It is important to note that while *Ramarajya* is often referred to by scholars as the ideal state established exclusively during the reign of Lord Rama, a closer and more critical reading of *Valmiki Ramayana* suggests that the foundations of this ideal governance were laid much earlier. The political and administrative framework evident during King Dasharatha's reign was already based on *Dharma*, Morality, and public welfare. These values were not unique innovations of Rama's rule but were inherited from a well-established tradition within the *Ikshvaku* Dynasty, sustained and transmitted across generations. Recognizing this continuity allows for a more comprehensive understanding of the socio-political order of Ayodhya during Rama's lifetime, including not only his own tenure as ruler but also the preceding governance under King Dasharatha.

Many scholars have often misunderstood *Ramarajya* as merely the Indian counterpart to the Western utopian Ideal State which is a symbolic, aspirational concept rather than a concrete political reality, however underestimating its historical depth and functional relevance. Here in this section we will see how *Ramarajya* was not simply a philosophical or mythological construct, but a practiced and sustained model of governance, grounded in ancient civilizational values and socio-political ethics and how it offers the potential to serve as an alternative Indian model of the welfare state; one that draws from indigenous traditions of governance rooted in *Dharma*, *Nyaya* and collective well-being. Although there exists a huge time gap between the present age and the era of the *Ramayana*; where it refers to the ideal kingdom of Ayodhya in the *Treta Yuga*, or more broadly, the ideal polity of the Kosala region which is fundamentally different from the polity and structure of the modern democratic framework.

During the *Ramayana* period, India was culturally unified but politically fragmented into numerous small kingdoms or principalities, each functioning independently.¹⁵ Yet, the political consciousness of the time was developed enough for the people of Ayodhya to recognize the dangers of a stateless society.¹⁶ Much like the *Dharmashastra* and the *Mahabharata*, Valmiki also mentioned about *Matsyanyaya*, where in the absence of a sovereign or state, a situation of lawlessness prevails, due to which larger fish swallowing the smaller ones;¹⁷ in an anarchic state, similarly, in an anarchic state, when no individual retains rightful ownership over their possessions, people exploit and destroy one another and society descends into chaos. This fear of disorder explains why, immediately following King Dasharatha's demise, the citizens of Ayodhya urgently appealed to Sage Vashistha for the appointment of a new monarch.¹⁸ Apart from this, in the *Uttara Kanda* of the *Ramayana*, another story was narrated by Sage Agastya in response to Rama's question about how the idea of kingship first emerged on earth. Accordingly, in the *Satyuga*, humanity lived without a ruler. But as sinful deeds increased and disorder began to threaten social harmony, the people prayed to *Brahma* (the creator) for the creation of a king,

¹⁵ *Supra* note 2 at Uttara Kanda, 38/20.

वाराणसीं ययौ तूर्णं राघवेण विसर्जितः । विसृज्य तं काशिपतिं त्रिशतं पृथिवोपुतीन् ॥२०॥

This is also evident from the fact that, after the war, when Rama returned to Ayodhya, more than 300 kings were present there. (Also refers to the Bala Kanda, 13/21-27)

¹⁶ *Id.* at Ayodhya Kanda, 67/9-32.

¹⁷ *Id.* at Ayodhya Kanda, 67/31.

नाराजके जनपदे स्वकं भवति कस्यचित् । मत्स्या इव जना नित्यं भक्षयन्ति परस्परम् ॥ ३१ ॥

¹⁸ *Id.* at Ayodhya Kanda, 67/38.

स नः समीक्ष्य द्विजवर्य वृत्तं नृपं विना राष्ट्रमरण्यभूतम् ।

कुमारमिक्ष्वाकुसुतं तथान्यं त्वमेव राजानमिहाभिषेचय ॥ ३८ ॥

realizing that human life could not be sustained without a governing institution. *Brahma* then appointed a man named Ksupa, endowed with the radiance and powers of the guardian deities, as the ruler of the earth.¹⁹ Thus, the institutions of the state came into being with the emergence of the king, who was ordained to protect the people, for without a king, the state could not survive. Yet, kingship in the *Ramayana* was not an absolute or arbitrary power. It functioned as a form of limited, or constitutional monarchy, where even the ruler was bound by the principles of *Rajadharma*, ensuring that his authority served the welfare of the people. The outward structure of Valmiki's kingship appeared hereditary, but a closer examination of the *Iksvaku* lineage reveals that dynastic succession was not absolute. In practice, royal succession was subject to a complex and nuanced system of political consent, involving not only ministers and royal elders but also feudal lords, whose endorsement was crucial.²⁰ Thus, the power to rule was not inherited in an unqualified manner; it was, rather, contingent upon broader political legitimacy. Even when Dasharatha nominated Rama as *Yuvaraja*; this decision was only formalized after it was ratified by the royal assembly.²¹ The monarch's will, therefore, was not final; it had to be negotiated within a framework of collective authority. The necessity of securing approval from subordinate rulers and court officials underscores the semi-elective nature of kingship during this period, challenging the notion of a purely autocratic or divine-right monarchy. It signifies the presence of democratic tendencies within the monarchical framework of Ayodhya. It was customary that the eldest son would inherit the throne.²² However, textual evidence suggests that succession was not automatic; if deemed unfit, he could be bypassed in favor of a more capable younger son. In the absence of a direct heir, the king's brother could assume the throne. To ensure continuity, the *Yuvaraja* (crown prince) typically succeeded the king upon death or abdication.

In ancient Indian political tradition, the king was not merely a political head but was also seen as a representative of divine will on Earth, entrusted with the protection and welfare of his people. Valmiki's ideal ruler, Rama, whose reign is still regarded as the model of perfect governance- ruled over a kingdom that had attained an ideal state. In his dialogue with Vali, on relation between Ruler and his Subject (Father-Son)²³; Rama himself states that rulers are givers of the most essential elements of life: *Dharma* (moral order), *Artha* (material prosperity), and *Jivana* (life itself).²⁴ Therefore, do not harm them, do not slander them, do not accuse them, and do not speak harshly to them, for they are truly deities who roam this Earth in human form.²⁵

Though this may be framed as an expectation of royal conduct, it presents an ideal ruler as one required to govern not by power alone, but through moral integrity and virtue. Valmiki in

¹⁹ *Id.* at Uttara Kanda, 77/37-43.

²⁰ See *Id.* at Ayodhya Kanda, 2/10, where Dasharatha decided to retire from the duties of kingship and appoint his son, Rama, to govern the kingdom for the welfare of the people, only after obtaining the consent of all the eminent Brahmanas present in his court.

सोऽहं विश्राममिच्छामि पुत्रं कृत्वा प्रजाहिते । संनिकृष्टानिमान् सर्वाननुमान्य द्विजर्षभान् ॥१०॥

²¹ *Id.* at Ayodhya Kanda (Canto- 1 and 2).

²² *Id.* at Ayodhya Kanda, 79/7.

ज्येष्ठस्य राजता नित्यमुचिता हि कुलस्य नः । नैवं भवन्तो मां वक्तुमर्हन्ति कुशला जनाः ॥७॥

²³ *Id.* at Ayodhya Kanda, 2/4.

विदितं भवतामंडद् यथा मे राज्यमुत्ततम् । पूर्वकैर्मय राजेन्दै सुतवद् परिपालितम् । ।

²⁴ *Id.* at Kishkinda Kanda, 18/41.

दुर्लभस्य च धर्मस्य जीवितस्य शुभस्य च । राजानो वानरश्रेष्ठ प्रदातारो न संशयः ॥४१॥

²⁵ *Id.* at Kishkinda Kanda, 18/42.

तान् न हिंस्यान्न चाक्रोशेन्नाक्षिपेन्नाप्रियं वदेत् । देवा मानुषरूपेण चरन्त्येते महीतले ॥४२॥

Chapter-2 of the *Ayodhya Kanda* outlined the characteristics of Lord Rama that he is truthful, heroic, endowed with divine qualities like *Indra*, one who upholds *Dharma* and *Artha*, pleasant like the moon, patient like the Earth, wise like *Brihaspati*, powerful like *Indra*, modest, one who does not covet others' wealth, calm, a comforter to the distressed, soft-spoken, grateful, self-restrained, gentle by nature, steady-minded, always welfare-oriented, pleasant in speech, a devotee of learned scholars, elders, and Brahmins, master of all weapons, knowledgeable in the *Veda*, well-versed in all branches of learning, a master of *Gandharvaveda* (music), generous and large-hearted, protector of villages and towns, skilled in warfare, victorious, affectionate toward his people (*praja-vatsala*), one who keeps all four *varnas* engaged in their duties, a great archer, cheerful, *Dharma*-abiding, radiant like *Vishnu*, free from vices like attachment and anger, just, and as radiant as the sun.²⁶ He was so ideal that the people of the earth wished to make him their ruler, as he possessed all virtues, was as powerful as the *Lokapalas* (guardian deities), and perfectly righteous to govern them all.²⁷

The most significant aspect of the *Ramayana* period was that, even though the people considered the king to be supreme, they expressed their responses according to the king's conduct. What stands out is the reciprocal nature of the king-subject relationship in Valmiki's political vision. While the king is revered, the people are not portrayed as passive recipients of rule. They observe, evaluate, and react to royal conduct. This reciprocal dynamic required rulers to align closely with *Dharma*, not only to uphold moral standards but also to retain the support and respect of their subjects. In this way, *Valmiki's* conception of kingship merges moral, political, and emotional expectations into a single ideal: a ruler who leads by example, governs with *Nyaya*, and continuously earns the trust of his people through ethical conduct and public service.

In the 100th chapter of the *Ayodhya Kanda*, through a thoughtful dialogue with Bharata, Lord Rama explains the essence of polity; lessons on *Rajadharma* or *Rajaniti*, defining what it genuinely means for a king to govern justly. The questions revolve around the idea of *Sushasan*, which is deeply embedded in Rama's vision of an ideal state, where the king should protect and care for all the people residing in his kingdom in accordance with *Dharma*,²⁸ and in doing so, through the righteous exercise of *Danda* (by punishing wrongdoers justly), the wise ruler ensures the welfare of his subjects, secures order over the entire earth, and ultimately attains heaven.²⁹ By adhering to righteous policies (*Niti*), the king ensures the safety and prosperity of his subjects but if he fails in his duties, they face destruction.³⁰

A king, responsible for the governance of a kingdom, which constitutes his *Sanatan Dharma*,³¹ must always keep foremost in his mind this responsibility and be prepared, if necessary,

²⁶ *Id.* at *Ayodhya Kanda*, 2/28-47.

²⁷ *Id.* at *Ayodhya Kanda*, 2/48.

तमेवंगुणसम्पन्नं रामं सत्यपराक्रमम् । लोकपालोपमं नाथमकामयत मेदिनी ॥४८॥

²⁸ *Id.* at *Ayodhya Kanda*, 100/48.

रक्ष्या हि राज्ञा धर्मेण सर्वे विषयवासिनः ॥४८॥

²⁹ *Id.* at *Ayodhya Kanda*, 100/76.

राजा तु धर्मेण हि पालयित्वा महीपतिर्दण्डधरः प्रजानाम् ।

अवाप्य कृत्स्नां वसुधां यथावदितश्च्युतः स्वर्गमुपैति विद्वान् ॥ ७६ ॥

³⁰ *Supra* note 2 at *Uttara Kanda*, *Praksipta Sarga* 2/5.

नीत्या सुनीतया राजा धर्मं रक्षति रक्षितः । यदा न पालयेद् राजा क्षिप्रं नश्यन्ति वै प्रजाः ॥ ५ ॥

³¹ *Id.* at *Bala Kanda*, 25/19½.

राज्यभारनियुक्तानामेष धर्मः सनातनः ।

to undertake actions that may be severe or mild, culpable or harmless, in order to safeguard his subjects (which is why he is *Praja-palak*).³² Such a ruler does not act out of self-interest but places public welfare and collective morality above his own comfort or interest. A righteous king shares in one-sixth of the spiritual merit earned by his subjects through their study of the *Veda*, austerities, and virtuous deeds, as he protects and upholds the dharmic order that makes such a life possible.³³ Rama has listed fourteen key flaws that an ideal king should avoid, including atheism, falsehood, anger, carelessness, procrastination, ignoring wise counsel, laziness, narrow-mindedness in planning, engaging in pointless strategies, and failure to execute plans or safeguard secrets.³⁴ Avoiding these defects enables a king to fulfill his responsibilities, ensuring good governance and the welfare of his people.

For the sake of personal discipline, Rama advised him to renounce the *Dasvarga* (the ten vices arising from desire)³⁵ and the *Ashtvarga* (the eight vices arising from anger).³⁶ Apart from the qualities and responsibilities of a king, he has mentioned the *Saptavarga*,³⁷ the seven essential elements of state administration. These are considered the seven limbs of a state and are equally important for its effective functioning. An ideal king must also follow the *Chaturvarga*³⁸ (the four *Upayas* or strategies) essential for state's diplomacy- *Sam* (conciliation), *Dam* (offering gifts), *Danda* (punishment), and *Bheda* (creating dissension) and; *Shadgunya*³⁹- the six *gunas* by which a king can achieve victory over all challenges. These are *Sandhi* (alliance), *Vigraha* (war), *Yana* (strategic movement or seeking shelter), *Asana* (neutrality), *Dwaidhibhav* (dual policy), and *Samshraya* (taking refuge under a stronger power), guiding a king to choose the most suitable approach depending on the situation favourable to his state governance.

³² *Id.* at Bala Kanda, 25/18.

नुशंसमनृशंसं वा प्रजारक्षणकारणात् । पातकं वा सदोषं वा कर्तव्यं रक्षता सदा ॥ १८ ॥

³³ *Id.* at Uttara Kanda, 74/31.

अधीतस्य षष्ठं तप्तस्य कर्मणः सुकृतस्य च । षष्ठम भजती जति भागं तु प्रजा धर्मेण पालयन् । ।

³⁴ *Id.* at Ayodhya Kanda, 100/65-67.

नास्तिव्यमनृतं क्रोधं प्रमादं दीर्घसूत्रताम् । अदर्शनं ज्ञानवतामालस्यं पञ्चवृत्तिताम् ॥ ६५ ॥

एकचित्तनमर्थानामनर्थनैश्च मन्त्रणम् । निश्चितानामनारम्भं मन्त्रस्यापरिरक्षणम् ॥ ६६ ॥

मात्तायप्रयोगं च प्रत्युत्थानं च सर्वतः । कच्चित् त्वं वर्जयस्येतान् राजदोषांस्त्वतुर्दश ॥ ६७ ॥

³⁵ *Id.* at Ayodhya Kanda, 100/68.

दशपञ्चचतुर्वर्गान् सप्तवर्गं च तत्त्वतः । अष्टवर्गं त्रिवर्गं च विद्यास्तिस्त्रश्च राघव ॥ ६८ ॥

Manu in his *smriti* (7.47) listed these ten vices as - Hunting, dice, sleeping during the day, censoriousness, overindulgence in sensuality, intoxication, musical triad and listless wandering constitute the ten-fold set arising from the love of pleasure.

मृगयाऽक्षो दिवास्वप्नः परिवादः स्त्रियो मदः ।

तौर्यत्रिकं वृथाट्या च कामजो दशको गणः ॥ ४७ ॥

³⁶ *Id.* at Ayodhya Kanda, 100/68.

These are- slander, reckless daring, treachery, jealousy, fault-finding, misuse of wealth, harsh speech, and excessive punishment.

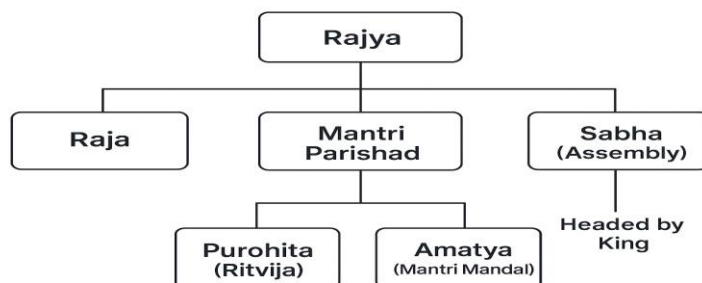
³⁷ *Id.* at Ayodhya Kanda, 100/68.

These are- the King, the Ministers, the Nation (or territory), the Fort, the Treasury, the Army, and the Allies.

³⁸ *Id.* at Ayodhya Kanda, 100/68.

³⁹ *Id.* at Ayodhya Kanda, 100/69.

इन्द्रियाणां जयं बुद्ध्या षड्गुण्यं दैवमानुषम् । कृत्यं विंशतिवर्गं च तथा प्रकृतिमण्डलम् ॥ ६९ ॥



The king was the sovereign head of the state, yet the administrative machinery of the state could not function solely on his authority. To run the administration of the state, he had to rely upon the collective assistance and counsel of his *Mantriparishad* (council of ministers), whose role extended beyond mere assistance to shaping the very direction of state policy. Political authority in the *Ramayana* thus emerges not as an absolute concentration of power in the monarch, but as a shared exercise wherein the king's legitimacy and effectiveness depended heavily on his advisory body. The ministers were crucial in maintaining the stability of the state, ensuring continuity of governance, and determining critical issues such as succession, coronation, war, and peace.

In the *Valmiki Ramayana*, much like today, there were two tiered structures of the *Mantriparishad* (Council of Ministers), where the king administered the state with the cooperation of both. One is *Ritvija* (*Purohita*) or *Gurus* functioned as an advisory council.⁴⁰ Before undertaking any important task, the king consulted them. They were generally *Brahmins* and performed duties similar to those of ministers.⁴¹ *Rajpurohita*, who was in fact a minister, played a significant role in all the affairs of the state. Even the king could not disregard his counsel. He served as the Prime Minister, and his position was second only to that of the king. Second is *Amatya*⁴² that acted as Cabinet or *Mantri Mandal* in today's language. Each minister was the head of a department. Their consultation played an important role in good governance. That is why, in Chitrakoot, Ram asked Bharat whether he had appointed only such capable persons like him as his ministers who are brave, knowledgeable, self-controlled, noble and perceptive⁴³, because the main reason for the king's victory rests on good advice, which is effective only when ministers, well-versed in ethics and scriptures, keep it completely secret⁴⁴.

⁴⁰ See *Id.* at Bala Kanda, 7/4, where Vashishtha and Vamadeva were the *Ritvija* or *Purohita* of Dashratha.

ऋत्विजी द्वावभिमतौ तस्यास्तामृषिसत्तमौ । वसिष्ठो वामदेवश्च मन्त्रिणश्च तथापरे ॥४॥

and *Id.* at Bala Kanda, 7/6½, the king's traditional appointed *Ritvija* invariably performed the ministerial duties.

एतैर्ब्रह्मर्षिभिर्नित्यमृत्विजस्तस्य पौर्वकाः ।

⁴¹ *Id.* at Bala Kanda, 7/6.

एतैर्ब्रह्मर्षिभिर्नित्यमृत्विजस्तस्य पौर्वकाः । विद्याविनीता हीमन्तः कुशला नियतेन्द्रियाः ॥६॥

⁴² See *Id.* at Ayodhya Kanda, 100/16, where *Amatya* was defined as a jewel among those skilled in the science of polity as सुसंवृतो मन्त्रधुरैरमात्यैः शास्त्रकोविदैः ॥ १६ ॥

⁴³ *Id.* at Ayodhya Kanda, 100/15.

कच्चिदात्मसमाः शूराः श्रुतवन्तो जितेन्द्रियाः । कुलीनाश्चेङ्गितज्ञाश्च कृतास्ते तात मन्त्रिणः ॥ १५ ॥

⁴⁴ *Id.* at Ayodhya Kanda, 100/16.

मन्त्री विजयमूलं हि राज्ञां भवति राघव । सुसंवृतो मन्त्रिधुरैरमात्यैः शास्त्रकोविदैः ॥१६॥

The leadership of the Council of ministers was usually in the hands of the *Purohita*, though appointed at the king's discretion, functioning in close proximity to the ruler. Nothing that concerned their own kingdom or other kingdoms remained unknown to them. Through a network of spies, they kept themselves informed and were fully aware of what was being done, what had been done, and what was intended.⁴⁵ As vigilant guardians of the king's interests in the state, they observed every judgement through the eyes of *Dharma*,⁴⁶ guiding the people in truth, ethics, religion, and morality, while ensuring the smooth execution of policies across their departments. In all matters they deliberated with careful thought and unwavering intellect. At the same time, *Purohita* and the *Gurus* were called for consultation only in special circumstances. They worked selflessly for the welfare of the king and the state, so they were given special respect. That is why immediately after the death of King Dashratha, in the absence of Ram and Bharat, all the *Gurus* had handed over the right to decide who should be made the king to Sage Vashishtha.

Though governance was centralized under monarchical authority, there remained a scope for independent institutional deliberation through the assembly constituted by the state, known as the *Sabha*. The king was the presiding officer (*Sabhapati*) of the *Sabha*, and in his absence *Purohita* assumed this role, which usually happened only in times of emergency.⁴⁷ *Amatyas* and *Purohitas* or *Guru Jans* were ex-officio members of the *Sabha* and participated in its proceedings. In the *Ramayana*, the term *Sabha* appears in two contexts; in one instance, it refers to a place where the public gathered for discussions,⁴⁸ and in another, it denotes the hall where the king used to call a meeting (Royal Assembly).⁴⁹ The second type of *Sabha* mentioned here must have an important place in the governance. The approval of the *Sabha* was mandatory for all important state decisions, as it represented all sections of the kingdom. Therefore, at many places in the entire *Ramayana*, there is mention of the king meeting the *Sabha* from time to time. Whether it is the occasion of Ram's coronation or Bharat's. From general administrative work to war etc., actions were carried out only with the approval of the *Sabha*. The primary duty of the *Sabha* members was to either accept the proposal presented by the king or suggest a better alternative. Generally, before presenting any proposal to the assembly, the king consulted his ministers to ensure its approval. However, the final power was with the king, like even today, if any law has to be implemented, then the help of ordinance is taken for implementing it and when the circumstances are favorable, it is passed by the parliament. Though the independence of the *Sabha* was limited, its functioning reveals that governance was, to some extent, accountable to society, and the social order was shaped with the collective welfare in mind. If any system proved detrimental to society at large, the people in the *Sabha* did not merely oppose it; they actively provided alternatives and often implemented change.

⁴⁵ *Id.* at Bala Kanda, 7/9.

तेषामविदितं किञ्चित् स्वेषु नास्ति परेषु वा । क्रियमाणं कृतं वापि चारेणापि चिकीर्षितम् ६ ॥

⁴⁶ *Id.* at Bala Kanda, 7/16.

हितार्थाश्च नरेन्द्रस्य जाग्रतो नयचक्षुषा ॥ १६ ॥

⁴⁷ *Id.* at Ayodhya Kanda, 3/24-35.

⁴⁸ See *Id.* at Ayodhya Kanda, 6/20, when Shri Rama was declared as the *Yuvaraj*, the people of Ayodhya gathered in groups in the *Sabha* (Public Assembly) to praise Dashratha.

समेत्य सङ्घशः सर्वे चत्वरेषु सभासु च । कथयन्तो मिथस्तत्र प्रशंससुर्जनाधिपम् ॥ २० ॥

⁴⁹ See *Id.* at Ayodhya Kanda, 67/2, where सभाम् (*Sabham*) were used for the meeting hall (Royal Assembly).

व्यतीतायां तु शर्वर्यामादित्यस्योदये ततः । समेत्य राजकर्तारः सभामीयुर्द्विजातयः ॥ २ ॥

NYAYA-DANDA VYAVASTHA

The Idea of *Ramarajya* was not merely a mechanism for maintaining political order, but a pragmatic constitutional framework grounded in *Dharma*, where justice was not treated as an abstract legal category, but as the concrete realization of righteousness (*Dharma*), rooted in the *Sastras* and sustained by the traditions. Rama himself administered justice according to the established tradition of *Rajadharma* and thus became the fountain of both *Dharma* and *Nyaya* for all alike. In the *Uttara Kanda* (*Praksipta*, Sarga 1 and 2) of the *Valmiki Ramayana*, we find an interesting episode of a dog approaching the court of Rama shows that in *Ramarajya*, justice was so impartial and inclusive that not only human beings but even animals had their appeals heard and duly redressed.

Rama used to sit in his court every day, where every grievance of his subject was to be heard. One day, when all cases had been heard, he asked his brother Lakshmana to step outside and check if anyone else was waiting. Lakshmana went out and saw a dog sitting there, injured on the head. He asked the dog what had happened, but the dog said, "I want justice from Rama. I will only tell him my problem." So Lakshmana took him inside the court, where he explained to Rama that a Brahmin ascetic named Sarvathasiddha had struck his head without any reason, even though he had done nothing wrong. Rama summoned Sarvathasiddha to the court and, when asked, he also admitted his crime. He said, "In a moment of Krodha, I hit him on the head with a stick. I am guilty of this. You can give me whatever Danda (punishment) you want." Rama placed the matter before his ministers and courtiers and asked, "What punishment do you think is appropriate for this ascetic?" After deliberation, they replied that this case is highly intricate, for the offender is a Brahmana, and according to the Sastric injunctions, no corporeal punishment may be inflicted upon a Brahmana. Hence, the ordinary provisions of law are inapplicable here. Therefore, being a king, it is within your prerogative to give the judgment." Then, in keeping with Dharma, Rama asked the dog itself what punishment should be given. The dog replied, "My lord! Make him the chief Mahant of the Kalinjar Math." Rama did the same, upon which the ascetic Brahmin became happy. Seeing this, everyone in the royal court was astonished, remarking that the punishment seemed more like a reward than a penalty. Then, on Rama's instructions, the dog explained the reason to all the courtiers that in his previous birth, he was the head of the same Math. Due to pride, arrogance, and the misuse of his authority, he had deviated from the path of Dharma and, as a result, was reborn as a dog. If this priest, who is already marked by Krodha and cruelty, is elevated to the same position, he too will sink into misery and ultimately degrade himself.⁵⁰

This account of the dog's justice illustrates the ideal of *Ramarajya*, where the administration of justice was so simple and accessible that even the lowest beings, even an animal, could directly approach the king for justice. Judiciary, in that period was centered in the *Sabha* or *Rajasabha* (Royal Assembly), which functioned as the court of law. Unlike modern times, where the judiciary operates independently, in *Ramarajya* the king himself acted as the chief justice, personally presiding over the royal court; that is why the king was often referred to as the

⁵⁰ See *Valmiki Ramayana*, *Uttara Kanda*, after Sarga 59, *Praksipta*, Sarga 1/14-28 and Sarga2/1-46.

*Dharmapala*⁵¹ (guardian of *Dharma*) and *Dandadhara*⁵² (executor of punishment). For the resolution of disputes among the subjects, the king was obliged to appear daily in the *Sabha*, seated upon the *Dharmasana*⁵³ (the seat of *Dharma*), wherein *Dharma* denoted *Nyaya* or justice; the very seat from where he dispensed justice to his subjects. That *Sabha* was also full of other members, including ministers knowledgeable in state affairs, scholars well-versed in the *Dharmasastra*, experts in ethics and governance, and kings called *Sabhasads*⁵⁴. It was their duty to assist the king in the Court of law. They may be termed as the jury of that ancient period.⁵⁵ Since there were neither professional lawyers as we see today nor the burden of court expenses, justice remained impartial and accessible. A petitioner seeking justice, who was then known as *Karyarthi*,⁵⁶ has the right to immediate access to court.⁵⁷ The judicial process involved no complications, as the king himself personally heard the grievances of his subjects and delivered judgments without delay, based on the evidence and in accordance with the *Sastras*. Litigation was rare, very few *Karyarthi* came to Rama's Court, which shows that, at that time, judiciary was strong, as society preferred to abide by *Dharma* and avoid transgression, that's why no evidence of wrongful acts was ever found in *Ramarajya*; neither children, nor youth, nor those of middle age faced death, nor did anyone encounter obstacles in seeking justice, for the entire governance was conducted righteously in accordance with *Dharma*.⁵⁸ There was a regular judicial mechanism, as complaints were heard each day in the *Sabha*, ensuring the accessibility and immediacy of justice, for which Rama instructed his brother Lakshmana that a king who fails to dispense justice each day, or who delays and neglects its administration, incurs grave sin and becomes destined for hell.⁵⁹ Rama's Court of Justice, probably also discharged as the functions of the final Court of Appeal in the state.⁶⁰

Valmiki has mentioned that the authority of a king was sustained through his enforcement of laws, expressed in the qualifying phrase "ruling according to *Dharma* and *Nyaya*." It is important to note here that the king acted merely as an agent of the state, administering justice impartially to enforce the *Dharma* which was neither of his own making nor necessarily of his own choice but based upon the *Sastras* and traditions in society. In Rama's Kingdom, *Nyaya Vayvastha* (Judicial system) was based on *Dharma*, *Niti* and *Satya*, where Rama himself was the

⁵¹ *Id.* at Aranya Kanda, 1/18.

निवेदयित्वा धर्मज्ञास्ते तु प्राञ्जलयोऽब्रुवन् । धर्मपालो जनस्यास्य शरण्यश्च महायशाः ॥ १८ ॥

⁵² *Id.* at Aranya Kanda, 1/19.

पूजनीयश्च मान्यश्च राजा दण्डधरो गुरुः । इन्द्रस्यैव चतुर्भागः प्रजा रक्षति राघव ॥ १९ ॥

⁵³ *Id.* at Uttara Kanda, Praksipta Sarga 1/1.

ततः प्रभाते विमले कृत्वा पौर्वाह्निकी क्रियाम् धर्मसिनगतो राजा रामो राजीव लोचनः ॥ १ ॥

⁵⁴ *Id.* at Uttara Kanda, Praksipta Sarga 1/3.

मन्त्रिभिर्यवहारज्ञैस्तथान्यैर्धर्मपाठकैः । नीतिज्ञैश्च सभ्यैश्च राजभिः सा सभा वृता ॥ ३ ॥

⁵⁵ Ramashraya Sharma, *Socio Political Study of The Valmiki Ramayana* 359 (Motilal Banarsidass, 1971).

⁵⁶ *Supra* note 2 at Uttara Kanda, Praksipta Sarga 1/5.5.

निर्गच्छ त्वं महाबाहो सुमित्रानन्दवर्धन ॥ ५ ॥ कार्याभिनश्च सौमित्रे व्याहर्तुं त्वमुपाक्रम ।

⁵⁷ See *Id.* at Uttara Kanda, Praksipta Sarga 1/5.5, where Rama instructed Lakshman to go and call them (petitioner) in, one by one; From this it seems that on that time all the petitioners, who would seek justice from Shri Rama, would gather outside the court daily.

⁵⁸ *Id.* at Uttara Kanda, Praksipta Sarga 1/9.

न बालो म्रियते तत्र न युवा न च मध्यमः । धर्मेण शासितं सर्वं न च बाधा विधीयते ॥ ६ ॥

⁵⁹ *Id.* at Uttara Kanda, 53/6.

पौरकार्याणि यो राजा न करोति दिने दिने । संवृते नरके घोरे पतितो नात्र संशयः ॥ ६ ॥

⁶⁰ P.C. Dharma, *The Ramayana Polity* 83 (Bharatiya Vidya Bhawan, 1989).

living embodiment of *Dharma*, always committed to the welfare of all beings.⁶¹ Justice was completely impartial. Unlike today, where biases often create friction between the judiciary and other organs of the government (i.e., the executive and legislature), and where allegations of favoritism and nepotism are frequently made against the judiciary, in *Ramarajya* the system was entirely free from such conflicts. Members of the *Nyaya Sabha* i.e., king's council would not hesitate to give *Danda* (Punishment) to their own sons if the situation demanded, ensuring that the *Dharma* remained supreme and impartial.⁶²

Danda was treated as the necessary mechanism to maintain peace and order in society, safeguarding the security and stability of the state and serving as a means to prevent and curb crime. *Danda*, when properly applied, was essential for protecting life, property, *Dharma*, and the state, ensuring the safety and welfare of the subjects. The *Valmiki Ramayana*, however, makes it clear that imposing *Danda* without the commission of a crime is unjust.⁶³ In terms of governance, *Ramarajya* was guided by *Danda Niti*, wherein those who transgressed the *Dharma* were subjected to punishment, as exemplified by Rama's decision to punish Vali only upon his deviation from the righteous path.⁶⁴ Those who act against or violate the social order can be brought back to their righteous path only through *Danda*.⁶⁵

There were four types of *Danda* mentioned in the *Valmiki Ramayana*: *Dhik Danda* (Condemnation), *Vak Danda* (Punishment by words), *Artha Danda* (Punishment by fine) and *Badh Danda* (Capital punishment). Vibhishana was sentenced to *Dhik Danda* and Maricha and Malyavaan was sentenced to *Vak Danda*. *Artha Danda* was usually given to thieves, while *Badh Danda* was given by Rama to Vali.⁶⁶ In addition to these four types of punishment, the *Ramayana* also mentions other forms of penalties such as imprisonment or confinement, exile from the kingdom, and bodily mutilation, among others. *Danda* was used to restrain those who had transgressed the boundaries of *Dharma*. It was believed that a king who inflicted punishment justly and lawfully on offenders was led to heaven,⁶⁷ but if he punished unjustly, whether with bias or deceit, he paved the way to his own downfall.⁶⁸ The king's primary duty was to exercise *Danda* judiciously, for if he failed to punish an offender he became a sharer in that person's sin, expiable only through penance, but if he punished lawfully in accordance with the crime, both king and offender were freed from karmic debt i.e., the king for upholding justice, and the criminal for bearing the consequences of his actions.⁶⁹ The king would punish even his own son if he committed

⁶¹ *Id.* at Uttara Kanda, Praksipta Sarga 1/22.

धर्मो विग्रहवान् नृपः । सत्यवादी रणपटुः सर्वसत्त्वहिते रतः ॥ २२ ॥

⁶² *Id.* at Bala Kanda, 7/10.

कुशला व्यवहारेषु सौहृदेषु परीक्षिताः । प्राप्तकालं यथा दण्डम धारयेयुः सुतेष्वपि ॥ १० ॥

⁶³ *Id.* at Uttara Kanda, 79/8.

दण्डेन च प्रजा रक्ष मा च दण्डमकारणे ॥ ८ ॥

⁶⁴ *Id.* at Kishkinda Kanda, 18/20.

तद् व्यतीतस्य ते धर्मात् कामवृत्तस्य वानर । भ्रातृभार्याभिमर्शेऽस्मिन् दण्डोऽयं प्रतिपादितः ॥ २० ॥

⁶⁵ *Id.* at Kishkinda Kanda, 18/21.

नहि लोकविरुद्धस्य लोकवृत्तादपेक्षः । दण्डादन्यत्र पश्यामि निग्रहं हरियूथप ॥ २१ ॥

⁶⁶ Dr. Rameshwar Prasad Gupta, *Valmiki Ramayan me Rajnitik Tatva* 165 (Eastern Book Linkers, 1995).

⁶⁷ *Id.* at Uttara Kanda, 79/9.

अपराधिषु यो दण्डः पात्यते मानवेषु वै । स दण्डो विधिवन्मुक्तः स्वर्गं नयति पार्थिवम् ॥ ६ ॥

⁶⁸ *Id.* at Ayodhya Kanda, 100/59.

यानि मिथ्याभिशास्तानां पतन्त्यश्रूणि राघव । तानि पुत्रपशून् जन्ति प्रीत्यर्थमनुशासतः ॥ ५६ ॥

⁶⁹ *Id.* at Kishkinda Kanda, 18/61.

a crime; all were equal before the rule of law (*Dharma*), even the king was also bound by it and must work for the welfare of the society at large. In Rama's Kingdom, *Dharma* was upheld above all else. His unwavering commitment to *Dharma*, as defined by the moral and societal codes of his time, illustrate a significant adherence to the rule of law, where his actions exhibit respect for the established laws and traditions of society.

CONCLUSION

Ramarajya is not merely a metaphor for an ideal state; but it represents a lived civilizational experience of *Dharma* in India's historical consciousness. The essence of its values has been preserved and transmitted through generations. Thus while, the *Ramayana* has conventionally been viewed as a mythological text narrating the victory of Rama over Ravana, or of virtue over vice. However, beyond this narrow view, this chapter has examined the ideals of polity and administration presented in the *Ramayana* under Rama's rule. His vision of political leadership was ideal as it fell under the purview of *Dharma*, which set the benchmarks for statecraft and administration, with the primary objective being the welfare and happiness of all beings, thereby bringing forward the indigenous model of good governance in the academic domain at large. The *Dharmarajya* of Rama has been described as the 'विग्रहवान धर्मः' or the epitome of morality, where ruler himself worshipped people (आराधनाय लोकस्य) and the kingdom (राज्यम उपासित्वा) or in simple language where the ruler regarded both the people and the state as objects of reverence. Today, the centuries ancient political idea of *Ramarajya* consequently emerged as a well-established metaphor for the welfare state. Whether viewed from the perspective of either political philosophy or practical governance, the ideals of *Ramarajya* continue to hold normative significance, representing a synthesis of the material and the spiritual, the individual and the collective, the temporal and the eternal and resonating across both classical and contemporary political thought. Several rulers in ancient India sought to associate their reigns with this ideal, as it represented a political order committed to fulfilling the needs of even the common populace, thereby reaffirming its vision of progression, from virtuous leadership to just governance, prosperity, and ultimately the realization of an ideal state i.e., *Ramarajya*. Such a *Dharmic* polity served as a constant reminder to those in authority of their ethical obligations, resonating with the modern notions of constitutional morality, where the legitimacy of authority rests not merely on power of the state, but on adherence to rule of law and the welfare of the citizenry.

MAJOR LEGAL SYSTEMS IN THE WORLD TODAY*

There would appear to be three at least which occupy uncontested place of prominence: the Romano-Germanic family, the Common law family and the family of Socialist law. These three groups whatever their value and extension throughout the world do not however take into account all contemporary legal phenomena. There are other systems, situated outside these three traditions or sharing only part of their conception of things, which prevail in a large number of contemporary societies and in their regard too, a number of observations will be furnished.

Romano-Germanic family

A first family may be called the Romano-Germanic family. This group includes those countries in which legal science has developed on the basis of Roman *jus civile*. Here the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. To ascertain and formulate these rules falls principally to legal scholars who, absorbed by this task of enunciating the “doctrine” on an aspect of the law, are somewhat less interested in its actual administration and practical application. These matters are the responsibility of the administration and legal practitioners. Another feature of this family is that the law has evolved, primarily for historical reasons, as an essentially private law, as a means of regulating the private relationships between individual citizens; other branches of law were developed later, but less perfectly, according to the principles of the “civil law” which today still remains the main branch of legal science. Since the nineteenth century, a distinctive feature of the family has been the fact that its various member countries have attached special importance to enacted legislation in the form of “codes” .

The Romano-Germanic family of laws originated in Europe. It was found by the scholarly efforts of the European universities which, from the twelfth century and on the basis of the compilations of the Emperor Justinian (A.D. 483-565), evolved and developed a juridical science common to all and adapted to the conditions of the modern world. The term Romano-Germanic is selected to acknowledge the joint effort of the universities of both Latin and Germanic countries.

Through colonization by European nations, the Romano-Germanic family has conquered vast territories where the legal systems either belong or are related to this family. The phenomenon of voluntary “reception” has produced the same result in other countries which were not colonized, but where the need for modernization, or the desire to westernize, has led to the penetration of European ideas.

Outside Europe, its place of origin, these laws although retaining membership in the Romano-Germanic family nonetheless have their own characteristics which, from a sociological point of view, make it necessary to place them in distinct groups. In many of these countries it has been possible to “receive” European laws, even though they possessed their own civilization, had their own ways of thinking and acting and their own indigenous institutions, all of which antedate such reception. Sometimes reception has left some of these original institutions in place; this is particularly clear in the case of Muslim countries where the reception of European law and the adhesion to the Romano-Germanic family have been only partial, leaving some legal relations subject to the principles of the traditional, local law. The old ways of thinking and acting peculiar to these countries may also mean that the application of the new has been quite different from what it is in Europe. This question is particularly important in the case of the countries of the Far East, where an ancient and rich civilization existed long before the reception of western law.

Finally, with respect to the countries of Africa and America, it will also be necessary to ask whether their geographical conditions and populations’ distribution, creating conditions entirely different from those in Europe, have not led to the development of laws substantially different from their European models.

* Rene David & J.E.C. Brierley, *Major Legal Systems in the World Today* (3rd edn., 1985).

Common Law Family

A second family is that of the Common law, including the law of England and those laws modelled on English law. The Common Law, altogether different in its characteristics from the Romano-Germanic family, was formed primarily by judges who had to resolve specific disputes. Today it still bears striking traces of its origins. The Common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is then much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judgments have, for Common law lawyers, an importance equal, or even superior, to substantive legal rules because, historically, their immediate pre-occupation has been to re-establish peace rather than articulate a moral basis for the social order. Finally, the origins of the Common law are linked to royal power. It was developed as a system in those cases where the peace of the English kingdom was threatened, or when some other important consideration required, or justified, the intervention of royal power. It seems, essentially, to be a public law, for contestations between private individuals did not fall within the purview of the Common law courts save to the extent that they involved the interest of the crown or kingdom. In the formation and development of the Common law- a public law issuing from procedure-the learning of the Romanists founded on the *jus civile* played only a very minor role. The divisions of the Common law, its concepts and vocabulary, and the methods of the Common law lawyer, are entirely different from those of the Romano-Germanic family.

And as with the Romano-Germanic family, so too the Common law has experienced a considerable expansion throughout the world-and for the same reasons: colonization or reception. The observations made with respect to the Romano-Germanic family apply with equal value. But here again a distinction between the Common law in Europe (England and Ireland) and that outside Europe must be made. In certain extra-European countries, the Common law may have been only partially received as in the case, for example, of certain of Muslim countries or India and where it was received, attention must be given to its transformation or adoption by reason of its co-existence with the tradition of previous civilizations. A different environment has, in any event, created difference between the Common law of the countries where it originated and that of those into which it was imported. This observation is particularly true with respect of the Common law family because it groups some countries such as the United States and Canada where a civilization different in many respects from that of England has developed. The laws of these countries enjoy a largely autonomous place within the family.

Relations between these two families

Over the centuries there have been numerous contacts between countries of the Romano-Germanic family and those of the Common law, and the two families have tended, particularly in recent years, to draw closer together. In both, the law has undergone the influence of Christian morality and, since the Renaissance, philosophical teachings have given prominence to individualism, liberalism and personal rights. Henceforth, at least for certain purposes, this reconciliation enable us to speak of one great family of western law. The Common law retains, to be sure, its own particular structure, very different from that of the Romano-Germanic system, but the methods employed in each are not wholly dissimilar. Above all, the formulation of the legal rule tends more and more to be conceived in Common law countries as it is in the countries of the Romano-Germanic family. As to the substance of the law, a shared vision of justice has often produced very similar answers to common problems in both sets of countries.

The inclination to speak of a family of western law is all the stronger when one considers that the laws of some states cannot be annexed to either family, because they embody both Romano-Germanic and Common law elements. The laws of Scotland, Israel, the Union of South Africa, the Province of Quebec and the sophies in which the place and function of law are very different from what they are in the West. A true picture of law in contemporary world society would be incomplete without taking these considerations into account.

In non-western societies the governing social principles to which reference is made are of two types. On the one hand law is fully recognized as being of great value but the law itself is framed in a

different concept than it is in the West; on the other, the very notion of law is rejected, and social relations are governed by other extra-legal means. The first view is that of Muslim and Hindu societies, while the latter is that adopted in countries of the Far East and large parts of Africa and Malagasy.

Family of Socialist Laws

The Socialist legal system makes up a third family, distinct from the first two. To date the members of the socialist camp are those countries which formerly belonged to the Romano-Germanic family, and they have preserved some of the characteristics of Romano- Germanic law. Thus, the legal rule is still conceived in the form of a general rule of conduct; and the divisions of law and legal terminology have also remained, to a very large extent, the product of the legal science constructed on the basis of the Roman law by European universities.

But apart from points of similarity, there do exist such differences that it seems proper to consider the socialist laws as detached from the Romano-Germanic family - the socialist jurist most decidedly do and as constituting a distinct legal family, at least at the present time. The originality of Socialist law is particularly evident because of its revolutionary nature; in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social order in which the very concepts of state and law will disappear. The sole source of Socialist rules of law resides therefore within the revolutionary work of the legislature, which expresses popular will, narrowly guided by the Communist Party. However, legal science as such is not principally counted upon to create the new order: law according to Marxism-Leninism- a scientific truth-is strictly subordinate to the task of creating a new economic structure. In execution of this teaching, all means of production have been collectivised. As a result the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its pre-eminence – all law has now become public law. This new concept removes from the very realm of law a whole series of rules which jurists of bourgeois countries would consider legal rules.

The family of Socialist laws originated in the Union of Soviet Socialist Republics where these ideas prevailed and a new law has developed since the 1917 Revolution. However, the laws of the socialist or people's republics of Europe and Asia must be classed as groups distinct from Soviet law. These laws belong to the Socialist family. But in those of the first group a greater persistence of characteristics properly Romano-Germanic is detected, while in those of the second it is useful to enquire how these new concepts are reconciled in practice with the principles of Far Eastern civilization which governed such societies before the Socialist era.

Other Systems

The three families just described, each of which as numerous variants, are undoubtedly the three principal families of law existing in the contemporary world. Strictly speaking there is no law in the world today which has not drawn certain of its elements from one or other of these families. Some even hold the view that all other systems, no more than survivors from the past, will ultimately disappear with the passing of time and the progress of civilization.

This attitude however proceeds from a rather native sense of superiority and is really no more than an hypothesis, it does not acknowledge an observable reality in the modern world. All contemporary states have, it is true, taken over a number of western ideas either because it was necessary to preserve their independence or because it was useful in their internal development. It does not follow that the older ways of thinking which, not so very long ago, were widely accepted in these different societies have been totally abandoned. Everyone will recognise the superiority of western technology; opinions differ however on the superiority of western civilization taken as a whole. The Muslim world, India, the Far East and Africa are far from having adhered to it without reservation. These countries remain very largely faithful to philo society, must act legally, courts must ensure that law is respected. Law, a mirror of justice, is in this conception superior even to equity itself; outside the law, there can only be anarchy, or arbitrariness, chaos or, the rule of force. Law is therefore venerated, the courts are temples of justice, the judges its oracles.

Far Eastern countries reject this view. For the Chinese, law is an instrument of arbitrary action rather than the symbol of Justice; it is a factor contributing to social disorder rather than to social order. The good citizen must not concern himself with law; he should live in a way which excludes any revindication of his rights or any recourse to the justice of courts. The conduct of individuals must, unfailingly, be animated by the search for harmony and peace through methods other than the law. Man's first concern should not be to respect the law. Reconciliation is greater value than justice; mediation must be used to remove conflicts rather than invoking law to resolve them. Laws may exist to serve as a method of intimidation or as a model; but law is not made with a view to being really applied, as in the West, Scorn is reserved for those who aspire to regulate matters according to law or whose preoccupation is its study or application, and who thereby defy convention and accepted proprieties.

Countries of the Far East have, traditionally, held the view that law is only for barbarians. The Chinese communist regime and the westernization of Japan have not fundamentally changed this conception rooted as it in their ancient civilizations. In China the communist regime rejected the legal codes drawn up after the fall of imperial rule along western lines and, and, after some brief hesitation, then repudiated the Soviet method of building communism. The techniques finally adopted for doing so have given up to the present time a very narrow place to law. Codes on the European model have been instituted in Japan but, generally speaking, the populations makes little use of them; people abstain from using the courts and the courts themselves encourage litigants to resort to reconciliation; and new techniques have been developed for applying or removing the need of applying the law.

Muslim, Hindu, and Jewish Laws

The attitude of the Muslim, Hindu and Jewish communities about the law is easily understood by a western jurist, even though the definition of law itself in western jurisprudence has always given rise to difficulties and no single definition has so far elicited any general acceptance. One of the fundamental reasons for this lack of agreement is the debate between the proponents and adversaries of the notion of "natural law". But it is because the idea of "natural law" exists that we are able to understand the starting premise of these other systems.

In this debate, law is held by some to be no more than the body of rules that are really observed. The application of which is entrusted to the courts. This is the view today to our western universities in which our national laws are taught. But law may also be seen as a model of ideal behavior, one not to be confused with the actual rules by which individuals act which courts apply. European universities, in their pre-nineteenth-century tradition, paid very little attention to national or customary laws of the time and taught, almost exclusively, an ideal law constructed on the basis of Roman law. In Muslim countries, in the same way, more attention is given to the model law linked to the Islamic religion than to local custom (treated as a phenomenon of fact) or the laws and decrees of the sovereign (treated as merely administrative measures) and neither of these is thought to possess the full dignity of law. The same can be said of Jewish law and, in a very different context, Hindu law.

Law, then, whether linked to a religion or corresponding to a particularly way of thinking about the social order, is not in either case always necessarily observed by private persons or applied by courts. It may nonetheless exert considerable influence on both "righteous" men may endeavor to rule their own lives according to what they consider to be truly the law. A student of western societies may well in a positivist perceptive concentrate attention upon the rules enacted by legislatures and applied by court or, alternatively, in a sociological perspective, classify as law only those rules which are really observed as a matter of practice. This difference in approach is not a source of any real inconvenience because in western societies there is a large degree of equivalence between justice, positive law and social manners. The same cannot however be said of non-western societies where "rules of law" (in the western sense) remain unorganized, fragmentary and unstable, and where there is generally feeling that true law is to be found elsewhere than in legislation, custom or judicial decisions. Without taking sides in the debate between positivists and advocates of natural law, Muslim and Hindu law, therefore, must be included within the major contemporary legal systems. Jewish law, despite its historical and philosophical interest, must be omitted because its sphere of influence is incomparably less than that the other two.

Far East

The situation in the Far East, especially China is completely different. Here there is no question of studying an ideal law distant from rules laid down by legislators or simply followed in practice: here the very value of law itself has traditionally been put into question.

In the West, and in Islamic and Hindu communities, law is held to be a necessary part of, indeed a basis for, society. Good social order implies the primacy of law: men must live according to law and, where necessary, be prepared to fight for the supremacy of law; administrative authorities, no less than any other part of Philippines would fall into this group. And lastly, but from another point of view, the Romano-Germanic and Common law families are included in the same deliberately ignominious term of “capitalist” or “bourgeois laws” by jurists of the socialist camp, made up of the Soviet Union and those countries that have used its law as a model or which, like the U.S.S.R. profess an adherence to Marxist-Leninist teachings.

Black Africa and Malagasy Republic

The preceding observations regarding the Far East apply as well to the black African countries and the Malagasy Republic (Madagascar). There too, in milieux in which the community’ cohesion prevails over any developed sense of individualism; the principal objective is the maintenance or restoration of harmony rather than respect for law. The Western laws adopted in Africa are often hardly more than a veneer, the vast majority of the population still lives according to traditional ways which do not comprise what we in the West call law and without heed to what is very often nothing more than an artificially implanted body of rules.

THE *SHAASTRA* OF LAW: FOUNDATIONS FROM INDIAN KNOWLEDGE SYSTEMS FOR CONTEMPORARY LEGAL METHODS

Ila Sudame*

Introduction

Legal education lays the foundation for all the facets of legal profession like law making, advocacy, teaching, research activities etc. Law comes from society. The society's cohesion finds its underpinnings in the ever-evolving ideas of morals, values and standards. Today, legal education in India is broadly based upon the Anglo-Saxon law. The foundations of western or Anglo-Saxon schools of jurisprudence are secure with the profundity of their philosophies. However, since they are born out of their indigenous customs; these do not find a natural blending with the Indian societal fabric. The unique contours of the diverse Indian society necessitate very peculiar legal adaptations in order for the society to acquiesce in the law. The unparalleled dynamism of heterogeneous Indian societal foundations is the cause of countless challenges that the legal profession faces on a day-to-day basis. These challenges of the modern Indian society prompt the need to get back to our roots – our indigenous knowledge systems flowing from the *shastras*. The word '*shastra*' needs to be recognized as being synonymous with 'science' - an organized body of knowledge on a given subject. It is generally used as a suffix to the name of a specialised area of knowledge.

Legal methods, as a subject, is basically an orientation for the new students of law and is meant to introduce law, basic concepts, terminologies related thereto. It familiarizes the students with legislative history, legal structures, institutions, authorities and processes. This orientation enables the students to locate and distinguish the sources of law, identify components of an Act, Rule, case-law etc. Further, it aims to develop the skills of critical thinking, analytical, logical and legal reasoning skills along with interpretation. As a *shastra*, this subject is an organised body of knowledge on the subject of law. This chapter aims to throw light upon India's indigenous '*Shaastras* of Law'.

Contemporizing Indigenous Knowledge Systems for Modern Indian Legal Education as a Demand of Globalization

There are various philosophies and approaches that can be adopted to know the concept of 'knowledge' in the first place and subsequently, the body of knowledge of a particular subject. These philosophies or approaches can be called as 'knowledge systems'. Every society in this world having some intellectual engagement, has either developed its own knowledge system or adopted one of the already developed knowledge systems. This adoption of some already developed knowledge system may be owing to the natural resonance of that system with the intellectual spirit of the given society or due to influence of some culture or society. A system which is originated and developed independently in a given society of extensive history can be called as the 'indigenous knowledge system' of that society. The word 'indigenous' here, may be understood in a societal, geographical or cultural context. This indigenous knowledge system becomes the intellectual heritage of that society.

The highly intellectual Indian society has to its credit a rich, evolved and sophisticated indigenous knowledge system which is backed by a history of illustrious constructive debates through which it has been time-tested over centuries. This indigenous knowledge system embedded in our *shastras* was followed and practised extensively by our scholars from all professional fields. Later, in the era of colonisation, foreign methods and systems were introduced which we adopted and nurtured. With this influential exposure the indigenous systems came to be ignored and eventually, to a large extent, abandoned. This is how, the foreign knowledge systems became dominant systems in India. These knowledge systems, although not native to India, are based on secure foundations.

Barely had we dealt with the aftermath of colonization when we were faced with the advent of globalisation. Globalization made knowledge systems of the world come closer to each other, identify each other's niceties and also go ahead to borrow from one another. Thus, from adoption and nurturing,

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we went ahead to import more of foreign methods in our intellectual pursuits. However, in order to be able to sustain ourselves in the scheme and offer something of our own to this global intellectual society, India needs to revive the study of its intellectual heritage. Without the study of our own knowledge system, the Indian scholars may not be in a position to make effective original contributions to the intellectual world.

Thus, in this modern world, in the context of what was our age-old traditional practice *anyamatapariksha* (examination of parallel contemporaneous doctrines/knowledge systems /theories/ opinions etc.); our indigenous knowledge systems have become the '*anyamata*' and its study has now become a demand of globalization. Indian scholars need to complement their foreign knowledge system-based research with this traditional Indian practice which entails exploring the parallel knowledge systems relying and banking on its own intellectual heritage; exploring pathways of understanding best practices and borrowing from such other rich systems by interfacing them with our own system. This exercise shall create scope for the dual benefit of improvisation of our own system through correct borrowings and exploring prospects of creating global knowledge systems through constructive and productive debates or *vaada* based on various indigenous knowledge systems and may give rise to an unprecedented culture of international intellectual ethos.

To pioneer this, India needs to bank upon the richness of its own intellectual heritage and root its educational system to the '*shastras*' for threefold purposes viz., to revive our own identity; *secondly*, to explore these knowledge systems to find novel and indigenous solutions to our contemporary problems and *thirdly*, to bring our uniqueness to the global village and thereby sustain ourselves in the scheme.

Understanding Dharma for Laying 'Dharmoprudential' Foundations to Legal Discourses

"Dharma" is a concept that has received highly varied definitions in our literature. This variety of definitions can be traced to Vedic and Post-Vedic literature. The modern-day literature found in translations has also contributed to these definitions. In the words of one of the most celebrated academicians and jurists, Prof. P. V. Kane,

"Dharma is one of those Sanskrit words that defy all attempts at an exact rendering in English or any other tongue. That word has passed through several vicissitudes".¹

The concept of *dharma* actually springs from the doctrine of goals/ends of human existence (*purushartha*) which are said to be four: right conduct (*dharma*), economic interests (*artha*), satisfaction of desires (*kama*) and liberation of spirit (*moksha*).² *Dharma, Artha, Kama* and *Moksha* are the four objects of human pursuit.

Out of the four, the first three i.e. right conduct, economic interests and satisfaction of desires being plausible are classified as three-fold ideals or *trivarga*. The *trivarga* is meant for welfare and happiness of people. This doctrine sets humans apart from animals by making humans capable of realizing right and wrong. This has been achieved by subjecting the *trivarga* to gradation of values. *Dharma* or right conduct is considered superior to all other objects. There are several definitions of the term *dharma* that associate it with religion and these definitions do hold the ground. But, the precise import of *dharma* is not conveyed by the word 'religion' which is generally taken to denote a particular faith, dogma or doctrine, rites and rituals.³ *Dharma*, in the case of *Dharmashastra*, includes everything that a person ought to do in life.⁴ It may be briefly described as a code of conduct: it teaches both religious and secular matters.⁵ *Dharma* was divided into *srauta* (based on *Vedas*) and *smarta* (based on *smritis*).⁶ The *srauta* *dharma* comprises of the rites and ceremonies from the *Vedic Samhitas* and *Brahmanas*. This aspect of *dharma* can be said to be associated with religion or meaning 'religious

¹ P. V. Kane, HISTORY OF DHARMASHASTRA, 3rd ed. 1990, rep. 2006, Vol. 1, Part 1, p.1.

² P. V. Kane, HISTORY OF DHARMASHASTRA, 3rd ed. 1997, Vol. 2, Part 1, p.8.

³ S.C. Banerji, A BRIEF HISTORY OF DHARMASHASTRA, 1st ed. 1999, p.1.

⁴ *Ibid.*

⁵ *Id.*

⁶ *Supra* n. 2, p. 2.

ordinances or rites'.⁷ *Smaarta* dharma on the other hand deals with the various classes and stages of life.⁸ It is from here that the basic code of conduct flows.

Madhvacharya, the Minister in Vijayanagar Empire, in his commentary on *Parashara Smriti*, has briefly and precisely explained the meaning of dharma as: Dharma is that which sustains and ensures the progress and welfare of all in this world and eternal bliss in the other world.⁹ This definition of dharma was also adopted by the Supreme Court and was further briefly put as dharma is that "which regulates the mutual obligations of individual and the society".¹⁰ Dharma is promulgated in the form of commands.¹¹ In the context of law and legal methods, the term dharma is concerned and stays limited to the *smaarta* aspect i.e. the law or code of conduct. It is in this context that the term dharma is accepted in most of the works on *dharmashastra*. The *Brihadaranyaka Upanishad* states that mere creation of kingship was not enough, the most excellent dharma (law) - a power superior to that of the king, was created to enable the king to protect the people, and gives the definition of law (dharma) as: Law is the king of kings; nothing is superior to law.¹² The Oxford dictionary defines dharma as truth or law that affects the whole universe.¹³

Dharma originated in the form of a solution to the eternal problems confronted by human race owing to the natural human instincts.¹⁴ Justice Rama Jois in his book quotes from *Manusmriti* while dealing with the origin of dharma: "There is no act of man which is free from desire; whatever a man does is the result of impulse or desire."¹⁵ Fulfillment of desires and material wealth is appreciated by the propounders of dharma but only when these are in consonance with the law or dharma. Therefore, *artha* (material wealth) and *kama* (desires) should always conform to dharma (law).¹⁶ This is the basis of every materialistic pursuit of all humans and gives a foundation for societal functioning. This has been the law operating since times immemorial in our country. This, is the true sense, in which the concept of dharma is to be understood.

Indigenous Sources of Law as 'Recommendatory Authorities' for Laws

In order to truly appreciate the meaning and scope of the term 'dharma', one needs to know the organization of Sanskrit literature. The ancient writers as well as modern historians have classified the literature into three groups: The *Vedic Samhitas* (*Rigveda*, *Yajurveda*, *Samaveda* and *Atharvaveda*), the *Brahmanas* (that include the early *Upanishads*) and the *Sutras*. The first two, viz., the *Vedas* and *Brahmanas* together constitute that what is known as *Shruti*. The *Sutras*, on the other hand, are not *Vedas* but are the systematic formal treatises connected with the *Vedas*. There are six auxiliary disciplines attached to the *Vedas*. They are known as *Vedangas*. *Kalpa* is one of the *vedangas* which consists of various *sutras* known as *Kalpasutras* that can be divided into three categories viz., *Srautasutras* (deal with *Vedic* sacrifices), *Grihyasutras* (deal with domestic ceremonies like *Upanayana*, marriage, etc.) and *Dharmasutras* (deal with provisions relating to politics, government, civil and criminal law).¹⁷ Thus, the *Vedas* and *Smritis* along with customs and usage are considered to be the primary source of *dharma*. Amongst these, the *Vedas* are considered to be superior and are to prevail over the *smritis* in case of conflict. Further, in cases on conflict between two *smritis*, the principles of equity as determined by popular usages are to have an overriding effect.¹⁸ Thus, even in

⁷ *Supra* n. 1.

⁸ *Supra* n. 2, p.2.

⁹ *A.S. Narayana Deekshitulu v. State of A.P.*, (1996) 9 SCC 548.

¹⁰ *Ibid.*

¹¹ *Supra* n. 3, p.4.

¹² *Supra* n. 3, p. 10.

¹³ A.S. Hornby, OXFORD ADVANCED LEARNER'S DICTIONARY, 8th ed. 2010, p. 417.

¹⁴ M. Rama Jois, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA, rep. 2016, p.4.

¹⁵ *Supra* n. 3, p.5

¹⁶ *Supra* n. 3, p.6.

¹⁷ *Supra* n. 1, p. 10.

¹⁸ *Supra* n. 3, p. 15

cases of conflicts between the sources of law, the king was not given a discretionary power but was required to apply the law as approved by custom and usage by people themselves.¹⁹

The Supreme Court of India has dwelled upon the importance of these texts while recognizing the recommendatory nature of *dharmasutras* and *grihyasutras*. It observed that while interpreting the books of morality, religion, law, etc., a great deal of caution is required to be exercised. The court also observed that the commentaries thereon are many-a-times mingled with statements of law but actually are intended to be recommendatory statements regarding the mandatory laws.²⁰ On one occasion, the High Court of Bombay while dwelling upon the operation of law codes of equal authority discussed *Dharmashastra* principle regarding this issue in the following words:

*“The Full Bench preferred to accept the latter view after considering the various other judgments and further that this approach was in consonance with what ancient Jurist Narada declared – Dharmashastra Virodhe Tu Yuktikyta Vidhe Smrita – that is, when the Dharmashastra or law codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. The views of modern Jurist Seervai, has also advocated a similar principle was also relied upon.”*²¹

It can be gathered how judiciary has been taking conscious efforts to resort to indigenous sources of law for finding conformity in cases of conflict.

Historical Comprehension of the Sophistication of Ancient Indian Legal System

The ancient Indian society had a highly evolved unique and sophisticated legal system. The study of this ancient system is important not just as a matter of history but; to understand the intricacies of the Indian society, the circumstances that existed then, the nature of problems which were resolved, its stages of evolution, the levels that judicial system has achieved in the past and the manner in which the problems were sought to be resolved. After all, the impact of all this evolution is the present day's growth and development. If the problems in the earlier system were not studied and realized, the same could not have been met and the modern-day system would not have come into force.

Classification of Dharma

The importance of the study of *Dharmashastra* lies in the fact that the entire range of basic legal concepts of rights, duties, liabilities, powers, offences, punishments, constitutional, civil and criminal jurisprudence is embedded in it. The jurisprudence that has evolved today and is being followed by sovereign states in the form of various enactments finds its roots in the different facets of *rajadharma* and *vyavahaaradharma*. The *rajadharma* and *vyavahaaradharma* in fact, mark the commencement of India's legal and constitutional history. Like the modern-day concept of rule of law flows from *rajadharma* which also made the king its subject. The principle of separation of powers was founded in *rajadharma* where the king had the power to only to enforce the laws and not to legislate. The classification of dharma finds its roots in the origin of this concept. In the stateless society, people were acting in accordance with dharma and protected each other. It was duty- based society. As time progressed and natural human instincts of desires and material wealth began to overwhelm the populace, the authority of king was created to protect the weak and punish the wrong doers. At this stage of evolution of human society, the powers, duties and responsibilities of this kingship known as *Rajadharma* and the system of civil/criminal legal proceedings known as *Vyavaharadharma* came to be established.²²

In the words of Justice Rama Jois,

¹⁹ *Ibid.*

²⁰ *Abhiraj Kuer v. Debendra Singh* AIR 1962 SC 351.

²¹ *Dnyaneshwar B. Ganwat v. Karyakari Abhiyanta, Chaskaman Prkalp Vibhag* 2010 SCC OnLine Bom 766.

²² *Supra* n. 3, p. 9.

“Dharma in the context of legal and constitutional history only means Vyavaharadharma and Rajadharma evolved by the society through ages which is binding both on the king (the ruler) and the people (the ruled)”.²³

Rajadharma: Rajadharma is the law laying down the powers, duties and responsibilities of the king. This is the basis of the modern-day constitutional law. It is supposed to be the fundamental law of the State, containing the principles upon which the government is founded, which provides for division of sovereign powers and specifies the powers of each of the division as also the manner in which the sovereign power is exercised.²⁴ Rajadharma was the Constitution for all the States in the whole of India in the real sense of that expression.²⁵

Further, it was the firm view of ancient Indian thinkers that dharma (law) without Rajadharma for its enforcement (through instrumentality of the State) would only be an illusion.²⁶ The various subjects of Rajadharma include legislative, executive powers, administration of justice, duties of the king (State), protection of property, treasury/finance, freedom and liberty, equality, etc.

Vyavahaaradharma: The system of civil and criminal legal proceedings is known as vyavahaaradharma. The king was to decide cases in accordance with the vyavaharadharma. The modern day civil and criminal laws have evolved from vyavahaaradharma. Vyavahaara means a law-suit or a legal proceeding. It is defined as proceedings in a court of law between two parties in which the violation of dharma is established by effort.²⁷ Regarding the origin of vyavahaara, it is said that:

“When people were dharma abiding and truthful there existed neither hatred nor envy now any legal disputes. Practice of dharma having declined in mankind, law suits (vyavahaara) were invented and the king was entrusted with the power to decide law- suits as he had the sanction of dharma to enforce obedience to, and to order punishment for disobedience of, dharma”.²⁸

This is the branch of law that regulates the rights and liabilities of parties to a legal proceeding. Earlier, eighteen topics of disputes or laws were identified and collectively known as ‘vyavahaarapada’.²⁹ These are payment of debts (*runadaan*), deposits (*nikshepa*), sale without ownership (*aswamy vikraya*), joint undertakings/partnerships (*sambhuya samuthana*), resumption of gift (*dattasyanapakarma*), payment of wages (*vetanadaana*), violation of convention of guilds and corporation (*samvidvyatikrama*), duties and husband and wife (*stripumdharma*), partition (*vibhaaga*), sale and purchase (*krayavirayanusaya*), betting and gambling (*dyutasamahavaya*), dispute between master and servant (*swamipala vivaada*), boundary dispute (*simavivaada*), defamation (*vakparushya*), assault (*dandaparushya*), theft (*steya*), offence by violence (*saahasa*), adultery (*strisangrahana*).³⁰ Out of these, the first fourteen topics are said to be arising out of wealth (*arthasamutthaani*) and the last four, out of violence (*himsodbhavaani*).³¹ Apart from these eighteen major titles of law, some miscellaneous matters which were omitted from the eighteen titles or were doubtful are categorized as prakirnaka.³²

The Rule of Law and Separation of Powers

Owing to the existence of separation of powers, the role and functions of king and *parishad* were determined clearly. The powers between the Parishad and the King were divided as follows:

²³ *Ibid.*

²⁴ Rama Jois, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE, 2nd ed. 2000, p. 24.

²⁵ *Supra* n. 24, p. 25.

²⁶ *Ibid.*

²⁷ *Supra* n. 3, p. 67.

²⁸ *Supra* n. 3, p. 63.

²⁹ *Supra* n. 14, p. 67.

³⁰ *Ibid.*

³¹ *Supra* n. 3, p. 69.

³² *Supra* n. 3, p. 70.

The Parishad and its Exceptional Competence: As such, the principal sources of law, as discussed earlier were identified to be the *shrutis*, *smritis*, *puranas*, customs or usages. But in situations where the law was silent and required legislation, the power to lay down new legal provisions was vested in an assembly of persons known as *parishad*. This *parishad* consisted in all of at least ten members who were competent in the following fields:

- Knowledge of one of the three Vedas,
- A Logician,
- A Meemaamsaka,
- One who knows *Niruktah* (etymology),
- One who recites the sacred law,
- Three men belonging to the first three order, i.e., - a Student-Bachelor (*Bramhachari*), A householder (*Grihastha*), A hermit (*Vanaprastha*).³³

Further, in some exceptional cases, the power to decide complicated questions of law by resolving the conflicts was also recognised in the *parishad*.

The King and his Fundamental Duties: *Rajadharma* had given the king the highest position in the State. But dharma or law was placed even above the king. Therefore, the king had no power to legislate. Only in cases of absence of laws in the *Shrutis*, *Smritis* or customs, the king was empowered to decide according to his conscience.³⁴ The king was entrusted with dual prime responsibilities of being the highest executive (*shaasaka*) and the highest judiciary (*nyaayadhishah*).³⁵ Welfare of the people was to be the king's chief concern and their protection, his highest duty. Administration of justice was considered to be his personal responsibility.³⁶ *Rajadharma* enumerated the various functions that were to be dispensed by the King himself. These functions are summed up in five fundamental duties of the king as follows:

- To punish the wicked,
- To honour and protect the good,
- To enrich the treasury by just methods,
- To be impartial towards litigants and
- Protection of the country.³⁷

This separation of powers between the *parishad* and the king ensured the existence of rule of law.

³³ *Supra* n. 24, p. 35.

³⁴ *Supra* n. 3, p. 17.

³⁵ *Supra* n. 3, p. 592.

³⁶ *Supra* n. 3, p. 609.

³⁷ *Supra* n. 24, p.36.

Unique Gradation and Jurisdiction of Ancient Indian Courts

There existed a five-tiered judicial system:

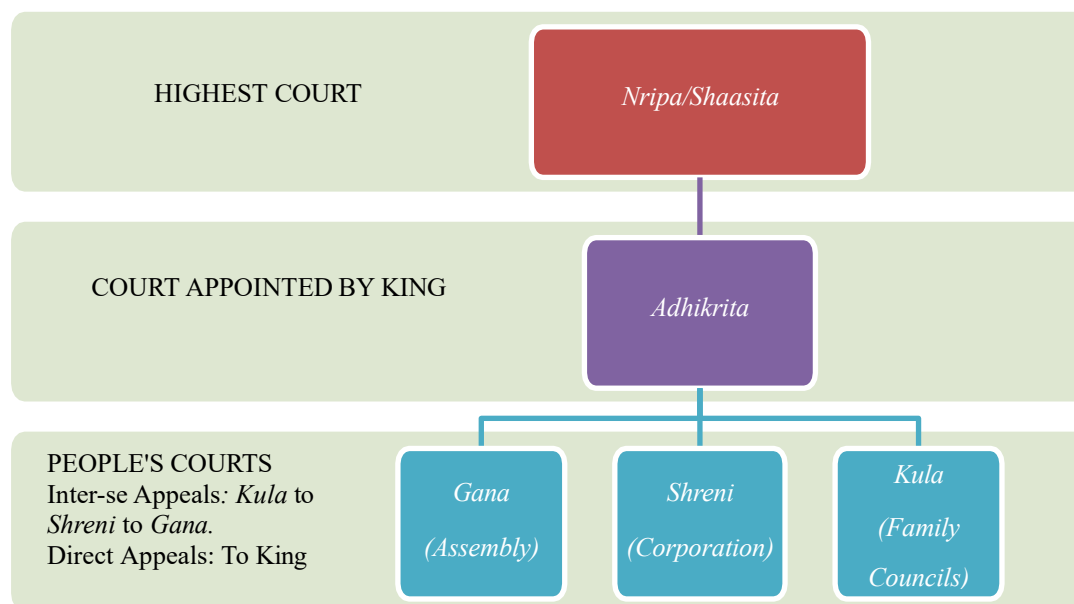


Chart 1: Gradation of Courts in Ancient India*

The People's Courts: The first three courts from the bottom of the legal system were the *Kula* (an assembly of impartial persons belonging to the family/caste of litigants functioning as *panchayatdars*), the *Shreni* (a corporation of persons following the same craft, profession or trade) and the *Gana* (an assembly of persons belonging to one place but to different castes/avocations).³⁸ These three were known as the 'people's courts' and had the jurisdiction to decide all civil and criminal matters except those involving offences committed with violence.³⁹

This is a very peculiar way of gradation of courts wherein the various categories of impartial peers had the original jurisdiction to decide matters. This kind of a gradation encouraged cultural and professional diversity in courts which is one of the major requisites of judicial appointments even today. This diversity ensured the correct understanding of prevalent social and professional situations for every matter.

Hierarchy and Appeals: These courts had *inter-se* appellate jurisdictions. The *Shreni* could review the decision of *Kula* and the *Gana* had the power to review the decision of *Shreni*.⁴⁰ Superior to the *Gana* was the court of *Adhikrita* or the court appointed by the king. This court had the power to decide cases relating to commission of violent offences also. The highest court in hierarchy was the court of *Nripa* or the king himself.⁴¹ This court was known as *Shasita*.⁴² Only the king had the authority to inflict fines and corporal punishments. Administration of justice was a matter solely looked after by this court and this function could not be delegated. The king was vested with the power to hear appeals from the decisions of any authority including *Kula*, *Shreni* and *Gana*.⁴³

Article 136 of the Indian Constitution finds its roots in this provision. The Law Commission of India while "Delay and Arrears in Trial Courts" had the occasion of examining this indigenous judicial system. Regarding these indigenous people's courts, it had remarked that:

* *Supra* n. 24, p. 122.

³⁸ *Supra* n. 24, p.123.

³⁹ *Ibid.*

⁴⁰ *Supra* n. 24, p. 124.

⁴¹ *Supra* n. 24, p. 125.

⁴² *Ibid.*

⁴³ *Id.*

“With the progressing society, the panchayats and assemblies of brotherhood or of local respectables, however, did not cease functioning altogether because of their useful role of settling minor disputes in rural areas through compromise and that is why the British retained them through necessary legislation.”⁴⁴

Other Courts: Apart from these courts (known as *Pratishthita*) that were established in some village/town, there were mobile courts (known as *Apratishthita*) also. *Mudrita* were the courts that were appointed by the king and authorised to use the royal seal.⁴⁵

Judicial Officers and their Specific Qualifications: The King’s Court or the *Shaasita* was the highest court. The judicial officers functioning in this court were the king himself who’s duty was to pass final decrees, the Chief Justice who was required to give the final opinions and there were other judges or *sabhyas* who were entrusted with the duty to investigate each case on merits. All the officers of the Court were appointed by the king himself. The Chief Justice of the court was to be appointed on the basis of the following qualifications:

QUALIFICATIONS OF THE CHIEF JUSTICE				
Well Versed in All 18 Titles of Law	Proficient in Logic (Nyaaya)	Proficient in Interpretation (Meemaamsa)	Master of Sources of Law (Vedas and Smritis)	Capacity to Extract Truth by Application of Law

Chart 2: Qualifications of the Chief Justice*

- “Well versed in all eighteen titles of law (*vyavahaarapada*),
- Proficient in logic (*nyaaya*),
- Proficient in interpretation (*Meemaamsa*),
- Master of sources of law (*Vedas and smritis*),
- Capacity to extract truth by application of law.”⁴⁶

The other judges or the *sabhyas* were required to qualify on the following grounds to be capable of being appointed to the king’s court:

- “Noble, honourable men of tried integrity,
- Ability to administer justice,
- Well versed in laws, rules of prudence,
- Fearless, independent and impartial towards friends and foes.”⁴⁷

It can be gathered from the qualifications and requirements of a judiciary mentioned above that the concept of independence of judiciary existed even then.

Judicial Proceedings: The court hall was known as *Dharmadhikarana*. The king could appoint Judges or *Sabhyas* as the members of Courts of Justice. In the absence of the king, the Chief Justice could preside over the court. It is interesting to note that while acting as a Judge, the king was to be in a simple dress, without ornaments and with a pleasant demeanour. This was to create distinction between judicial and executive functions.⁴⁸ The litigations, as stated earlier, were classified into eighteen topics known as *Vyavaharapada*. Out of these eighteen topics of litigation, thirteen were classified as civil disputes

⁴⁴ Chapter 3, 77th Report of the Law Commission of India on “Delay and Arrears in Trial Courts”.

⁴⁵ *Supra* n. 3, p. 490.

* *Supra* n. 14, p. 493.

⁴⁶ *Supra* n. 14, p. 493.

⁴⁷ *Supra* n. 14, p. 494.

⁴⁸ *Supra* n. 24, p. 122-129.

while five were categorised as crimes.⁴⁹ The judicial proceedings were segregated into four sequential parts viz.,

- i. *Purvapaksha* (case of the first party - *vaadin*),
- ii. *Uttara* (reply of the defendant - *prativaadin*),
- iii. *Kriya* (trial of the case) and
- iv. *Nirnaya* (the judicial decision).⁵⁰

Legal Remedies: Four types of judicial decisions were recognised viz.,

- i **Dharma:** Dharma was the decision delivered when wrongdoer admitted or confessed his guilt;
- ii **Vyavahara:** *Vyavahara* was the decision arrived at after adducing evidence when the parties made conflicting statements;
- iii **Charitra:** When the decision was arrived at after following the precedent of an earlier decision or a usage which squarely applied to the given case, the decision was termed as *Charitra*;
- iv **Rajashasana:** *Rajashasana* was the judgment delivered by the king in cases where there was no legal principle applicable or no evidence adduced.⁵¹

The guiding principles for application of mind in choosing one of the above ways of deciding a matter were laid, thereby securing the system from the menace of arbitrariness.

The Law Commission of India in the same report cited above further observed in following words:

*“We have just noticed that the present judicial system is the result of a gradual process which has been going on incessantly, and that it is not the product of one day. Changes, modifications and amendments have been made both in the hierarchy of courts as well as in the procedures followed by them, as the society gradually became more and more developed”.*⁵²

This speaks volumes of the fact that the rules of procedure and evidence in India were highly sophisticated and that; while appreciating the history of Indian legal system, one can only attempt to comprehend the level of complexities that were achieved through this system.

⁴⁹ *Supra* n. 3, p. 513.

⁵⁰ *Supra* n. 24, p. 135.

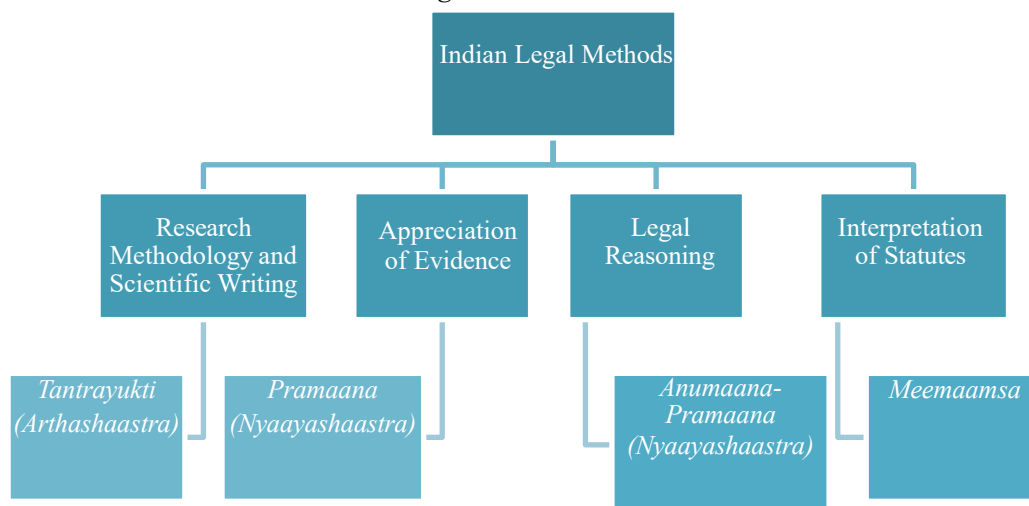
⁵¹ *Supra* n. 3, p. 513.

⁵² *Kerala Solvent Extractions Ltd., v. A. Unnikrishnan*, (2006) 13 SCC 619.

Indian Legal Methods

At this juncture in this chapter, it is pertinent to discuss some Indian legal methods that kept this evolved judicial system operational. The methods discussed in this chapter are actually sourced from varied domains of the vast spectrum of Indian philosophical traditions.

Chart 3: Indian Legal Methods and their Sources



Research Methodology and Scientific Writing

Research methodology is a subject that aims to systematise the research in a scientific work on any subject. It is a methodology which through its various concepts orients a researcher to be able to navigate through his/her research in a guided, organised and systematic manner. Thus, the research methodology begins with a statement of problem, objectives and rationale of research, literature review, hypotheses, research questions followed by respective findings and conclusions. The subject of research methodology and its concern of research methods has immense utility in every field just like in the field of law. However, its applicability is popularly restricted to only formalising a work which may be a dissertation or thesis. It is essential to know that this methodology can also be applied in order to know other disciplines, review literature, establish a problem, test a hypothesis, etc.

Indic Model of Research Methodology and Scientific Writing

The corresponding Indian model of this subject is termed as ‘*Tantrayukti*’. This term is a combination of two words: ‘*tantra*’ and ‘*yukti*’. ‘*Tantra*’ means a scientific work. The root of this word is ‘*tan*’ which means to compose, to write etc. *Tantra* is said to be the one which holds the diffused elements or the expanse of a subject.⁵³ The word ‘*yukti*’ connotes a device or a means. It is derived from the root ‘*yuj*’ which means ‘to arrange’.⁵⁴ *Tantrayukti* can thus be said to literally mean ‘the arrangement of a scientific work’. These are the devices that need to be employed while composing or reading a scientific work. It is not possible to compose or construe any scientific or organised work without these devices.⁵⁵

Tantrayukti Devices for Construction of a Scientific Work

The parallel Indian model of research methodology prescribes thirty-two devices that occur in a scientific work. These are the basic stages of any research. These are: a subject (*adhikarana*), arrangement (*vidhaana*), union of words (*yoga*), category (*padaartha*), implication (*hetvaartha*), enunciation (*uddesha*), declaration (*nirdesha*), instruction (*upadesha*), specification (*apadesha*), extended application (*atidesha*), determination from a statement to be made (*pradesha*), analogy (*upamaanam*), presumption (*arthaapattih*), doubt (*samshaya*), a connected argument (*prasanga*),

⁵³ W.K. Lele, *METHODOLOGY OF ANCIENT INDIAN SCIENCES*, rep. 2013, p. 20.

⁵⁴ *Supra* n. 53, p. 21.

⁵⁵ *Supra* n. 53, p. 22.

reversion (*viparyaya*), context (*vaakya- shesha*), assent (*anumata*), description (*vyaakhyaana*), etymological explanation (*nirvachana*), example (*nidarshana*), exception (*apavarga*), a special term (*sva-samjna*), question/prior-view (*purva-paksha*), reply (*uttara-paksha*), certain (*ekaanta*), anticipation (*anaagatavekshana*), retrospection (*atikraantavekshana*), injunction (*niyoga*), alternative (*vikalpa*), aggregation (*samuchchaya*) and ellipsis (*uhya*). These thirty-two *yuktis* help the reader find the essence of a work.

These *yuktis* appear in all kinds of scientific works. The number of *yuktis* used in a work depends upon its volume.⁵⁶ Depending upon the scope and magnitude of the work, the number of these *yuktis* can be customised. For example: for a brief work or a research paper with limited scope, one may choose to employ the *yuktis* of - a subject (*adhipikarana*), its etymological explanation (*nirvachana*), question/prior-view (*purva-paksha*), doubt (*samshaya*), presumption (*arthaapattih*), example (*nidarshana*) and assent (*anumata*)/ reply (*uttara- paksha*) only. While in a more detailed work, one may go further to anticipate (*anaagatavekshana*), retrospect (*atikraantavekshana*), make extended application (*atidesha*) and come up with a special term (*sva-samjna*). However, there are four basic steps that are involved in any work – brief or detailed. These four basic steps are: subject matter (*jijnasavishaya/adhipikarana*), doubt (*samshaya*), questions/objections/prior-view (*purva- paksha*), thesis (*sidhhaantah*) and review (*samanvaya*). Thus, it can be seen that this model of research methodology is highly adaptable to the nature of a text. The science of *tantrayukti* advises that these *yuktis* should be studied systematically and employed cautiously, judiciously and discriminatingly.⁵⁷

Functions of Tantrayukti

The *tantrayuktis* are said to carry out two basic functions in a text viz., arrangement of sentences (*vaakya-yojana*) and organization of meanings (*artha-yojana*).

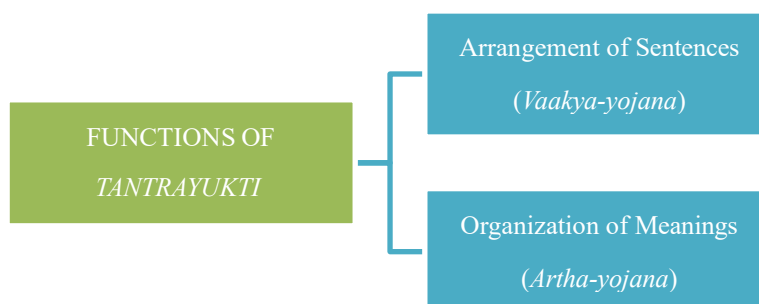


Chart 4: Functions of Tantrayukti*

- i. **Arrangement of Sentences (Vaakya-Yojana):** A *yukti* which brings about a coherent or meaningful connection between/among the apparently unconnected sentences is called *vaakya-yojana*.⁵⁸ This function of the *tantrayuktis* relates to the form of a scientific treatise. Thus, the *yuktis* of union of words (*yoga*), enunciation (*uddesha*), declaration (*nirdesha*) etc, relate to the arrangement of sentences in a work.⁵⁹
- ii. **Organization of Meanings (Artha-Yojana):** The *yukti* which reveals the concealed meaning and which shows that it is consistent with the context is called the *artha-yojana*. This function of the *tantrayuktis* relates to the matter of the text. The *yuktis* like the subject (*adhipikarana*), category (*padaartha*), ellipsis (*uhya*) relate to the organization of the meanings of terms used in a text.⁶⁰ These meanings that the *tantrayuktis* show are said to be of four distinct types:
 - i “That which cannot be explicitly expressed;
 - ii That which appears to be contradictory;

⁵⁶ *Supra* n. 53, p. 23.

⁵⁷ *Supra* n. 53, p. 29.

* *Supra* n. 53, p. 29.

⁵⁸ *Ibid.*

⁵⁹ *Id.*

⁶⁰ *Supra* n. 53, p. 26.

- iii That which is only slightly expressed and;
- iv That which is expressed through peculiar words.”⁶¹

Utility of Tantrayukti

Research methodology as a subject is useful for not just purpose of conceiving a dissertation or thesis but also for reading, writing and composing any scientific legal work in a much more substantial manner. The *tantrayuktis* can be employed to decipher any text and analyse the content of the same. With a superficial understanding, it can be said that these *yuktis* are also like a substantial academic index to the work. A topical index exhibits the topics that have been dealt with in a work. An academic index like the *tantrayukti* of a work will show what all aspects of that given topic have been discussed in that work.

These devices or *yuktis* guide one through the methodical arrangement of a scientific work by giving a correct idea of the arrangement of sentences and organisation of meanings in it. Therefore, these are considered to be useful for not just the writer to make the correct *vidhaana* or arrangement of his/her topic but also for the reader to decipher the various aspects that the writer has indulged in. Unless one understands the arrangement of a subject in a given text, it is not possible to absorb it systematically or in the intended light. The *vaakya-vojana* of the work will help the reader know the nature of a statement – whether it is just an enunciation or a declaration etc. The *artha-vojana* will throw light upon what has been considered as the subject in the work and what all categories have been dealt with therein etc. It is said that “Just as the sun causes a bed of lotuses to blossom or just as a lamp lights up a house, so also the *tantrayuktis* shed light on the meanings of the scientific subjects”.⁶² It is believed that the knowledge of the *tantrayuktis* is a key to understanding of a scientific treatise on any branch of knowledge.⁶³

On multiple occasions has the Supreme Court of India observed the problems in legal drafting and writing specifically when it relates to issues like lack of precision in expression, legal language and the complications that it entails etc. It has gone ahead to remark that writing lengthy judgments particularly while deciding interim matters is the main cause of delay in disposal of cases.⁶⁴ If this problem persists despite the rich history to the subject modern research methodology and scientific writing, then it is certainly necessitated that we look into parallel knowledge systems and examine the best practices for effective content development and its expression.

Epistemology and Appreciation of Evidence

The object of any legal proceeding is the determination of rights and liabilities which depend upon determination of facts. It is the law of evidence which consolidates methods and techniques of classification of facts and appreciation of evidence which happens to be one of the very significant and skillful tasks in legal methods. The exercise of fact-finding happens to be highly crucial to legal processes. Epistemology is a branch of knowledge that theorizes knowledge itself. When principles of epistemology are applied to the field of law, the branch is known to be of legal epistemology. It is the science of knowledge which defines and classifies knowledge and goes ahead to give parameters for its validity and invalidity. Going by this principal engagement of the branch, it becomes indispensable to the study of appreciation of evidence.

⁶¹ *Ibid.*

⁶² *Supra* n. 53, p. 28.

⁶³ *Supra* n. 53, p. 24.

⁶⁴ *Rajesh Kumar v. Rajendra Kumar Saxena*, 2012 SCC OnLine All 3966.

Indic Principles of Epistemology for Appreciation of Evidence

When Indic methods are discussed in this context, they stem from the domain of *pramaanas* – sources of knowledge. Every philosophical system in Indic knowledge systems like *Nyaaya-Vaisheshika*, *Saankhya-Yoga*, *Puurva-Uttar Meemaamsa* have their own recognized set of *pramaanas*.

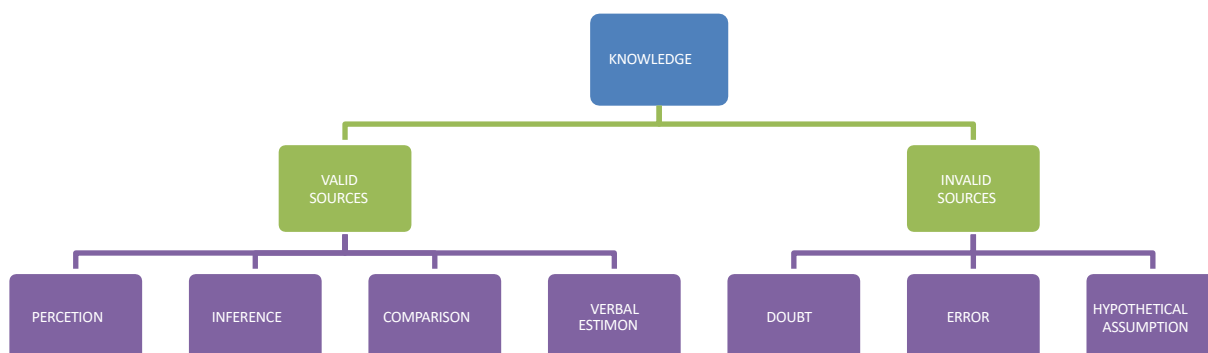


Chart 5: Sources of Knowledge as Recognized by Nyaayashastra*

On the basis of sources of knowledge, the *Nyaaya* theory of knowledge identifies validity and invalidity of knowledge.

Sources of Valid Knowledge

Nyaayashastra identifies four sources of valid knowledge viz.,

- i Perception (*Pratyaksham*),
- ii Inference (*Anumaanam*),
- iii Comparison (*Upamaanam*) and,
- iv Verbal Testimony (*Shabdah*).⁶⁵

These sources of knowledge are said to yield valid knowledge or *prama*.

Sources of Invalid Knowledge

It also recognizes three sources of invalid knowledge viz.,

- i Doubt (*Samshayah*),
- ii Error (*Viparyaya*) and,
- iii Hypothetical Assumption (*Tarkah*).⁶⁶

These sources of knowledge are believed to yield invalid knowledge or *aprama*.

Utility of Pramaana-Epistemology in Appreciation of Evidence

In matters of evidence, it is only upon Courts belief in the existence of a fact that it can be said to be 'proved'.⁶⁷ This is where the question of evaluation of evidence arises which takes us to the concern of validly sourcing the knowledge.⁶⁸ The Supreme Court had clarified the position regarding the nature and source of knowledge in an affidavit by relying on Order 19, Rule 3 of the Civil Procedure Code 1908 which requires the deponent to disclose the nature and source of his knowledge with sufficient particularity.⁶⁹

* *Pratyaksham anumaaanam upamaanam shaddah pramaanani* [N.S. 1.1.3].

⁶⁵ *Ibid*.

⁶⁶ Satishchandra Chatterjee, *THE NYAYA THEORY OF KNOWLEDGE*, 1st imp. 2015, p. 22.

⁶⁷ Section 3 of the Indian Evidence Act 1872.

⁶⁸ *Ila Sudame, Parameters Governing Percipient Witness Testimony in View of Pramaana Theory of Nyaayashastra*, 4CLR2020(117).

⁶⁹ *Sukhwinder Pal Bipan Kumar v. State of Punjab* (1982) 1 SCC 31.

Legal epistemology is a branch of knowledge that is of immense importance to legal methods. However, it also happens to be an area which is lesser explored in modern Indian legal education. Legal methods without epistemic foundations will keep a legal researcher distant from understanding the validity, invalidity, classification of knowledge and thereby result in increasing subjectivity while placing reliance upon a particular source of knowledge. Indic principles of epistemology go ahead from classifying knowledge to also laying down tests to determine the validity or otherwise of the same. These methods can prove to be crucial to classification of facts, appreciation of evidence and ultimately, administration of justice.

Logic and Legal Reasoning

In the field of law, logic and legal reasoning are the prominent and indispensable qualifiers. Any argument or judicial decision without the application of logic or legal reasoning is incapable of standing the test of reasonability and legitimacy. The subject of logic and legal reasoning has been extensively dwelled upon by logicians and jurists. At the outset, it is necessary to distinguish between the terms 'logic' and 'legal reasoning' as these terms are not synonymous and cannot be used interchangeably. Logic is concerned with the validity of the conclusion based on the proposition and reason employed. It is a technical and formal process of arriving at a conclusion according to principles of validity. Logic ensures the stability of an argument or a judicial-decision. Legal reasoning can be said to be a part of the logical process. It is one of the stages to be achieved in order to reach a valid conclusion. Legal reasoning as a step by itself, consists of reasons employed from the legal framework in view of the facts and circumstances of a case. This step also consists of the less technical touchstones of humanitarian approaches which require the exercise of judicial discretion.

Indic Fundamentals for Logic and Legal Reasoning

The Indian intellectual heritage has time-tested formulae of logic to offer to jurisprudence which helps structure and systematise the process of reasoning. Reason is basically a component in the process of inferencing. The process of inferring one fact from the other involves logically establishing a proposition with the help of a reason. Inferences can be drawn for one's own self (*svaarth-anumaanam*) or for other's sake (*pararth-anumaanam*). *Pararth-anumaanam*, unlike *svaarth-anumaanam* involves a much more formal procedure for its presentation. When one draws an inference for other's sake, one needs to use multiple steps to demonstrate what the proposition is that one is trying to establish, the reasoning behind the view, cite examples of similar nature, prove their applicability and thereby conclude. All these steps are required to be organised in specific logical method to have a correct *sthaapana* of the argument. This *sthaapana* or the organised logical structure of an argument can be developed through a syllogism.

Nyaaya's Syllogism for Principled Legal Reasoning and Legitimate Conclusions

Wherever one needs to make a *pararth-anumaanam*, either in regular discussions or more formal ones like in the courts; for the purpose of legal reasoning in argumentation or decision-making, one needs to use all the elements of a syllogism so as to demonstrate one's view. Going by their purpose – arguing or decision-making, how different are these syllogisms required to be is dependent upon how the nature of their structure is.

The *Nyaaya* philosophy prescribes a *pancha-avayava* or a five-member syllogism consisting of the following:

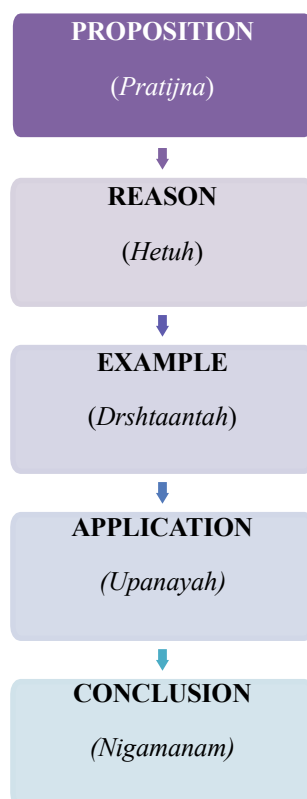


Chart 6: *Nyaaya's Five-Member Syllogism (Panchaavaya)**

- i. **Proposition (*Pratijna*):** The declaration of what is to be established;
- ii. **Reason (*Hetuh*):** It is the statement of the reason/means of establishing what is to be established;
- iii. **Example (*Drshtaantah*):** It is the illustration of the proposition and provides for a supporting reason;
- iv. **Application (*Upanayah*):** It states the validity of the example so cited;
- v. **Conclusion (*Nigamanam*):** The conclusion is the re-stating/confirmation of the proposition after the reason has been mentioned.⁷⁰

Highlighting the importance of logic and legal reasoning in courts, the Supreme Court of India had held that:

*“Reliefs granted by courts must be seen to be logical and tenable within the framework of the law.... It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings”.*⁷¹

Reasons are the lifelines of legal arguments and judgments. In the interest of effectively securing principles of natural justice, the concept of reason needs to be analyzed in contrast with its semblance. Employment of the *pancha-avayavas* of *Nyaaya's* syllogism in legal reasoning in judicial

* Radhavallabh Tripathi, *VADA IN THEORY AND PRACTICE*, 1st ed. 2016, p. 157.

⁷⁰ *Ibid.*

⁷¹ *Kerala Solvent Extractions Ltd., v. A. Unnikrishnan*, (2006) 13 SCC 619.

decision-making in particular can very effectively aid in maintaining the integrity of legal reasoning in the process.

Knowledge of Fallacies of Reasoning and its Significance in Critical Thinking

Critical thinking skills in law can be enhanced not just by acquiring the knowledge of components of legal reasoning. It needs to be supplemented with the sensitization regarding the various fallacies of reasoning. Knowledge of fallacies of reasoning equips a researcher of law with sharpened rational faculties that enables the researcher to achieve a twofold purpose of steering clear of them in legal reasoning in the first place and second; the ability to identify them in course of legal research.

Nyaayashastra identifies five fallacies of reasoning or *hetavabhaasaa* viz., erratic reason (*savyabhicharah*), the contradictory reason (*viruddhah*), reason being equal to the question (*prakaranasamah*), unproved reason (*saadhyasamah*) and, the mistimed reason (*kaalaatiitah*).⁷² These fallacies can produce conclusions that are not logically justified and ultimately cause errors in judgment while their knowledge can enable one to avoid drawing illogical conclusions, making fallacious arguments and meting out injustice.

Interpretation of Statutes

Little needs to be discussed about the importance of Interpretation of Statutes as a subject in legal academia. As a branch of law and legal studies, Interpretation of Statutes is indispensable. In India and globally, Maxwell's Principles of Interpretation are popularly resorted to by lawyers ranging from law students to jurists. What needs to be put in perspective is the fact that these principles of interpretation are one of the systems of interpretation of statutes that have indeed, extensively yielded to the challenges of interpretation where they were employed. However, what came to be ignored in the course its appreciation was another system of interpretation which was awaiting contextualization in the field of law and, which was indigenous to us.

Meemaamsa Principles as a Parallel System for Interpretation of Statutes

One of the major academic works in our intellectual heritage is the *Meemaamsa* principles of interpretation developed by Jaimini in his sutras. Though these principles existed even prior to Jaimini, his sutras are considered to be one of the systematic works on this subject. These principles were actually created for religious purposes like enabling correct performance of *yagya* but in appreciation of the logic and rationale in them, these came to be adopted by various disciplines like philosophy, law, grammar etc.⁷³ Jaimini has defined duty as "that what is to be fulfilled as the object of a command". Since law and duty are inseparably connected terms that also reverberate with the concept of dharma, Jaimini is said to have also defined the term law by way of implication.⁷⁴

The Supreme Court of India has on multiple occasions stated that principles of interpretation are not principles of law but a methodology of explaining the meaning of words used in a text. It has recognised the importance of this masterpiece of *Meemaamsa* rules of interpretation by our jurists. While dwelling upon the suitability of *Meemaamsa* and Maxwell's rules of interpretation, it has remarked that "Any system of interpretation can be used which helps in solving a difficulty. In certain situations, Maxwell's principles would be more appropriate, while in other situations the *Meemaamsa* principles may be more suitable".⁷⁵ The Apex Court has further deprecated the ignorance towards the intellectual achievements of our jurists in the following words:

"Meemaamsa rules of interpretation were our traditional principles of interpretation used for thousands of years by our jurists. It is deeply regrettable that

⁷² *Savyabhichaarviruddhaprakaranasamasaadhyasamakaalaatiitaa hetvabhaasaah*. N.S. 1.2.4.;

Savyabhichaarviruddhasatpratipakshaasiddhabaadhitaah pancha hetvabhaasaah. T.S. 50.

⁷³ Markandey Katju, K.L. SARKAR'S MIMANSA RULES OF INTERPRETATION: TAGORE LAW LECTURES-1905, 4th ed. 2013, p. 7.

⁷⁴ *Supra* n. 66, p. 51.

⁷⁵ *Surjit Singh v. MTNL*, (2009) 16 SCC 722.

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 bequeathed to us. The Meemaamsa rules of interpretation are one of these great achievements, but regrettably they are hardly ever used in our law courts. There is no reason why Meemaamsa principles of interpretation should not be used in appropriate occasions. It is not stated anywhere in the Constitution of India that only Maxwell's principles of interpretation can be utilised".⁷⁶

Classification of Legal Provisions

Jaimini has broadly classified the texts of revealed laws into obligatory and non-obligatory texts and has gone ahead to further categorise various legal provision according to their nature.

Obligatory Texts/Rules: The obligatory texts or rules are those whose performance or compliance is not a matter of choice or dependant on any contingency. These are the primary commands known as *pradhan chodanas* are in the form of one wide statement in the shape of a general injunction which expresses whole of its object and purpose.⁷⁷ Obligatory rules in their positive form are known as *vidhis* and in their negative forms, as *nishedhas*. A *vidhi* is a positive command in the form "You shall do it" while a *nishedha* is a negative command in the form "you shall not do it". The force of command of both is same in principle.

Non-Obligatory Texts/Rules: There are non-obligatory texts or rules that are connected with the obligatory *Vidhis* or *Nishedhas*. These non-obligatory rules are classified into explanatory/illustrative and texts known as *arthavadas* general clauses/definitions known as *namadheyas*. An *arthavaada* is an explanatory or illustrative text connected with a *vidhi* and may explain the reason of a *vidhi* or illustrate it.⁷⁸ *Namadheyas* are the descriptions of names and can be said to be the same as the definition clauses in modern laws.⁷⁹ There are also texts that qualify in the category of directory rules. These are subsidiary or incidental statements known as *niyamas*.⁸⁰

Proviso/Exception: There are also clauses that qualify either as provisos or as qualified exceptions to the given *Vidhi* or *Nishedha*.⁸¹ These clauses are known as *Paryudasa*. The rule of modern laws that a case falling under the proviso cannot come under the main clause and vice versa resonates with the concept of *paryudasa*.⁸²

Inconsistency in Provisions: The inconsistent arguments placed on different provisions of a statute are known as *vidhivaishamya*.⁸³ This occurs when two provisions are construed in such a manner that if the construction of one is accepted, then the other cannot stand. Such constructions are not permitted even under other parallel systems of interpretations.

Maxims (Nyaaya): *Nyaayas* are the devices that can be used to interpret a provision or explain the given case forcefully.⁸⁴ These correspond to the term 'maxims'. *Nyaayas* have been of immense importance just like the Latin maxims in jurisprudence.⁸⁵ There can be maxims that govern interpretation or maxims govern general experience.⁸⁶

⁷⁶ *B. Premchand v. Mohan Koikal*, (2011) 4 SCC 266.

⁷⁷ *Supra* n. 66, p.128.

⁷⁸ *Supra* n. 66, p. 53.

⁷⁹ *Supra* n. 66, p. 54.

⁸⁰ *Supra* n. 66, p. 150.

⁸¹ *Supra* n. 66, p. 151.

⁸² *Ibid*.

⁸³ *Supra* n. 66, p. 154.

⁸⁴ *Supra* n. 66, p. 152.

⁸⁵ *Ibid*.

⁸⁶ *Supra* n. 66, p. 153.

Jaimini's jurisprudence also identifies provisions as express and implied provisions. The provisions that are embodied expressly are termed as *Pratyaksha* while those that are considered as implied rules are termed as *Kalpya*.

Procedure for Interpretation

In order to ascertain the meaning of a provision, the *Meemaamsakas* established a systematic five-staged procedure in the form of a theme known as an *adhikarana*. The *adhikarana* consists of the following steps for interpretation:

- i. The subject matter which requires interpretation is set out first.
- ii. The doubt which has arisen in the matter of such interpretation is explained.
- iii. The purva-pakshah or the prima facie argument is set out.
- iv. The answer or the other side is set out.
- v. The conclusion or the final interpretation is arrived at.⁸⁷

This systematic approach was adopted to interpret any provision, wherein a doubt in interpretation was encountered.

Rules of Construction for Ascertaining Meanings of Provisions and their Inter-se Relative Force

Meemaamsa system has laid down four basic rules that are to be followed for construing the meaning of a provision. These rules are to be observed as a matter of procedure before choosing a specific principle for interpreting. These are also referred to as the golden rules of interpretation and are briefly stated as under:



Chart 7: Meemaamsa Rules of Construction for Ascertaining Meaning of Provisions*

- i. **Shruti (Direct Assertion):** This rule states that when a sentence is complete and explicit in sense and grammar, no attempt should be made to strain or twist its meaning.⁸⁸
- ii. **Linga (Indicative Power):** *Linga* is the power or capacity of a word to denote a certain thing.⁸⁹ The rule of indicative power states that 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 that word has been used.⁹⁰
- iii. **Vaakya (Syntactical Connection):** This rule requires that where words and sentences are not connected in an explicit or clear manner, they should be joined grammatically so as to make a sensible proposition.⁹¹
- iv. **Prakarana (Context):** In cases where the sentence or a clause is clear in its meaning and grammatical composition but makes no complete sense by itself, its meaning should be ascertained by reading it with some other passage with which it coalesces with due regard to the context in which such clause/sentence is used.⁹²

It can be gathered that the *Meemaamsa* system has abundantly insisted on the literal interpretation of any provision. As far as possible, assumption of meanings by drawing inferences is to be avoided. The order of preference or the relative force of these rules has also been laid down. Irrespective of the consequence of the meaning, the *shruti* rule of construction is to be preferred over

⁸⁷ *Supra* n. 3, p. 436.

* *Supra* n. 14, p. 453

⁸⁸ *Ibid.*

⁸⁹ *Supra* n. 14, p. 457.

⁹⁰ *Ibid.*

⁹¹ *Supra* n. 14, p. 458.

⁹² *Supra* n. 14, p. 460.

every other rule. Where *shruti* rule is not helpful, the rule of *linga* is to be resorted to. If these two methods fail in ascertaining the meaning, then only the rule of *vaakya* is to be applied. The rule of *prakarana* is the last rule of construction in the order of preference.⁹³

Elementary Principles of Interpretation of Statutes

Having classified the provisions and laid down the procedure to be adopted for interpretation, the elementary rules of interpretation were expounded. Jaimini laid down six elementary principles which are also known as axioms of interpretation:

1. **Sarthakya:** According to this axiom, every word and sentence must have some meaning and purpose. If there are more words, there will be more meanings. This goes to show that any interpretation rendering a part of the provision otiose is a faulty interpretation known as *anarthakya-dosha*.⁹⁴ This principle corresponds with Maxwell's literal rule of interpretation.
2. **Laghava:** This principle states that where one rule or proposition would suffice, more must not be assumed.⁹⁵ This includes the rule that the construction which makes the meaning simpler and shorter is to be preferred. It suggests that complex questions should not be entered into and the simpler and shorter interpretations should be adopted. This corresponds with the rule that construction should not be burdensome.⁹⁶
3. **Arthaikatva:** This principle requires that to a word or sentence occurring at one and the same place, double meaning should not be given.⁹⁷ There should be consistency in the meaning given to the same word or sentence in different contexts, unless, the context requires otherwise. The corresponding rule of interpretation according to Maxwell is: "It is at all events reasonable to presume that the same meaning is implied by the use of the same expression in every part of the Act".⁹⁸
4. **Gunapradhan:** This principle states that if a word or sentence which, on the face of it, purports to express a subordinate idea, clashes with the principal idea, the former must be adjusted to the latter or altogether be discarded.⁹⁹ The rationale behind this is that the main clause carries the principal idea. This principal idea is the basis upon which its subordinate clause should be interpreted and not vice versa.
5. **Samanjasya:** *Samanjasya* means harmony. This principle states that any contradiction between words and sentences is not to be presumed where it is possible to reconcile them.¹⁰⁰ As far as possible, all the provisions of law must be construed harmoniously without presuming any *inter se* contradiction. This is the rule of harmonious construction.
6. **Vikalpa:** The principle of *vikalpa* states that where there is real contradiction, one of the contradictory matters may be adopted at option.¹⁰¹ *Vikalpa* means option. In a situation where it is impossible to reconcile the two conflicting provisions, any one of them may be given effect to.¹⁰² This exercise of option is to be done with reference to the context, facts and circumstances of the case.
7. In the matter of *Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd.*, where the Supreme Court of India was required to interpret the provisions of the Electricity Act, 2003, it had explained and applied the axioms of *samanjasya*, *vikalpa* and *gunapradhan*. It had held that Sections 174 and 175 of the Electricity Act, 2003 can be read harmoniously by applying *samanjasya* rule. Further, it held that Section 174 is the *pradhan* whereas Section 175 is the *guna* or subordinate.

⁹³ *Supra* n. 14, p. 461.

⁹⁴ *Supra* n. 3, p. 448.

⁹⁵ *Supra* n. 66, p. 79.

⁹⁶ *Supra* n. 66, p. 80.

⁹⁷ *Supra* n. 14, p. 461.

⁹⁸ *Supra* n. 3, p. 448.

⁹⁹ *Supra* n. 66, p. 79.

¹⁰⁰ *Supra* n. 66, p. 80.

¹⁰¹ *Ibid.*

¹⁰² *Supra* n. 3, p. 452.

Therefore, Section 175 (the *guna* or subordinate) has to be adjusted to make it in consonance with Section 174 (the *pradhan* or principal).¹⁰³

Conclusion

The Indian systems of knowledge have not just comprehensively but exhaustively dealt with the subjects of law, logic and their interpretative techniques. The need of the hour is to revive and put the *Shaastric* parameters embedded in *Dharmashastra*, *Nyayashastra*, *Meemaamsa* etc. to practical utility in the field of law. Introducing *Shaastric* legal education shall promote “*akhanda-vidya*” i.e. analysing the object or issue as a whole as opposed to segregating it into subjects that are allied to it. This is what our ‘Indic thought process’ has developed for studying these subjects. This leads to the creation or dissemination of an all-encompassing profound body of knowledge related to that subject and enables one to ‘think like a lawyer’ in the truest sense. In fact, the present-day trend of a ‘multi-disciplinary’ research finds its roots in this concept of *akhanda-vidya*. The revival of our indigenous knowledge system in the field of law and thereby aiding India’s sustenance in the globalised world is promised by this revolution of *Shaastric* legal education.

¹⁰³ *Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd.*, (2008) 4 SCC 755.

Our Legal System

N.R. Madhava Menon

The legal system of a country is part of its social system and reflects the social, political, and cultural characteristics of that society. It is, therefore, difficult to understand the legal system outside the socio-cultural milieu in which it operates. It is true in the case of India also even though the legal system we now have is largely the gift of the British rulers. There is a view that the system is still alien to the majority of Indians whose legal culture is more indigenous and whose contact with the formal legal system (the imported British model) is marginal if not altogether non-existent. The language, technicality and procedure of the inherited legal system are indeed factors which limit access to justice for the illiterate, impoverished masses of our country. Nevertheless, the rights and benefits conferred by the laws and the Constitution offer the opportunity for those very people to enjoy the fruits of a welfare democracy which the people of India have given unto themselves on the 26th January 1950. It is in this context familiarity with law and its processes becomes essential to every Indian, rich or poor, man or woman, young or old.

Components of a Legal System

A legal system consists of certain basic principles and values (largely outlined by the Constitution), a set of operational norms including rights and duties of citizens spelt out in laws -Central, State and local, institutional structures for enforcement of the laws and a cadre of legal personnel endowed with the responsibility of administering the system.

The Constitution: The Fundamental Law of the Land

The Constitution of a country is variously described depending upon the nature of the policy and the aspirations of the people in a given society. It is generally a written document and assumes the character of a federal (several independent units joined together) or unitary form of government. India is declared to be a Socialist, Secular, Democratic Republic. It is said to have a quasi-federal structure. The Constitution of India represents the collective will of 700 million Indians and, as such, the reservoir of enormous power. It describes the methods by which this power conferred on the State is to be exercised for the benefit of the people. In other words, it is a political document which distributes State power amongst different organs (Central and State Governments, Legislative, Executive and Judicial wings of each Government) and regulates its exercise in its incidence on the people. The form of government is democratic and republican and the method is parliamentary through adult franchise.

The goals are spelt out in Preamble itself which seeks to secure to all citizens: “Justice, social, economic and political; Liberty of thought, expression, faith and worship; Equality of status and of opportunity, and to promote among them all.” Fraternity assuring dignity of the individual and the “unity and integrity of Nation” .

To achieve this goal of dignity of the individual with justice, liberty and equality the Constitution guarantees certain Fundamental Rights and provides for its enforcement through the High Courts and the-Supreme Court. These basic Human Rights include:

- (a) Equality before law,
- (b) Equality of opportunity in matters of public employment.
- (c) Prohibition of discrimination on grounds of religion, sex etc.
- (d) Protection of life and personal liberty.
- (e) Protection of right to freedom of speech, of assembly, of association, of movement and of profession or occupation.
- (f) Prohibition of forced labour,

- (g) Right to freedom of religion,
- (h) Protection of interest of minorities, and
- (i) Right to constitutional remedies for enforcement of the above rights

Further, towards achieving the goals set out in the Preamble, the Constitution gives certain Directives to State to follow in its policies and programmes. Principles of State Policy have been recognized to be as sacrosanct as Fundamental Rights. In other words, they together constitute a reference for State action in every sphere.

The Constitution envisages a unique place for the judiciary. Apart from overseeing the exercise of State power by the Executive and the Legislatures of the State and the Central Governments, the Supreme Court, and the High Courts are charged with the responsibility of effectively protecting citizens' rights through its writ jurisdiction. This offers a cheap and expeditious remedy to the citizen to enforce the guaranteed rights. The Supreme Court liberalized the rules so as to enable poor and illiterate citizens to have easy access to courts for enforcing their basic rights.

The Rule of Law is supreme, and the independence of judiciary is reality in our country. This forms the bulwark of democracy and compels everyone to abide the law in his own be understood and subscribed to by every Indian if we are to succeed in our declared goals.

Laws, Civil and Criminal

The laws of the country are too numerous, varied and complex; they are bound to be so because law is as large as life itself which is increasingly becoming complex in, every sphere. In a Welfare State like ours, laws are at the more so because they are expected to regulate a variety of social and economic activities so as to subserve the common good. Inspired by the Constitution, Parliament, the State legislatures and local councils make and unmake the laws day in and day out as occasion demands. Courts interpret them in specific fact situations and, in the process, extend the scope and application of the laws. The common man may get lost in the maze of legislations coming from all sides and contribute to its complexity by creating his own laws through contracts and agreements with others he has to deal with.

On the basis of the remedies sought and the procedure followed, all laws can be grouped into two categories, namely, Civil Laws and Criminal Laws. Broadly speaking, criminal law is concerned with wrongs against the community as a whole, while civil law is related to the rights duties and obligations of individual members of the community between themselves.

Civil Law includes a number of aspects which may be grouped under six or seven major headings such as family law, the law of property, the law of tort, the law of contract, the law relating to commerce and business, labour law, law of taxation etc. Family law, which in India has its source both on statute and religion, comprises of the laws governing marriage, divorce, maintenance, custody of children, adoption inheritance and succession. Though the Constitution envisages a Uniform Civil Code, each religious group at present follows largely its own norms in matrimonial and family relations. The law of property includes rights of ownership, transfer, mortgages, trusts, intestacy and similar matters. The law of contracts is concerned with the enforcement of obligations arising from agreements and promises. This includes transactions such as sale of goods, loans of money, partnerships, insurance, guarantees, negotiable instruments, agency and the like. The law of torts deals with propriety of actions and infraction of duties. Injuries to person or property caused by failure to take reasonable care and caution leads to actionable wrongs under tort, which usually compensates the victim of such injuries. Laws of commerce and business, which includes contract law, relate to economic operations of individuals, partnerships and companies and governmental regulation of them. Even law of taxation forms part of commercial laws. Labour law deals with the relationship between employer and employees in the production and distribution of wealth.

Criminal law is concerned with public wrongs or wrongs against the order and well being of the society in general. The persons guilty of such wrongs are prosecuted and punished by the State.

These wrongs are specific and are defined in the Penal Code and a few other special and local laws. One important aspect in this regard is that criminal laws insist (apart from a few exceptional offences) on a particular intent or state of mind as a necessary ingredient of a criminal offence. It also recognizes degrees of criminality and gradations of crime. Ignorance of law is never taken as an excuse. Certain situations where guilty intention could not have been entertained such as infancy, insanity mistake of fact etc., they are recognized as defences to criminal responsibility. Offences are classified on the basis of the objective or otherwise. Thus, there are crimes against the human body, property, reputation of the individual, against the State or against public rights.

On a procedural basis they are classified as cognizable and non-cognizable (cognizable are those in which the police can investigate or arrest persons without judicial warrant), bailable and non-bailable, compoundable or otherwise.

Procedural Laws, Civil and Criminal

Most proceedings in the Supreme Court and the High Courts are governed by Rules of Procedure made by the Courts themselves under powers given by statute. The Civil and Criminal Procedure Codes and the Evidence Act do apply to judicial proceedings in these courts as well. The writ procedure under Articles 32 and 226 is unique to these courts and is intended for the quick enforcement of Fundamental Rights whenever they are threatened by the State or its agencies. In such situations citizens can approach these courts even through a letter sent by post as the Supreme Court has declared that procedure should not be allowed to come in the way of dispensation of justice.

For the enforcement of civil rights and obligations a suit before a civil court is usually instituted. The procedures for trial and appeals including execution of decrees and orders are laid down in the Code of Civil Procedure. Variationism for purposes of jurisdiction is made according to the Suits Valuation Act. The amount of court fees to be paid on plaints and appeals is determined by the Court Fees Act. The Limitation/ Act prescribes the periods of limitation within which suits can be filed. The Evidence Act regulates the relevancy, admissibility and probative value of evidence led in courts, civil and criminal.

The trial is in the nature of adversary proceedings where two parties oppose each other in a suit or action between parties. The procedure commences with 'pleadings', which set out the precise question in dispute or the cause of action. The opposite party (the defendant) may file a written statement to admit or deny the allegations in the plaint. The pleadings may be supplemented by the parties by making admissions of fact, answers and interrogatories, oral statements before the court and by admissions and denials of documents filed by them.

The hearing of a suit commences with the serving of a copy of the plaint to the defendant. A party can appear himself in court for the hearing or make appearance through an agent or a pleader. According to the Advocates Act right to practise law before courts is given to Advocates only. In the proceedings, parties have to summon their witnesses for deposing in court. The trial involves recording of evidence of witnesses on a day-to-day basis at the conclusion of which judgment is to be pronounced in open court.

Because civil proceedings are private matters, they can at any time be abandoned or compromised and, in fact, in a number of cases they are settled before trial.

Judgments are enforceable through the authority of the court. Refusal to obey a judgment may lead to penal consequences, many decrees are open to appeal in higher courts within the specified period.

Criminal proceedings are governed by the provisions of the Code of Criminal Procedure, the purpose of which is to determine whether the accused is guilty of the offence charged and, if so, to decide the punishment to be awarded, therefore. It is designed to give every accused a 'fair trial' consistent with the constitutional commitment to individual liberty and freedom.

A criminal proceeding involves four major stages, namely, investigation, prosecution, trial and disposition. Crimes being wrongs against society, the State undertakes the prosecution on behalf of the victim. The police on receiving information of the commission of an offence proceeds with the investigation. They are authorised to interrogate people, arrest the suspects (with warrant from the Magistrate in non-cognizable cases), search places for recovery of relevant materials, seize property connected with the crime and prepare a report on their findings for necessary action by the prosecuting authorities. Whenever arrests are made, they are obliged to produce the arrested person before the nearest Magistrate within 24 hours. They are not to use 'third degree methods' in interrogation and confession given to police is not admissible as evidence in court. In all bailable cases they are bound to release the person on bail. The arrested person has right to seek the aid of a lawyer of his choice and he cannot be compelled to give evidence against himself.

Under our law every accused is presumed innocent, and the prosecution (the State) has to prove the guilt beyond a reasonable doubt. If there is any doubt in the evidence or the prosecution, the benefit of doubt is given to the accused, and he is acquitted. The defendant has the right to cross-examine every prosecution witness while he cannot himself be questioned unless he consents to be sworn as a witness in his own defence. In the case of indigent persons there is provision for legal aid at the State expense.

If at the end of trial, the Judge finds him guilty, he has a right to be heard on the determination of sentence. The emphasis in modern criminal justice being reformation and rehabilitation, there is enough scope for a deserving convict to get correctional treatment as part of sentence.

Apart from the civil and criminal proceedings prescribed in the respective codes, there are a variety of adjudicative procedures followed in tribunals, quasi-judicial administrative agencies, arbitration councils, Nyaya panchayats etc. where private disputes are processed and settled through informal procedures. They are found to be cheap, expeditious and less cumbersome in terms of adjudication.

Legal Aid has now assumed an important place in judicial procedure in country. Right to counsel by a lawyer of one's choice is a constitutional right every citizen possesses. In the case of poor person the Criminal Procedure Code provides for the appointment of counsel at State expense to defend the indigent accused in all major criminal cases. In civil proceedings, a poor person can declare himself to be a 'pauper' in which case he is exempted from co fees and a variety of related court expenses. Legal Aid Schemes set up in State also provide such persons with the services of lawyers to conduct litigation on their behalf.

Courts of Law

Courts are institutions wherein disputes are adjudicated and justice, administered. They are created by Statutes and enjoy such powers and jurisdiction, which the Statutes confer. The Constitution itself provides for the Supreme Court and the High Court in each State at the apex of the judicial system and confers original and appellate jurisdiction on them primarily to resolve disputes between Union and the State, State and State, State and the citizen and in limited cases appeals arising out of private disputes involving substantial questions of law. This higher judiciary is named as the Union Judiciary and appointments to it are made by the President of the Union on the advice of the Chief Justice. Citizens can directly approach the High Courts or the Supreme Court to seek redress for the violation of Fundamental Rights. These courts have a supervisory function over the subordinate courts (State Judiciary) which are set up by each State according to its requirements under the Civil Procedure Code, Criminal Procedure Code or other State laws. The High Courts and Supreme Court enjoy civil and criminal jurisdiction apart from the writ jurisdiction.

The State judiciary under the High Court is organised in a hierarchy on the civil and criminal sides based on their jurisdiction, territorial or monetary. On the criminal side, the Criminal Procedure Code provides for the Magistrates Court (First or second Class depending on the extent of powers for punishment) and above them the Sessions. Courts, usually one in each District. On the civil side the Civil Procedure Code provides for the Munsiff Court (with limited pecuniary jurisdiction), the Sub-Divisional Court and the District Court each with varying pecuniary and territorial jurisdiction. There

can be Special Courts set up for specific purposes and also Administrative and Revenue Tribunals to adjudicate upon specific categories of disputes. Thus there are Motor Vehicles Compensation Tribunals, Sales Tax Tribunals etc. all of which are judicial bodies adjudicating disputes in the areas assigned to them, Appeals from these courts and tribunals usually lie to the High Courts and, in exceptional cases, a second appeal to the Supreme Court.

The Personnel of the Law

Administration of justice requires the co-operation not only of the parties and the judges but also of officers of court who include the Advocates, the court staff and the para-legal personnel who assist the lawyers and judges.

Judges

All judicial officers from the Supreme Court Judge to the Munsiff in a small taluka are independent of both the legislature and the executive. They are free to administer-law without fear or favour and they cannot be interfered with by anyone including the top functionary of the Government. They have the power to punish those who commit contempt of court or disobey their legitimate orders.

The President, acting on the advice of the Cabinet and the Chief Justice of India, appoints the Judges of the Supreme Court and the High Court. The Governor of the State appoints the Judicial Officers of the State similarly on the advice of the State High Court/Government. Their salaries and service conditions are determined by law and cannot be changed to their disadvantage. Their removal from service requires a special procedure and the control of their judicial functions vest on the higher judiciary.

Lawyers and the Bar

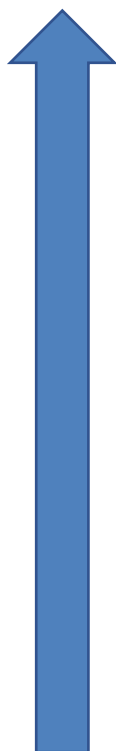
Lawyers are the key functionaries assisting the judges in the administration of justice. They are officers of court and are constituted into an independent profession under an Act of Parliament. (The Advocates Act, 1961). No others may practice before the courts. Without the expert assistance of lawyers on either side of a dispute, judges will find it difficult to find the truth on disputed facts in issue and interpret the law applicable to varied situations. That is why the legal profession is often referred to as a noble and a learned profession.

There are at present approximately 2,30,000 (*kindly refer to current figure*) Advocates practising in the various courts in the country. For organizational purposes they have formed themselves into bar associations. They are enrolled into the profession by the Bar Council created by Parliament under the- Advocates Act. The Bar Councils at the State level and the Central level consist of elected members of the profession who undertake the responsibility of not only admitting new entrants but also improving the quality of legal services particularly through the exercise of disciplinary powers over erring members of the profession. Legal Services to the poor is one of the social obligations of every lawyer required under the Bar Council rules of professional conduct.

HIERARCHY OF COURTS, TRIBUNALS & COMMISSIONS IN INDIA & THEIR JURISDICTION

Anupam Jha

SUPREME COURT OF INDIA

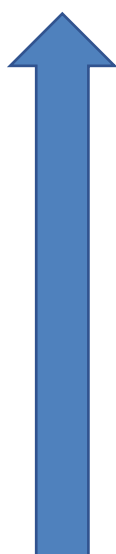


Appellate Jurisdiction
 Appeals under the Constitution
 Appeals by Special Leave (SLPs)
 Statutory Appeals
Original Jurisdiction
 Writ
 Original Suits
 Transfer of Cases
 Election Disputes (President & VP)
Advisory Jurisdiction
 Articles 143 (1) & 317

International Commercial Arbitration

Review
 Art 137
 Curative Petition

HIGH COURT



Appellate

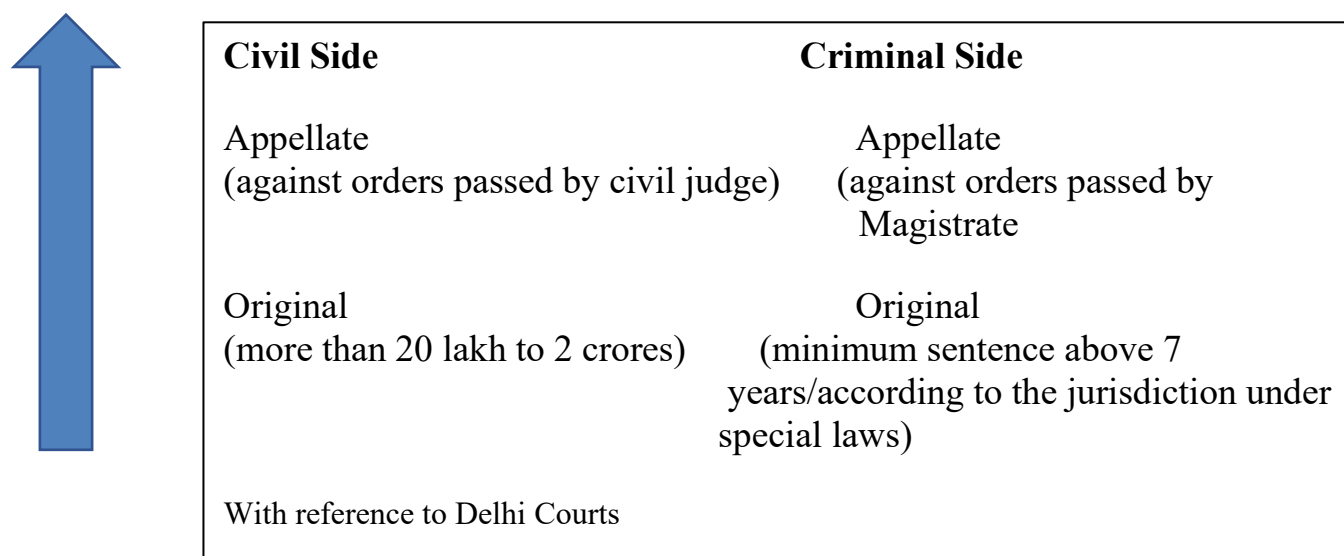
Original
 Writ
 Original Suits (more than Rs. 2 crores)
Supervisory

Revisional

Election Disputes (MPs/MLAs/MLCs)

With reference to Delhi High Court

DISTRICT COURTS



CIVIL JUDGES/JUDICIAL MAGISTRATES

Civil Judges (up to 20 lakhs)*

Chief Judicial Magistrate
(punishment up to 7years)

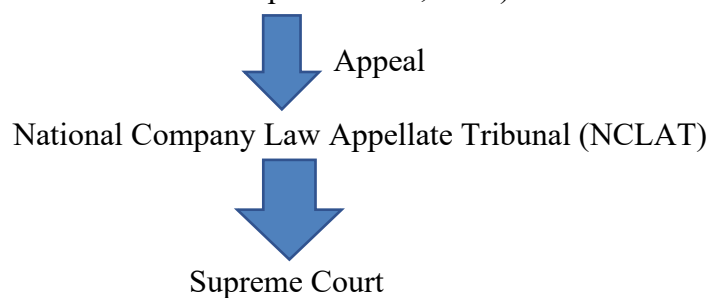
Judicial Magistrates (punishment
Up to 3 years)

*With reference to Delhi Courts

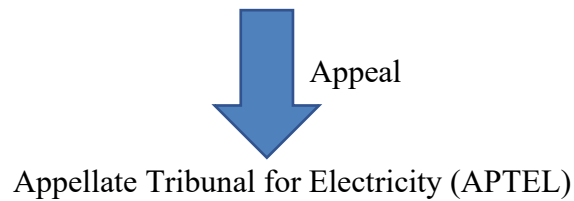
IMPORTANT REGULATORY BODIES

A. COMPETITION COMMISSION OF INDIA (CCI)

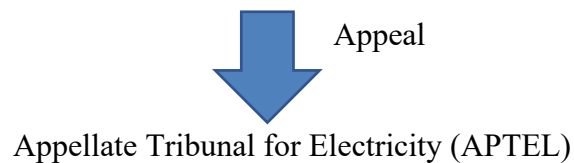
(established under the Competition Act, 2002)



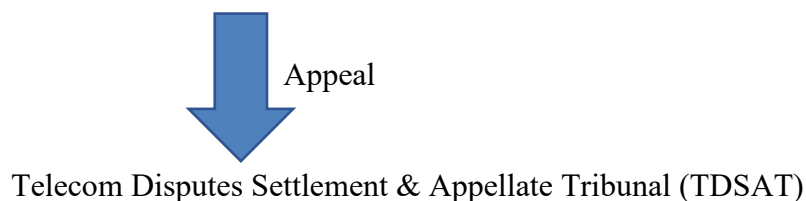
B. ELECTRICITY REGULATORY COMMISSIONS (ERCs)
(established under the Electricity Act, 2003)



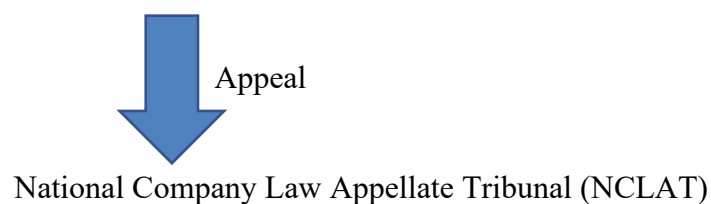
C. PETROLEUM & NATURAL GAS REGULATORY BOARD (PNGRB)
(established under the PNGRB Act, 2006)



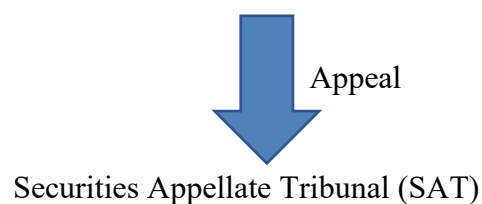
D. TELECOM REGULATORY AUTHORITY OF INDIA (TRAI)
(established under the TRAI Act, 1997)



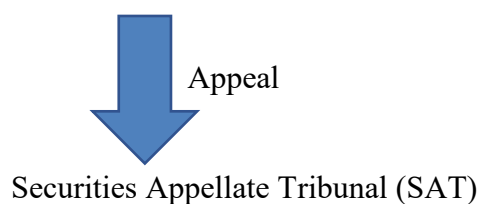
E. INSOLVENCY & BANKRUPTCY BOARD OF INDIA (IBBI)
(established under the Insolvency and Bankruptcy Code, 2016)



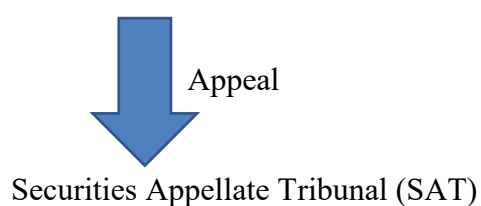
F. SECURITIES & EXCHANGE BOARD OF INDIA (SEBI)
(established under the SEBI Act, 1992)



G. INSURANCE REGULATORY & DEVELOPMENT AUTHORITY (IRDA)
(established under the IRDA Act, 1999)

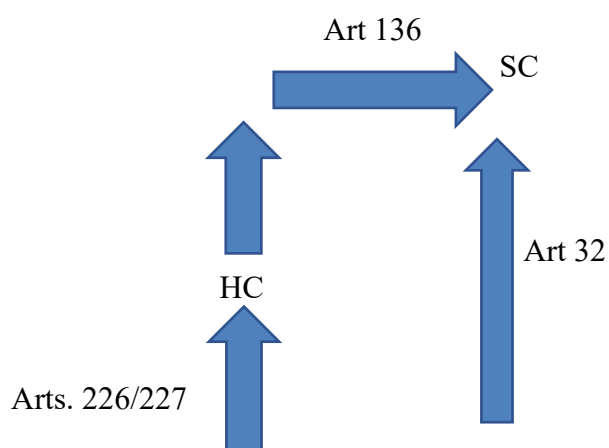


H. PENSION FUND REGULATORY & DEVELOPMENT AUTHORITY (PFRDA)
(established under the PFRDA Act, 2013))



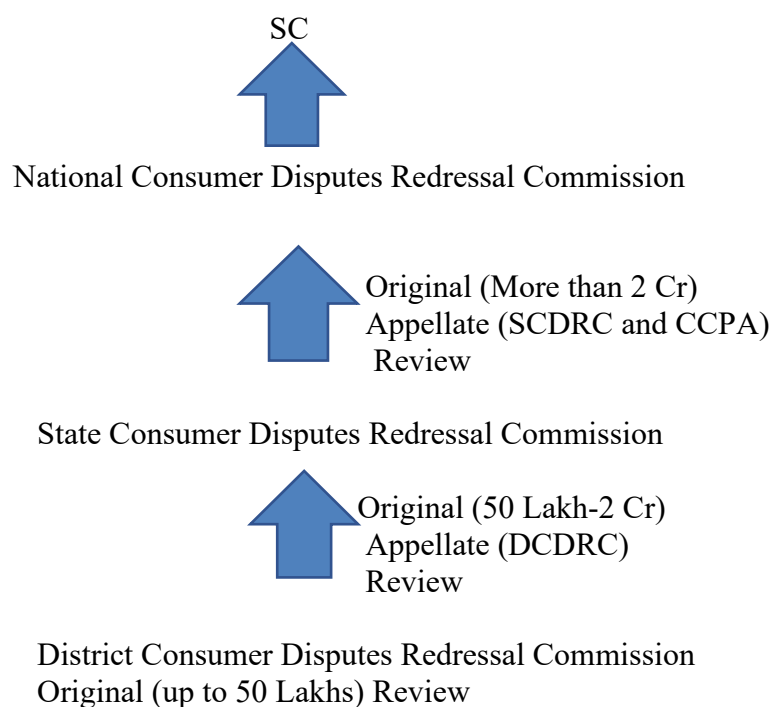
TRIBUNALS/COMMISSIONS

A. SERVICE MATTERS

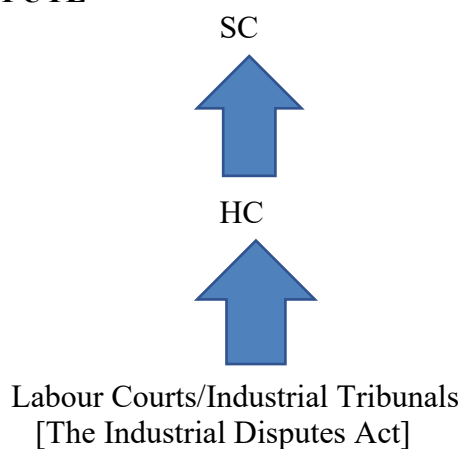


CENTRAL ADMINISTRATIVE TRIBUNAL
(The Administrative Tribunal Act)

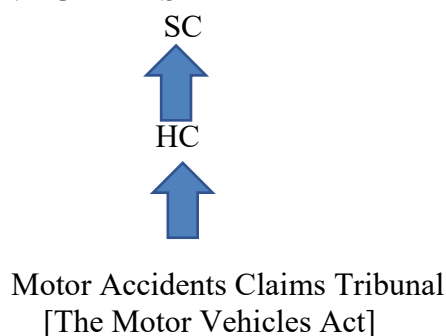
B. CONSUMER COURTS



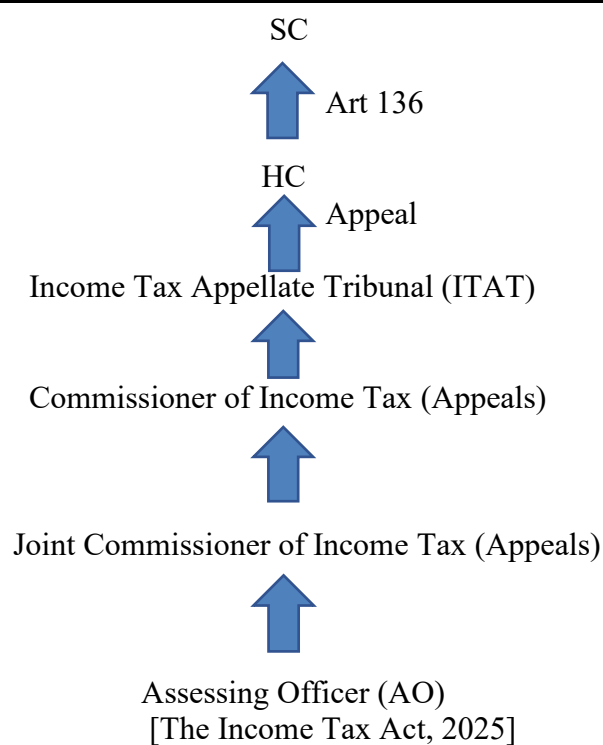
C. LABOUR DISPUTE



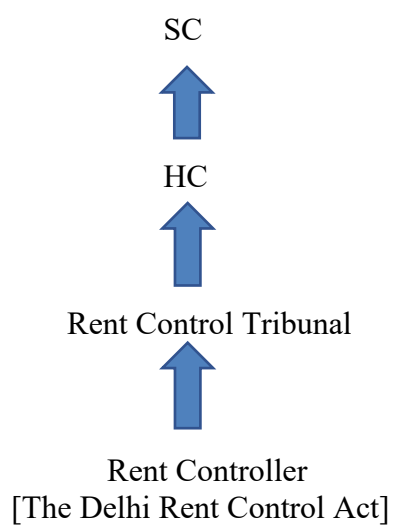
D. MOTOR ACCIDENT CLAIMS



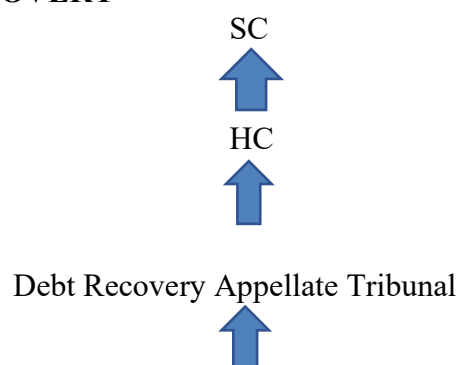
E. INCOME TAX



F. RENT

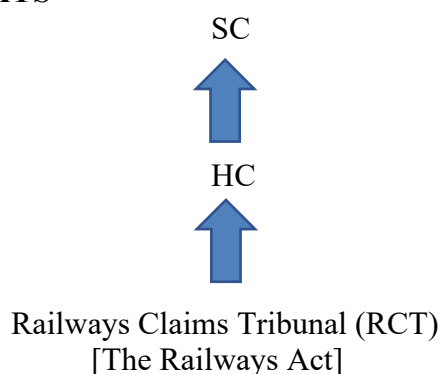


G. DEBT RECOVERY

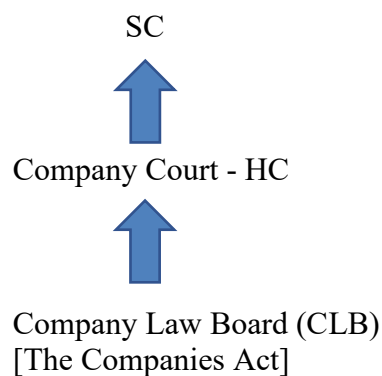


Debt Recovery Tribunal (DRT)
(The Recovery of Debts and Bankruptcy Act)

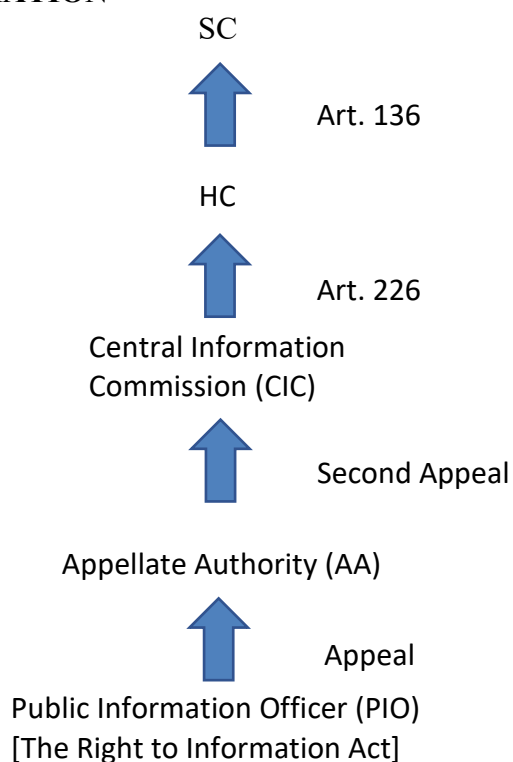
H. RAILWAYS



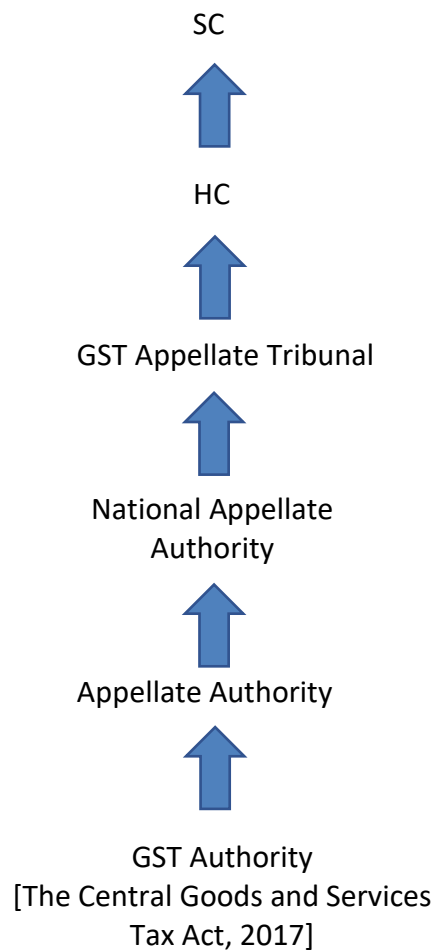
I. COMPANIES



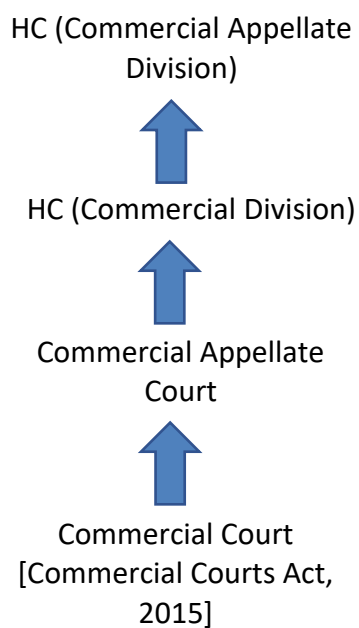
J. INFORMATION



K. GOODS AND SERVICES TAX (GST)



L. COMMERCIAL MATTERS



LEGAL SERVICE/AID AND LOK ADALAT

R. Swaroop

Need for introduction of an adequate and comprehensive legal aid/service programme had been felt for many years, and it was increasingly being realized that there could not be any real equality in criminal cases unless the accused got a fair trial of defending himself against the charges laid and unless he had competent professional assistance. In *Hussainara Khatoon v. State of Bihar* [AIR 1979 SC 1369, 1375], the Supreme Court observed that it was not possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there was a nationwide legal service programme to provide free legal services to them. Impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man, the Supreme Court in *Hussainara Khatoon* case observed:

“Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across ‘Law for the poor’ rather than ‘Law of the poor’. The law is regarded by them as something mysterious and forbidding – always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by the dynamic and activist scheme of legal services.

We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the Constitutional Directive embodied in Article 39-A.”

The State cannot, therefore, avoid its constitutional obligation to provide free legal aid to the accused by pleading financial or administrative inability. The State is under a Constitutional mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the Constitutional Directive embodied in Article 39 A, to ensure fair trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of the Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to fair trial and his right to free legal aid or to secure assistance of a counsel, where he cannot afford to engage one, on account of indigence or poverty.

There are several reasons why, the right to legal aid or to avail legal services in a country like India, which is under-developing, democratic republic, wherein, the ‘Welfare State’ Doctrine has been adopted, assumes wider significance. There are several reasons, aspects and facets prevalent in this country, which would prompt to have a very effective, useful and efficient infrastructure for providing free and competent legal aid in a country like India, where less than 33 percent of the people know how to write and read sufficiently and usefully. Majority of the people are poor or indigent and most of them live below the poverty line, even though the poverty line is drawn liberally, and not upon an International Standard. It is imperative to reach the goal of ‘equal access to justice,’ which is a constitutional commandment and statutory imperative. Legal aid is not a charity or a chance, but as stated, it is constitutional mandate to the State and right of public, which is not now an opinion, but a constitutional obligation and compulsion. As such it is not a pledge or a plan of a government, but has assumed, the status of people’s movement. Somebody has rightly said, “What is the use of the system, which does not help lowly and lost, poor and downtrodden and which creates distance between law and justice.” It is in this context, the provisions for legal services have been made in the Constitution as well

as in the Legal Services Authorities Act, 1987, over and above the provisions made in Section 304 of the Criminal Procedure Code, 1973.

Constitutional Mandate

“The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the Court in *Rhem v. Malcolm* [377 F. Supp. 995]: “the law does not permit any Government to deprive its citizens of constitutional rights on a plan of poverty” and to quote the words of Justice Blackmun in *Jackson v. Bishop* [404 F Supp 2d, 571]: “human considerations and constitutional requirements are not in this day to be measured by dollar considerations” (*Khatri v. State of Bihar*, AIR 1981 SC 928, 930).

The Founding Fathers of the Constitution of India have right from the Preamble, taken a positive approach of doctrine of philosophy of Equal Justice which becomes apparent on the plain perusal of the preamble of the Constitution. The preamble promise is further strengthened by the constitutional provisions in Articles 14, 19, 21, 22(1), 32, 39-A, 51-A and 226 of the Constitution of India. Article 22(1) of the Constitution, expressly provides that, “No person, who is arrested, shall be detained in custody, without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied of the right to consult and to be defended by a legal practitioner of his choice.”

Long before the Constitution, even in the Old Criminal Procedure Code, under Section 340(1), it had been provided that:

“Any person, accused of an offence before the Criminal Court or against whom proceedings are instituted, under this Code, or any such Code, may of right, be defended by a pleader.”

Free legal services an essential element of fair procedure: When under Article 21 of the Constitution of India, no person can be deprived of his life or personal liberty except according to the procedure established by law, it is not enough that there should be some resemblance of procedure provided by law but the procedure under which a person may be deprived of his life or liberty should be ‘reasonable’, fair and just [*Maneka Gandhi v. Union of India*, AIR 1978 SC 597]. Now, a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as ‘reasonable, fair and just.’ It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court’s process that he should have legal services available to him.

Insertion of Article 39A providing for equal justice and free legal aid - As a principle of policy to be followed by the State: The Constitution (Forty-second Amendment) Act, 1976 has inserted Article 39-A as a Directive Principle of State Policy. This Article stipulates that –

“39-A. Equal justice and free legal aid – The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities” [Enforced w.e.f. 3.1.1977].

This article (Article 39-A) also emphasises that free legal service is an inalienable element of ‘reasonable, fair and just’ procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is, therefore, clearly an essential ingredient of ‘reasonable, fair and just’ procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an

accused person if the circumstances of the case and the needs of Justice so require, provided of course the accused person does not object to the provision of such lawyer.

“It is [legal assistance to poor or indigent accused] necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rules of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests...”

In *Khatari v. State of Bihar* [AIR 1981 SC 928] the Court went a step further and held that the constitutional obligation of the State to provide free legal service to an indigent accused extends not only at the stage of trial but also at the stage when he is first produced before the Magistrate. However, in *Suk Das v. Union Territory of Arunachal Pradesh* [AIR 1986 SC 991, 993] the Supreme Court, further observed that, “of course, it must be recognized that there may be cases involving offences, such as, economic offences or offences against law prohibiting prostitution or child abuse and the like, where social Justice may require that legal service may not be provided by the State.

Exercise of this fundamental right whether conditional upon the accused applying for free legal assistance: In *Sukh Das v. Union Territory of Arunachal Pradesh*, the Supreme Court while interpreting legal aid as a fundamental right which the state is constitutionally obliged to provide to every indigent accused in criminal proceedings, dealt with the question whether this fundamental right could lawfully be denied to the accused if they did not apply for free legal aid. The Court has observed:

“But the question is whether this fundamental right could lawfully be denied to the appellants if they did not apply for legal aid. Is the exercise of this fundamental right conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now, it is common knowledge that about 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what their rights and entitlements under the law are. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail its purpose. This is the reason why in *Khatari v. State of Bihar* [AIR 1981 SC 928] we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State...” [Refer also to *State of Kerala v. Kuttan*, 1988 Cri LJ 453].

In *Khatari v. State of Bihar*, the Supreme Court has held thus:-

“But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is the common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognized as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail in its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial Magistrate failed to discharge this obligation in the case of the blinded prisoners, and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided.”

The Supreme Court in that case directed the magistrates and Sessions judges in the country-

“We would, therefore, direct the magistrates and Sessions judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State.”

The Supreme Court also directed the State of Bihar and required every other State in the country-

“[T]o make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social Justice may require that free legal services need not be provided by the State.”

Reports of Law Commission of India

Though even in the old Criminal Procedure Code, under Section 340 (1), it had been provided that: “Any person accused of an offence before the Criminal Court or against whom proceedings are instituted, under this Code, or under any such Code, may of right, be defended by a pleader.” [Section 303 of the new Code corresponds to the said section, with the addition of the words ‘of his choice’ at the end]. The emphasis being on “any person accused of an offence in a criminal case is entitled to be defended, as of right, by an Advocate”, this right under the said section did not make it obligatory on the part of the Court in a Sessions case, to assign a pleader for the defence of the accused at the expenses of the State. However, many High Courts issued circulars and orders, and incorporated rules in the Criminal Rules of Practice providing for assignment of an advocate for the defence of an accused in Session trials and other cases of serious nature in consonance with the Constitutional mandate and fundamental human rights.

Right to be provided with a lawyer by the State: For the first time it was in the year 1958, the Law Commission of India in its Fourteenth Report Volume I on the subject “Reform of Judicial Administration” made certain recommendations for State legal aid and emphasized for right to assignment of counsel at government expense. It observed, - “Unless some provision is made for assisting the poor man for the payment of court-fees and lawyer’s fees and other incidental costs of litigation, he/she is denied equality in the opportunity to seek justice.” (p.487). Again in 1969 the 41st Law Commission Report, the Law Commission strongly recommended that representation by a lawyer should be made available at Government expenses to accused persons in all cases tried by a Court of

Sessions (Vol.1, paras 24, 34-38). The Law Commission in its Forty Eighth Report also suggested for making provision for free legal assistance by the State for all accused who were undefended by a lawyer for want of means.

Recommendation codified in Section 30: This recommendation has now been codified in sub-section (1) of Section 304 of the Code of Criminal Procedure, with this change made by the Joint Committee, that the State aid will be available only where the accused “has not sufficient means to engage a pleader”. Section 304 reads, -

“304. Legal aid to accused at State expenses in certain cases -

- 1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
- 2) The High Court may, with the previous approval of the State Government, make rules providing for-
 - (a) the mode of selecting pleaders for defence under sub-section (1).
 - (b) the facilities to be allowed to such pleaders by the courts.
 - (c) the fees payable to such pleaders by the government, and generally, for carrying out the purposes of sub-section (1).
- 3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-section (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Sessions.”

The section provides that when in the trial and more so in trials before the Court of Sessions, the accused is not represented by a pleader or an Advocate and when it appears to the Court that the accused has not sufficient means to engage an Advocate, the Court shall assign a pleader or an Advocate for his defence at the expense of the State. Under Section 304(3), the State Government, may, by notification, direct that the provisions of sub-section (1) will apply to any class of trials before other Courts in the State.

A bare reading of the provisions under Section 304 of the Criminal Procedure Code make it crystal clear that in a criminal trial, the Magistrate or the Sessions Court before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence or any other disability, he is entitled to free legal services, at the cost of the State. It is, therefore, imperative for a Presiding Officer, in charge of a trial to inform every accused, who appears before him and who is not represented by a private lawyer on account of the poverty, ignorance or by any disability that he is entitled to free legal services, at the cost of the State.

While it is settled position of law that to provide legal aid to accused persons without means in all cases tried by a Court of Session, is a mandatory constitutional necessity, it is further necessary that such lawyer should be of competence. Such counsel appointed for the accused must be given the complete brief of the case and time to prepare the case. Failure to this is a denial of proper representation of the accused and vitiates the trial. [*Raj Kishore v. State*, 1969 Cri LJ 860 (Cal): AIR 1969 Cal 321]. Also, no counsel can be thrust upon the accused without ascertaining the wishes of the accused and without giving him any choice in selecting his lawyer as Article 22(1) of the Constitution guarantees that choice to be accused.

Committee for Implementing Legal Aid Scheme (CILAS)

Concerned with the programme of legal aid as it is the implementation of a constitutional mandate, in September, 1980, the Government of India, with the object of providing free legal aid, by a resolution dated 26th September, 1980, appointed “Committee for Implementing Legal Aid Schemes”

(CILAS) with P.N. Bhagwati J (as he then was) as the Chairman to monitor and implement legal aid programs on a uniform basis in all the States and union territories. The Committee evolved a model scheme for legal aid programme, [which includes organization of legal aid camps] and set up several legal aid and advice boards throughout the country.

But on a review of the working of the CILAS, certain deficiencies had come to the fore. It was, therefore, felt that it would be desirable to constitute statutory legal service authorities at the national, State and District levels so as to provide for the effective monitoring of legal aid programmes. Therefore, the Legal Services Authorities act, 1987 (Act No.39 of 1987) was enacted with a view to constitute Legal Services Authorities at National, State and District Levels. However, the Act not having been brought into force (The Act was brought into force with effect from 9-11-1995, almost eight years after its enactment) the term of Committee was extended again for a period of one year on and from the 14th May, 1990 or till the National Legal Service Authority was constituted under the Legal Services Authorities Act, whichever was earlier.

Constitution of Legal Aid Boards and Committees

Many states evolved their own programmes and even enacted State Legislation or promulgated certain schemes or Rules to provide Legal Aid to under privileged and disadvantaged sections of the society. For effective implementation and to achieve the desired objective of providing Free Legal Aid and Advice to the poor, State Boards, District Legal Aid Committees and Taluka Committees were constituted. But it was felt that enactment of a Central Legislation to co-ordinate and promote the activities of the various States in providing Legal Aid and Advice to the poor was desirable to monitor and implement legal aid programmes on a uniform basis in all the States and union territories.

Need for Strategic Legal Aid Programme

It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice, to the people cannot afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organization of legal aid camps, encouragement of public interest litigation and holding of Lok adalats or Niti melas for bringing about settlements of disputes whether pending in Courts or outside. [*Centre of Legal Research v. State of Kerala*, AIR 1986 SC 2195]. As observed by Justice Bhagwati “what is necessary is to supplement the traditional legal service programme with strategic legal service programme. The strategic legal service programme aims at prevention and elimination of various kinds of injustices which the poor as a class suffer because of poverty and endeavours to launch a frontal attack on the poverty itself with the ultimate goal of its eradication from the society. It does not involve merely quantitative extension of traditional legal services to the poor but instead requires a qualitative and radical change in the whole emphasis, aims and functioning of the legal service programme. It involves novel, radical, more dynamic and multi-dimensional uses of law and the legal process and seeks to provide representation to groups of social and economic protest. It does not regard litigation as playing an important or even significant role in the life of the poor and hence refuses to consider the court as a centre of all legal activity and is concerned with the problems of the poor as a class rather than with the individual problems of the poor which may be projected in litigation in court. The strategic legal service programme is thus directed towards group-oriented approach to the problem of poverty rather than individual-oriented treatment and basically it is calculated to make the poor as class- conscious and powerful, self-reliant and capable of using law as a potent weapon for various purposes”

A common man has started feeling that justice itself is on trial. It is, therefore, imperative to evolve effective and efficient strategies both preventive and protective:

(1) To manage: Unmanageable; (2) To break: Unbreakable; (3) To beat: Unbeatable; (4) To hit: Unhitable; (5) To defend: Indefensible.

Looking to the present situation in the country, we are obliged to create and constitute a Neo-Jurisprudence, a public-oriented participation performing, progressive, professional and pervasive

programmes. Unfortunately, in the present system, the litigant, who is the heart of judicial anatomy, is the most neglected segment. He is the consumer of justice, and he should be respected. The litigant-consumer of justice – and heart of our system – must receive equal, effective, inexpensive and speedy trial and justice.

In our country, amount spent or expenditure for administration of law and justice is reported 0.2 percent of the Gross Domestic Product (G.D.P.) which is grossly inadequate and insufficient in a democratic set up. It is, therefore, necessary to constitute a regular mechanism, whereby, we can take and evaluate Judicial Cardiomogram for necessary urgent and useful, effective and ebullient reforms to translate Constitutional mandate and obligation propounded right from Preamble Promise in their fighting faith by its Founding Fathers, a reality.

Legal literacy: Legal literacy is a pre-condition to maintain the “rule of law”. As observed by Justice Bhagwati, the strategic legal service consists of creating legal awareness or what may be described as promoting legal literacy, for knowledge of their rights and entitlement would give to the poor strength and confidence to fight and help them to avoid needless difficulties which arise from ignorance. Legal aid camps can also be arranged as part of the strategic legal service programme for carrying legal services to the doorsteps of the rural poor. (Quoted in “Equal Justice and Forensic Process: Truth and Myth” by V.R. Krishna Iyer, at p.47). The model scheme for Legal Aid evolved by the “Committee for Implementing Legal Aid Scheme (CILAS)” also included programme for promotion of legal literacy and spread of legal awareness among the weaker sections of the community by way of organizing legal Aid camps, especially in rural areas, slums or labour colonies. Voluntary organizations, social action groups, journalists and even advocates have been rendering significant service to educate the people about the laws, their rights and benefits flowing out of the various schemes and measures. The assistance of voluntary agencies and social action groups must therefore be taken by the State for the purpose of operating the legal aid programme in its widest and most comprehensive sense, and this is an obligation which flows directly from Article 39 A of the Constitution.

Public Interest Litigation

Public Interest Litigation has been devised as a tool to secure benefit to a class or group of persons, either victims of exploitation, or oppression or who are denied the constitutional rights but cannot come to court personally for relief by reason of ignorance, poverty, destitution, helplessness, disability or social or economic disadvantage. It is a form of litigation where jurisdiction of the Court is invoked on behalf of such persons or group of persons by a third person or a social action group or a social organization regardless of its personal injury. Cases of this kind involve the rights of thousands of people at a time, unlike traditional litigation, which are basically of adversary character and concerns disputes between individuals. Whenever such litigations have come to Court, the Courts in the country have done everything to help the poor and to break every procedural barrier to deliver justice to the poor. To quote Krishna Iyer, “Moulding the remedies to suit the needs of the situation so that efficacious and comprehensive remedies may be granted, regardless of pickled precedents in remedial methodology, is part of judicial dynamics.”

Public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violation of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law, which forms one of the essential elements of public interest in any democratic form of government. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prosecuted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights, and the Rule of Law meant for them also, though today it exists only

on paper and not in reality. [*People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473].

Public interest litigation is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.

So far, the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice. But, now for the first time the portals of the court are being thrown open to the poor and the downtrodden, the ignorant and the illiterate and their cases are coming before the Courts through public interest litigation which has been made possible by the recent judgment delivered by the Supreme Court in *S.P. Gupta v. President of India*, AIR 1982 SC 149 [Judges Appointment and Transfer case].

The Legal Aid movement and public interest litigation seek to bring justice to these forgotten specimens of humanity who constitute the bulk of the citizens of India and who are really and truly the "people of India" who gave to themselves this magnificent Constitution. It is true that there are large arrears pending in the Courts but that cannot be any reason for denying access to justice to the poor and weaker sections of the community. No State has a right to tell its citizens that because a large number of cases of the rich and the well to do are pending in our Courts, we will not help the poor to come to the Courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the Courts must become the courts for the poor and struggling masses of the country. They must shed their character as upholders of established order and the status quo. They must be sensitized to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realization must come to them that social justice is the signature tune of our Constitution, and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realization of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice, for without it, it cannot survive for long. Fortunately, this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront, and the entire theatre of the law is changing. It holds our great possibilities for the future. In

M.C. Mehta v. Union of India [AIR 1987 SC 1086], a constitutional Bench of the Apex Court while considering the scope of public interest litigation to grant compensation to the victims of hazardous or dangerous activities when deaths or injuries were caused to them on account of the accident during the operation of such activities, has held that the law should keep pace with changing socio-economic norms; where a law of the past does not fit in the present context, the Court should evolve new law in a public interest litigation. The Court has incidental and ancillary powers in exercise of which it can devise new methods and strategy in securing enforcement of fundamental rights particularly in public interest litigation or social action cases.

In *Bandhua Mukti Morcha v. Union of India* [AIR 1984 SC 802, 815], the Supreme Court held that when the poor come before the Court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights. The Supreme Court further observed:

"It must be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the Court, and they need a different kind of lawyering skill and different kind of judicial approach. If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights, and the result would be nothing but a mockery of the Constitution. We therefore to abandon the laissez faire [Let things be] approach in the

judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. And this is clearly made permissible by the language of clause (2) of Article 32 because the Constitution-makers while enacting that clause have deliberately and advisedly not used any words restricting the power of the Court to adopt any procedure which it considers appropriate in the circumstances of a given case for enforcing the fundamental right. It is true that the adoption of this non-traditional approach is not likely to find easy acceptance from the generality of lawyers because their minds are conditioned by constant association with the existing system of administration of justice which has become ingrained in them as a result of long years of familiarity and experience and become part of their mental make-up and habit and they would therefore always have an unconscious predilection for the prevailing system of administration of justice. But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.”

The traditional rule of locus standi considerably relaxed by the Supreme Court

The traditional rule in regard to ‘locus standi’ that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal rights- by some agency or individual has now been considerably relaxed by the Supreme Court. In *S.P. Gupta v. President of India* [AIR 1982 SC 149, 188], the Supreme Court speaking through Bhagwati, J. has held:

“It may, therefore, now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental rights of such person or persons, in this Court [Supreme Court] under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. ”

THE INSTITUTION OF LOK ADALAT

Lok Adalats or Niti Melas

Lok Adalat has emerged lately as a new system of dispensation of justice and received tremendous response and wide support from different sections of the society. The system visualized as an alternative dispute settlement mechanism, evolved as a part of the CILAS programme with the object of taking justice to the doorsteps of the poor and to give speedy and cheap justice to those who cannot afford to fight the costly legal battle. Lok Adalat has come to be seen as an institution or an agency, for handling disputes by conciliation and counseling, a species of peace making. Lok Adalats do not treat the issues before it as disputes under contest and decide cases but treat them as differences and resolve them by conciliatory and persuasive efforts. The process involves discussing with the parties the pros and cons of their case and explaining to them advantages and disadvantage of resolving their dispute by conciliation and compromise, or in the alternative, of resorting to the traditional dilatory procedure of adversarial litigation in regular Courts. The process of participatory justice is a unique feature of this institution. Dispute in the Lok Adalats is resolved by discussion in an informal atmosphere, in which parties and panel members of the Lok Adalat participate, and settlement is reached with the mutual and free consent of the parties. Unlike in litigations concluded in our regular Courts, being in the nature of compromises, there is no winner and no loser in a mediated resolution of dispute by Lok Adalats. The intention being to help warring parties to work things out, shake hands, and become friends (or not enemies again), resolution of disputes in Lok Adalat, is more likely to bring or keep people together

and, therefore, more conducive to harmonies. There has been in the last few years a growing interest in the institution, and it has emerged as a forum for alternative dispute resolution, to supplement the existing justice delivery system. These forums based on the concept of dispute settlement mechanism by way of counseling persuasion and conciliation, function as peacemaker, and are intended to work informally with simplified procedure.

As part of CILAS programme, Lok Adalats (Peoples' Court) were constituted and Niti melas were organized at various places in the country, under the supervision of State Legal Aid and Advice Boards, for the disposal, in a summary way and through the process of arbitration and settlement between the parties, of a large number of cases expeditiously and with lessor costs. The organizers of the Lok Adalats fixed the date and place of the holding of Lok Adalats about a month in advance. Information about the holding of Lok Adalat was widely publicized through press and other means of publicity. Presiding Officers of various Courts were requested to look into the cases pending in their respective Courts and to see whether there was possibility of conciliation in these cases. Such of those cases where there was reasonable possibility of conciliation were identified and listed. Cases were analyzed, classified under various heads according to the nature of dispute and substance recorded. Then, pre-Lok Adalat conferences were held and parties to the dispute were approached and motivated by the legal aid teams, which included, law students, social workers and volunteers to resolve their disputes through Lok Adalats. Before the case was taken up by the Lok Adalat, the mediation process or justice process through Lok Adalat was initiated by way of thorough discussion with the parties as to the details of the case and desirability of conciliation and compromise and the scope of a settlement mutually acceptable to the parties was assessed. The team involved in the mediation or Lok Adalat justice process, consisted of the members of local Legal Aid Committee, advocates, spirited public men or elders of the locality or social activists and called conciliators. This process was continued and resumed at the campsite of the Lok Adalat. Once parties had made a compromise or arrived at a settlement, it was reduced into writing by members of the panel of the Lok Adalat, signatures of the parties were obtained and countersigned by the members of the panel and passed on to the Court concerned for final decree or order. Multiple panels, according to the need of the Lok Adalat, were set up. These panels or members of Lok Adalat consisted of two or three persons, one of them could be a retired judge or a senior retired civil servant or an advocate, a law teacher, and others, social workers and eminent persons of the locality, carefully chosen by the Local Aid Committees on the basis of their record of public services, honesty and respectability among local population, supposed to be good conciliators, concerned with the cause of social justice and sympathetic to people's problem. When the compromise so arrived at was presented before the Court concerned, the Court was expected to look into the question whether all the parties to the suit were entering into settlement or compromise, examine the fairness and legality of the settlement or compromise, and satisfy itself that compromise had been arrived at by free and mutual consent of the parties. After this process of due verification of the compromise made or settlement arrived at by the parties, decree or orders were passed in terms of the settlement or compromise.

Importance of the institution of Lok Adalat in the present context: The revolutionary evolution of resolution of dispute by one or other means, Alternate Dispute Redressal (A.D.R.) mechanism, has been, successfully, translated in various countries. While, in India, roughly, 91 percent of cases instituted in the Courts go for trial and only 9 percent of cases are settled without judicial agitation, in U.S. A., more than 90 percent of cases involving legal disputes are settled before they go for trial.

The institution of Lok Adalat has been acknowledged as an effective Alternate Dispute Redressal agency and gaining wide acceptability. More and more people are choosing this forum to help settlement of dispute through negotiation, counselling, conciliation, settlement and compromise than to go for a verdict through court. It provides a quicker remedy, it is less expensive, less time consuming, does not permit dilatory tactics of parties to prolong litigation. It saves parties from intricacies of procedure and is concerned more with narrowing the differences and finding settlement in accordance with natural justice, rules of equity and other legal principles than with expatiating upon procedural complexities and their strict application. It is based on jurisprudence of peace and provides a rendezvous for social amity and affinity and social justice. It aims at promoting larger interest, harmony, comity

and policy and jurisprudential cohesion and environment. Looking to the present situation in the country the role of Lok Adalat assumes higher degree of importance.

It is reported that 34 percent of the total world's poor populace is in India. More than majority persons live below poverty line. Most of the rural people in India who reside in more than 5,18,000 villages are either, illiterate, indigent or ignorant of their rights. Even in case of urban populace most of them are ignorant about their legal rights, who are otherwise, literate. The urbanized populace lacks awareness about their legal rights. Our present traditional system of justice is suffering from maladies like huge and heavy expenses, unexpected and unpredictable delay in disposal and, cumbersome and complex process of Court. In view of the failure to provide easy, cheap and expeditious accessibility, mental barrier is developed amongst many persons to suffer injustice. As a result of which, a common man has started looking at it, as foe rather than a friend. The life span of a civil case or a lawsuit in civil side is ranging average, between 8 to 12 years. Who knows even after a successful decision or order in favour of a party, whether he would be able to see light at the end of tunnel after having passed through the long legal and procedural conduit pipes? Even after a decree awarded or order passed on judicial side in favour of a party, after number of years, successful party has to again undergo the second round of litigation at the stage of execution. It is not a Pity v. Duty? Pending workload of cases in Indian Courts has rapidly crossed the 30 million as per latest survey, and many more are under inquiry or investigation stage, etc. The ratio of Judges per million in India is almost 9, whereas it is more than 115 in U.S.A. In case of ratio of Advocate available in India, is far less than developed countries. There are about only 4,50,000 and odd number of Advocates in India, which has populace of 1 billion. In view of these circumstances, the institution of Lok Adalat is being looked upon as an effective Alternate Dispute Redressal Forum, which has proved to be dialectical and speedy. By bringing justice at their doorstep, it gets the poor litigants justice without having to meet huge costs and help them to settle their disputes amicable. It creates not only peace but also a culture of compromise. It provides a rendezvous for social amity and affinity and social justice. [Cf. *Dineshbhai Dhemendrai v. State of Gujarat*, 2001 (1) GLR 603].

Legal status for Lok Adalat: The Lok Adalat, a specie of conciliatory agency, proved to be very popular in providing for a speedier system of administration of justice at lessor costs. The success of these Lok Adalats in taking justice to the doorsteps of poor and the needy and making justice quicker and less expensive raised a new ray of hope for those who could not otherwise afford to fight the protracted costly legal battle for assertion and protection of their rights under the law. The institution received wide support from concerned citizens and spread to disputes of diverse and varied nature and resolved cases pertaining to compoundable criminal complaints, civil and revenue disputes, MACT cases, and even institutional cases (cases where one of the parties is an institution, such as, municipality or a corporation). The number of cases resolved by these Lok Adalats also began to reflect on the workload of our regular Courts. The institution of Lok Adalats was, however, functioning as a voluntary agency without any statutory backing for its decisions. In view of its growing popularity, there was demand for providing a statutory backing to this institution and the awards given by Lok Adalats. It was being felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also provide social justice and serve to achieve the constitutional mandate under Article 39 A. The Government was convinced that this admirable alternate dispute settlement mechanism shall now only reduce the burden of arrears of work in regular courts but would also take justice to the doorsteps of the poor and the needy and make justice quicker and less expensive and felt that if the Lok Adalats were given statutory status they could function more effectively. Therefore, the Government in exercise of its duty under Article 39 A, drafted the Legal Services Authorities Bill 1987 and the same was enacted by the Parliament as Act No. 39 of 1987, acknowledging the institution of Lok Adalat and giving statutory status to Lok Adalats. However, the Act was brought into force with effect from 9-11-1995, almost eight years after its enactment.

Public Participation in Legal Aid Programme

Role of Voluntary Organizations and Social Action Groups: In *Centre of Legal Research v. State of Kerala*, AIR 1986 SC 2195, the Supreme Court held that there could be no doubt that if the legal aid programme was to succeed it must involve public participation. The Court observed: -

“The State Government undoubtedly has an obligation under Article 39A of the Constitution which embodies a directive principle of State Policy, to set up a comprehensive and effective legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality. But we have no doubt that despite the sense of social commitment which animates many of our officers in the Administration. It is absolutely essential that people should be involved in the legal aid programme because the legal aid programme is not charity or bounty, but it is a social entitlement of the people and those in need of legal assistance cannot be looked upon as mere beneficiaries of the legal aid programme, but they should be regarded as participants in it.”

Emphasizing the importance of role that could be played by voluntary organizations and social action groups in securing people’s participation and involvement in the legal aid programme, the Supreme Court went on to observe:-

“If we want to secure people’s participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organizations and social action groups. These organizations are working amongst the deprived and vulnerable sections of the community at the grass-root level and they know what are the problems and difficulties encountered by these neglected sections of the Indian humanity. They have their finger on the pulse of the people and they know from their own experience as to what are the unmet legal needs of the people, what are the sources of exploitation and injustice to the underprivileged segments of society and what measures are necessary to be taken for the purpose of ending such exploitation and injustice and reaching social or distributive justice to them. We are therefore definitely of the view that voluntary organizations and social action groups must be encouraged and supported by the State in operating the legal aid programme. It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organization of legal aid camps, encouragement of public interest litigation and holding of Lok Adalats or niti melas for bringing about settlements of disputes whether pending in Courts or outside. The assistance of voluntary agencies and social action groups must therefore be taken by the State for the purpose of operating the legal aid programme in its widest and most comprehensive sense, and this is an obligation which flows directly from Article 39A of the Constitution.”

Role of the Bench and the Bar: In various countries, particularly, in United States and other Western countries, the contribution of the Bar in rendering free and competent legal aid is praiseworthy and it must be emulated. Legal Aid fraternity must respond with juristic sensitivity to the voice from the silence zone (a class of litigants) and mass voice of weak, meek, poor, suppressed and exploited women and destitute children so as to create evolving ebullient echo for the silent sector. The Bar must evolve scheme to ensure that unprotected is not priced out of Market. The Bar is, really, a backbone of the legal services to compliment and complete the Constitutional obligation and obtain statutory rights of millions of indigents, needy, handicapped and deserving people.

To save the Nation, a catalytic role has to be played by Legal Aid in the larger interest of weaker sections. N.A.L.S.A. has undertaken various important and effective and appreciable Legal-Aid programmes and, therefore, members of Bench and Bar, N.G.Os. and Government Agencies must render voluntary helping hand in such noble and novel projects. [See *Dineshbhai Dhemnrai v. State of Gujarat*, 2001 (1) GLR 603].

LEGAL PROFESSION AND THE ADVOCATES ACT, 1961

A.N. Veera Raghvan

(Abridged, edited by H S Bhalla)

(i) King's Courts

Law, as a profession, appears to have been in vogue in ancient Indian thought. Its concept was quite different from that it is today pursuant to the Regulating Act of 1773, authorised by the King's Charter of Letters Patent, the Supreme Court, was established at Fort William in Bengal through a Charter issued on the 26th of March 1774, Clause 11 of the Charter provided:

And we do hereby further authorise and empower the said Supreme Court of Judicature, at Fort William in Bengal to approve, admit and enrol such and so many advocates and attorneys at law as to the said Supreme Court of Judicature at Fort William in Bengal, shall seem meet, who shall be attorneys of record and shall be and are hereby authorised to appear and plead, and act for the suitors of the said Supreme Court of Judicature at Fort William in Bengal and the said advocates and attorneys, on reasonable cause, to remove; and no other person or persons whatsoever, but such advocates or attorneys, so admitted and enrolled shall be allowed to appear and plead, or act in the said Supreme Court of Judicature at Fort William in Bengal, for or on behalf of such suitors, or any of them.

The Advocates entitled thus to appeal were only the English and Irish barristers and members of the faculty of 5 Advocates in Scotland; the attorneys referred to were the Irish attorneys and solicitors. The Court was thus an exclusive preserve for member of the British legal profession. An Indian lawyer had no right of appearance in the Courts.

When the Supreme Courts with the same jurisdiction and power were established at Bombay and Madras later, the same powers for the enrolment of advocates and attorneys-at-law were conferred on them. The Indian had no right to appear before the Courts.

(ii) Company's Courts

Prior to the rise of British power in India, in Northern India, Justice was administered by Courts established by the Moghul Emperors called Vakils were available to litigants in these native Courts.

The Vakils practising before the Moghul Courts appeared in the Company's Courts also till Bengal Regulation VII of 1793 created for the first time a regular legal profession for the Company's Courts. The Bengal Regulation regulated the appointment of Vakils or native pleaders in the Courts of Civil judicature in the provinces of Bengal. Bihar and Orissa and gave power to the Sadar Dewani Adalat to enrol pleaders for all Company's Courts., to fix the retaining for pleaders and to fix a scale based on a percentage for the value of the property. Only Hindus and Muslims could be pleaders.

Under the Bengal Regulation XXVII of 1814, pleaders were empowered to act as arbitrators and give legal opinions on payment of fees. The next important legislation was the Bengal Regulation XII of 1833 which introduced a change. In that only person duly qualified, to whatever nationality or religion they might belong would be enrolled as pleaders of the Sadar Dewani Adalat.

The Bengal Practitioners Act, 1846, made three important changes namely:

(1) the office of pleaders was thrown open to all persons of whatever nationality by the Sadar Courts to be of good character and duly qualified for the office:

(2) attorneys and barristers of any of Her Majesty's Courts in India were eligible to plead in any of the Sadar Courts subjects to the rules of those Courts as regards language or otherwise

(3) the pleaders were permitted to enter into agreements with their clients for their fees for professional services. The Act did not affect certain Vakils entitled to appear before the Village munsif and other authorities specified under the Madras Code.

The Legal Practitioners Act, 1855, permitted also barristers and attorneys of the Supreme Court not entitled till then to be admitted as pleaders in the Courts of the East India Company, subject to all the rules in force in the Court relating to language and other matters: connected with pleadings. It was also provided that a pleader was not bound to attend the Court except at the hearing of a case in which he was employed, thus barristers and attorneys were "empowered to practise in the Company's Courts while the Indian Legal practitioners could not appear before Courts.

The position clearly underwent a change after the British Crown took over the administration of the country from the Company and the Government of India Act, 1858, was passed. *The Indian High Courts Act, 1862* was enacted by the British Parliament authorising the setting up by Letters Patent of High Courts in the several presidencies in place of the respective Supreme Courts and the Sadar Dewani Adalats & Sadar Nizamat Adalats. Clause 9 of the *Letters Patent of 1865* which replaced the earlier Letter Patent creating a High Court in Calcutta authorised it to approve, admit and enrol advocates, Vakils and attorneys. The persons so admitted were entitled to appear for the suitors of the High Court in the Letters Patent issued for the High Courts of Bombay and Madras. Several other High Courts came to be established later.

(iii) The Legal Practitioners Act, 1879:

The Legal Practitioners Act, 1879, which is in force today to a limited extent and is applicable now only to a limited class of persons as stated later in the article while dealing with the Advocate Act, 1961, was enacted to consolidate and amend the Law relating to legal practitioners of the High Court except the revenue agents were under the disciplinary jurisdiction of the High Courts under this Act. The Attorneys were under the disciplinary jurisdiction of the High Courts under the Letters Patent. The revenue agents were subject to the disciplinary authority of the Chief Controlling Revenue authority.

Section 4 of the Act empowered an advocate or Vakil on the roll of any High Court, or a Pleader of the Chief Court of the Punjab to practise in all the Courts subordinate the Court on the roll of which he was entered and in all revenue offices situated within the local limits of the appellate jurisdiction of such court subject to the rules relating to the language of the Court and also practice in any Court in British India other than a High Court on whose roll he was not entered and in any revenue office. There was proviso, however, to the effect that this power would not extend to the original jurisdiction of the High Court in a Presidency Town. The High Court could dismiss any advocate so enrolled from practice but not without application and opportunity of defending himself.

In the Chartered High Courts rules had been framed. The persons who could be enrolled as advocates were barristers of England or Ireland or members of the Faculty of the Advocates of Scotland. An additional qualification by way of reading in chambers was also required. The High Court other than the Calcutta High Court allowed also persons who were not called to the Bar to enrol as advocates. Rules had been made by the Chartered High Courts. The Rules of the High Courts varied. In Madras a person who had taken a degree was qualified and underwent training with a practising advocate, vakil or attorney for a year. In Calcutta the requirement for admission of the vakil was that he should have been a graduate in Arts or Science, taken a degree in law and served as an articled Clerk with a vakil of five years' standing. Similarly, rules had been made by the other High Courts also.

The High Courts were given the power, under section 6 to make rules as to the qualifications, admissions, and certificates of proper persons to be:

(a) Pleaders of the subordinate Courts and of the revenue offices and

(b) To be mukhtars of subordinate courts, and the fees to be paid for the examination and admission of such persons. The rules made by different High Courts regarding the qualifications of pleaders varied. In this connection it may be pointed out that in *Regina Ghua'* and in the matter of application by Miss Sudarshan Sabala Hazara' the Calcutta and Patna High Courts held that under the Rules made by the High Court under Section 6, women could not be admitted and enrolled as pleaders.

To remove doubts entertained as to the eligibility of women to be enrolled, *the Legal Practitioners (women) Act, 1923*, was passed to provide that notwithstanding anything contained in the

previous enactments or other provisions in this regard, "no Women shall, by reason only of her sex, be disqualified from being admitted or enrolled as a legal practitioner" and the number has been increasing every year. Reference may be made to the rules in Madras under which law graduates and graduates and who passed the pleadership examination if not enrolled in the High Court, could practice in all the civil and criminal Courts in the three contiguous districts by getting enrolled as Ist grade pleaders. Persons could get enrolled as 2nd grade pleaders if they were graduates in Arts only and had passed the pleadership examination.

Section 27 empowered the High Court to fix and regulate from time to time the fees payable by any party in respect of his adversary's advocate, pleader, vakil, mukhtar or attorney. Section 36 of the Act dealing with touts, which will continue to be in force even after all the Provisions of the Advocates Act are brought into force, empowers district judges, sessions Judges, district magistrates and presidency magistrates, every revenue officer not being below the rank of a Collector of a district and Chief Judge of a Presidency Small Causes Court to frame publish lists of persons proved to their satisfaction by evidence or general reports or otherwise to be touts. No persons' name is to be included in any such list without giving him a opportunity or showing cause against such inclusion. The Court or Judge may exclude from the precincts of the Court any person included in such list. A person so named is punishable with imprisonment or fine.

(iv) The Chamber Committee and the Indian Bar Councils Act, 1926

Dissatisfaction was expressed about the distinction that existed- between barristers and vakil, and the special privileges enjoyed by the British barristers and solicitors. Consequently, the Government of India had to constitute in November 1923, the Indian Bar Committee known as the Chamber Committee to report on:

- (i) The proposals made from time to time for constitution of Indian Bar, whether on all India or provincial basis, with particular reference to the constitution, statutory recognition, functions and authority of a Bar Council or Bar Councils, and their positions, vis-à-vis High Courts.
- (ii) The extent to which it might be possible to remove the distinction enforced by statute of practice between barristers and vakils.

On the question of the continuance of the dual system in Calcutta and Bombay, the Chamber Committee was sharply divided and hence did not make any recommendation. The significant recommendation of the Committee was regarding the establishment of Bar Councils for the High Courts.

The Bar Councils Act, 1926 passed with a view mainly to implementing some of the recommendations of the Chamber Committee and to consolidate and amend the law, relating to the legal practitioners. The Indian Bar Councils, Act, 1926 received the assent of the Governor-General on 9th September 1926. Bar Councils were constituted in the different provinces on different dates in and after 1928.

The Act introduced, inter alia, two main changes. Firstly, it made separate provision for advocates while the Legal Petitioners Act of 1879 continued to be applicable to other legal practitioners.

Every Bar Council was to comprise of fifteen members, with the Advocate General as an ex-officio member, and four members nominated by the High Court, and ten members elected by and from amongst advocates of the High Court. With reference to the High Court of Fort William in Bengal and Bombay, a certain proportion of the members had to be advocates entitled to practise on the original side, and out of them a number fixed by the High Court has to be the barristers of England and Scotland. The Advocate-General in the Bar Councils of Madras, Bombay and Calcutta, was to be ex officio Chairman. The term of the Bar Council was for a period of three years.

The High Court had to prepare and maintain a roll of advocates, vakils and pleaders entitled as of right to practise immediately before the date when sanction of the Act was brought into force and of

all and others admitted thereafter as advocates. While with reference to advocates the date of admission as advocates was the date of call to the bar if it was earlier.

While the roll was maintained by the High Courts, Section 9 authorised the Bar Council, with the sanction of the High Court to make rules to regulate the admission of persons to be advocates, to prescribe the qualifications of persons applying for admission as advocates, to regulate the admission as advocates, by rules as their qualifications and the hearing of objections by the High Court preferred on behalf of the Bar Council

The qualifications for admission as laid down under the rules permitted inter alia those who had taken a degree in law and barristers and attorneys to be enrolled. The rules in some Bar Councils provided for a period of training as a pupil for a year by way of compulsory attendance in the chambers of the master (as advocate of a certain years' standing), maintenance of diaries, by the Bar Council. The rules in this regard varied in the different Bar Councils.

An applicant for enrolment had to pay a stamp duty for the entry in the rolls as provided for under the Indian Stamp Act. While the papers of the applicant for enrolment had to be presented to the Bar Councils, the enrolment was actually moved before the High Courts after the certificates were issued by the Bar Councils

Section 14 of the Act empowered an advocate to practise: -

(i) in the High Court where he was enrolled, subject to the rules of conditions to be made by the High Courts of Fort William in Bengal and at Bombay regarding persons practising in the High Courts, and in the exercise of their original jurisdiction.

(ii) in all subordinate Courts and tribunals (whether in the High Court where he was enrolled or not).

It may be pointed out that under the Act, the power of enrolment of advocates virtually remained in the High Court. The function of the Bar Council was advisory in nature. The Act did not affect the original side of the Calcutta and Bombay High Courts. Further the attorneys of Calcutta and Bombay High Courts were not affected by the Act and the enrolment of the disciplinary jurisdiction over the attorneys continued to be in the hands of the High Courts under their respective Letters Patent. The right of the advocates of one High Court to practise in another High Court was made subject to the rules made by the High Court.

The rules made by the Bar Councils had stipulated that advocates of other High Courts would be permitted to appear and plead in the respective High Courts only with the permission of the Chief Justice provided all advocate enrolled in that High Court appeared with him. The provisions in the Bar Councils Act were regarded as unsatisfactory.

The recommendations of an India Bar Committee and the Law Commission

The Bar was not satisfied with passing of the Bar Councils Act, 1926. The Act had not covered the pleaders, mukhtars and Revenue agents practising in the mofussil courts and Revenue offices and consequently did not set up a unified Indian Bar. Further the powers conferred on the Bar Councils constituted under the Act were limited and the Bar Councils were neither autonomous nor had any substantial authority. Therefore, several non-official members' bills had been introduced to amend the law relating to the legal profession and had lapsed and nothing concrete emerged. With the coming into force of the Constitution in 1950 and the establishment of a Supreme Court for India the need for an all-India bar was stressed by the legal fraternity. In this situation, the Union Government set up a committee known as the All-India Bar Committee under the Chairmanship of Justice S.R. Das of the Supreme Court.

Subsequently in 1955 the Law Commission, presided over by Mr. M.C. Stelvad, then Attorney-General of India, in its fourteenth report on the Reform of Judicial Administration endorsed the recommendations of the All-India Bar Committee, as regard the creation of a unified All India Bar as well as the establishment, composition and functions of the State and all India Bar Councils.

To implement the recommendations of the All-India Bar Committee and of the Law Commission in its fourteenth report, the Legal Practitioners Bill, 1959, was introduced in the Lok Sabha on 19th November 1959. The Bill was to amend and consolidate the law relating to legal practitioners and to provide for the constitution of State Bar Councils and an All-India Bar Council.

When the Bill came to be passed, the name legal Practitioners Bill was changed into the Advocate Act.

The Advocates Act, 1961, which received the assent of the President of India on the 18th of May, 1961, extends to the whole of India, except the State of Jammu and Kashmir. Under Section 1, the Act is to come into force on such date as the Central Government may, by notification in the official gazette, appoint and different dates may be appointed for different provisions of this Act.

Broadly speaking, the main features of the Act are:

- (i) to have, in course of time only one class of legal practitioners viz. advocates,
- (ii) to take away the powers till then vested in the Courts, in the matter of admission of advocates and the maintenance of the rolls, and their disciplinary conduct (subject to an ultimate appeal to the Supreme Court), and
- (iii) the constitution of a Central Bar Council with powers, inter alia, to recognise the degree in law for admission as advocates. Every Bar Council constituted under the Act is a body corporate having a common seal, and may, by the name of which it is known sue and be sued.

(i) Every State Bar Council consists of-

(i) the Advocate-General as the ex-officio member (for the Bar Council of Delhi, since there is no Advocate-General for the Union Territory of Delhi, the Additional Solicitor General was made the ex-officio member, and when the office was made the ex-officio member, and when the office was abolished, the Solicitor-General of India was made ex-officio members, and

(ii) in the case of the Bar Councils of Assam and Nagaland, Orissa, Delhi and Himachal Pradesh fifteen other members and in the case of all the other State Bar Councils twenty other members elected in accordance with the system of proportional representation by means of the single transferable vote from amongst the advocates on the electorate of the State Bar Council concerned.

The Act as originally passed prescribed a term of six years for an elected member of a State Bar Council subject to the principle of rotation, but this provision has since been amended and the term as now fixed is four years from the date of the publication of the result of the election.

Even State Bar Council has

- (i) one or more disciplinary Committee,
- (ii) an executive Committee, consisting of five members,
- (iii) an enrolment Committee, consisting of those members and
- (iv) each other Committees as may be deemed necessary.

Every disciplinary Committee consists of two persons elected by the Council from amongst its members and one other person co-opted by the council who have practised for at least ten years, Each Bar Council has a chairman, and a Vice-Chairman elected in such manner as may be prescribed and has to appoint Secretary, and an accountant, if necessary

The functions of a State Bar Council are to admit persons as advocates on its roll, to prepare and maintain such roll, to entertain and determine cases of misconduct against advocates on its roll; to safeguard the rights privileges and interests of advocates on its roll, to promote and support law reform; to provide for the Election of its members; to perform all other functions assigned to it by or under the Act and to do all other things necessary for discharging the aforesaid functions.

(ii) The Bar Council of India: Membership and Function

The Act provides that there shall be for the territories to which the Act extends a Bar Council known as the Bar Council of India, which consists of the Attorney General of India, and the Solicitor-General of India as ex-officio members, and one member elected by each State Bar Council from amongst its members. There shall be a Chairman, and a Vice- Chairman of the Bar Council of India elected as prescribed by rules and a Secretary, and an Accountant, if any, under Section 7.

The functions of the Bar Council of India are to prepare and maintain a common roll of advocates, to lay down standards of professional conduct and etiquette for advocates, to lay down the procedure to be followed by its disciplinary committee of each State Bar Council; to safeguard the rights; privileges and interests, of advocates; to promote and support law reform; to deal with and dispose of any matter arising under Act, which may be referred to it by a State Bar Council to exercise general supervision and control over State Bar Councils, to promote legal education and to lay down standards of such education, the consultation with the Universities whose degree in law shall be a qualification for enrolment of an advocate and for the purpose visit and inspect Universities; to manage and invest the funds of the Bar Council, to provide for the election of its members; to perform all other functions conferred on it by or under the Act and to all other thing necessary for discharging the aforesaid functions.

The Bar Council of India is to have one or more disciplinary Committee, a Legal Education Committee, an executive Committee, and such other Committees as may be deemed necessary. Every disciplinary committee is to consist of three members, two persons elected by it from amongst advocates as have practised for at least ten years. The senior most advocates from amongst its members is to be chairman of the committee. The legal education committee consists of ten members of whom five are persons elected by the Council from amongst its members and the other five are those who are not members of the Council. The executive committee consists, or the members elected by the Council from amongst its members.

The main source of income of the Bar Council of India is the contribution of 40 per cent out of the fee of Rs. 250 paid by each applicant for enrolment to the State Bar Council.

(iii) Senior Advocates

Persons who were "senior advocates immediately before the appointed day, i.e. 1-12-1961 have been deemed to be senior advocates for the purpose of the Act. Besides, power has been conferred under Section 16 of the Act to the Supreme Court and the High Courts to designate any advocate as senior advocate if in its opinion by virtue of his ability, experience and standing at the Bar, he is deserving of such distinction. Senior advocates are governed by the rules of the Supreme Court applicable to them and are also subject to the restrictions laid down by the Bar Council of India in the interest of the legal profession.

(iv) Qualifications, for admission as an advocate

Section 24 of the Act lays down the qualification for admission as an advocate. Broadly speaking, the following are entitled to be admitted as advocates, if they fulfil also certain other requirements laid down under the Section:

- (i) A person who has obtained a degree in law from any University in India or from any University outside the territory of India, recognised by the Bar Council of India for the purposes of the Act,
- (ii) A barrister;
- (iii) A vakil or a pleader who is a law graduate if his application for enrolment was made within two years from the appointed day viz. 1-12-1961;
- (iv) A person who has for at least three years been a vakil or a pleader or a mukhtar or was at any time entitled to be enrolled under any law for the time being in force as an advocate of a High Court or of a Court of a Judicial Commissioner or in any Union Territory.

An applicant for admission has to be a citizen of India and should have completed the age of 21 years. He should pay a fee of Rs. 250/- to the State Bar Council and should fulfil the other

requirement as laid down by the rules of the State Bar Councils, which generally include an application for admission on the production of the certificate granted by the University in respect of the degree in law granted by the University, and character. However, a national of any other country may be admitted as an advocate in a State roll, if he is a citizen of India duly qualified and permitted to practise law in the country.

If the application is on the basis of the degree in law obtained from a University in India or outside the territory of India, Section 24 (1) (d) requires that the applicant should have undergone a course of training in law and passed an examination both of which prescribed by the State Bar Council. Under the rules of the State Bar Councils, the Course of training, which was originally for a period of one year, has subsequently been reduced for an advocate to a period of six months. It has to complete apprenticeship under an advocate of certain years standing, attendance at Courts and at Chambers, maintenance of diaries, attendance at lectures, and the passing of an examination on some subjects.

With regard to a barrister also, the Bar Council of India has specified, the same requirement as to a degree in law. A provision to this sub-section as amended provides that the clauses as to training and examination shall not apply to:

- (1) Any person who have obtained a degree in law from any University in India on the results of an examination held before the 31st day of March, 1964, or such other later date as may be prescribed, or a barrister who, was the Bar before such date, or a barrister who, having qualified later that date, has received such practical training in law as may be recognised in this behalf by the Bar Council of India.
- (2) Any person who has for at least two years held a judicial office in any area which was comprised before the 15th day of August 1947 within India as specified in the Government of India Act, 1935, or has been an advocate of any High Court in any such area:
- (3) Any person who has practised before any High Court and who had discontinued practice by reason of his taking up employment under the government, or local authority or any other person: and
- (4) Any other class of persons by reason of their legal training or experience are declared by the Bar Council of India to be exempted from the provision of this clause.

The last date mentioned in the proviso had owing to agitations and representations, frequently been extended and sub-section was amended as above in 1964. Even the amendment of 1964 could not be final on the subject. The Government of India's latest notification relevant on the matter has narrowed down the scope of the requirement as to training and examination practically making it a nullity. Training and examination will not be necessary according to the notifications if the applicant has taken the degree of law (after undergoing a course of instruction the three years (laid down by the rules of the Bar Council of India) or has been called to the Bar on or before 31.12.1968, or if he had taken the master's degree in law.

(v) Legal Qualifications

The degree in law mentioned as one of the qualifications for admission, may be degree in law:

- (i) of a university in India, or
- (ii) of a university contains the territory of India.
- (iii) A degree in law of University in India;

The standards laid down by the Bar Council of India on legal education and recognition of degree of law of the University prescribes inter alia the following conditions:

A person to be eligible to join the course of study in law should be a graduate of university or hold such academic qualification which is considered by the Bar Council of India equivalent to a graduate degree of a university. The duration of the course of instruction shall be three years. This is

with reference to those who join the course of instruction in or after the first term of the academic year 1967-68. In the case of fourteen universities, however, for reasons considered sufficient by the Bar Council of India, it was the first term or the academic years 1968-69 instead of 1967-68. The course of instruction comprises ten compulsory subject and six others as optional as mentioned in the rules.

During the last year of the course, the instruction and practical training should also be imparted for a period of six months in the rules of courts and in drafting and pleadings and documents.

According to the resolution of the Bar Council of India, practical training would include pleading and conveyancing, moot courts and conducting civil and criminal proceedings, attending courts; maintaining a record of the above three requirements and arrangements of at least six lectures of professional ethics, attendance at four of which shall be compulsory. The scope and nature of training as set out in this resolution is not to be deemed as exhaustive. It should thus be open to the Universities and law colleges to add to the same and work with Bar Council of India at the earliest. Practical training should be made a part of the examination system for which marks should be assigned and awarded.

The rules on standards of legal education were made, as required under the Act, in consultation with the Universities imparting legal education and the State Bar Councils. In accordance with the above rules, the Bar Council of India in exercise of the powers conferred under section 24 (i) (c) (iii) of the Advocates Act, has recognised degrees in law obtained from any of the Universities which fulfills the requirements of rule II of its rules and obtained by those who had commenced the three-year -course of instruction as provided for, in the first terms or the academic year 1967-68 by actual attendances at colleges. Under the powers vested in it, it has predicted the postponement of the three-year course to the academic year 1968-69 in the case of the Universities of Kanpur, Madras, Meerut, Bangalore, Aligarh, Mysore, Bhagalpur, Patna, Agra, Ranchi, Behrampur and Jiwaji, Sardar Patel and Vikram Universities, one of the functions of the Bar Council of India is as mentioned earlier, to visit and inspect Universities, imparting legal education.

(i) Conditions for admissions to roll

Section 28 of the Act empowers the State Bar Councils to make rules, subject to the approval of the Bar Council of India. The rules can be made, inter alia, on the conditions subject to which a person may be admitted as an advocate on the roll of Bar Council. The rules accordingly made by State Bar Councils generally prohibit the enrolment of a person who though he may be otherwise qualified, is in full or part time service or employment or is engaged in any trade or profession. The prohibition against enrolment does not apply to certain categories of persons specifically referred to in the proviso to the rule such as 'law officers' fulfilling certain conditions, articled clerk or an attorney, a person in part-time service as a professor or Lecturer, teacher in law of a person who by virtue of his being a member of a Hindu Joint Family has an interest in a Joint management thereof or other classes of persons specifically exempted after approval by the Bar Council of India.

The compulsory subjects are: Indian Legal and Constitutional History, Contracts, Torts, Family Law including Hindu and Mohammedan Law; Evidence, Legal Theory (Jurisprudence and Comparative Law): Civil Procedure, Limitation and Arbitration.

(ii) Application for admission to roll

An application for admission as an advocate has to be made in the prescribed form to the State Bar Council within whose jurisdiction the applicant proposes to practice. Applications for enrolment have to be referred to and disposed of by the enrolment committee of the State Bar Council. But if the enrolment committee proposed to refuse such applications, it has to refer the application with the statement of the grounds in support of the refusal to the Bar Council of India and has to dispose of the application finally in conformity with such opinion.

(iii) Right to practise

Chapter IV of the Advocates Act regulates the right of Advocate to practice. One of the objects of the Act is to have in course of time only one class of legal practitioners. Section 29 provides that

subject to the provisions of the Act as from the appointed day 1.6.1969, there shall be only one class of persons entitled to practice throughout the territories through which the Act extends in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence of before any other authority or person before whom such advocate is entitled to practise. Further under Section 33 advocates alone are entitled to practise in any Court.

(iv) Practice by persons not entitled to practice:

Persons illegally practising in Courts or before other authorities when they are not entitled to practise under the provisions of the Act are liable for punishment with imprisonment for a term which may extend to six months.

(v) Some important powers of the Bar Council or India:

Apart from the other powers already enumerated the Bar Council of India has been specifically conferred certain special powers.

1. Power to remove name from the rolls.

The Bar Council of India is empowered, either on a reference made to it or otherwise, if it is satisfied that any person has got his name entered in the roll of the Advocates by misrepresentation, to remove such person from the roll of advocates after giving him an opportunity of being heard. The Bar Council of India or any State Bar Council may also remove from the common roll or the State roll as the case may be, the name of any advocate, who is dead or from whom a request has been received to that effect. Besides, the name of advocate may be removed from the roll as punishment for misconduct in disciplinary proceedings.

2. Revision

Apart from the power vested in it to remove the name of an advocate in certain cases, and the power vested in its disciplinary committees to hear and dispose of the disciplinary matters whether by way of original hearing or on appeal, the Bar Council of India has the power at any time to call for the record of any proceedings under the Act, which has been disposed of by a State Bar Council or a Committee thereof, and from which no appeal lies, for satisfying itself as to the legality or propriety of such a disposal and may pass such orders thereon as it deemed fit. No order which prejudicially affects any person can be passed without giving him a reasonable opportunity of being heard.

3. Directives

Section 48 B empowers the Bar Council India for the proper and efficient discharge of the functions of a State Bar Council or any committee thereof, to give such directions to the State Bar Council or its committees as may appear it to be necessary, and the State Bar Council or the Committee has to comply with the directions. Where a State Bar Council is able to perform its functions for any reason whatsoever, the Bar Council of India may give such directions to the ex-officio member thereof as may appear to it to be necessary, and such directions shall have effect, notwithstanding anything contained in the rules made by the State Bar Council.

4. Rules 'to make and approval'

Section 15 enumerates the powers of the State Bar Councils and the Bar Council of India to make rules on the matters dealt with Chapter II of the Act relating to the Bar Councils. Section 28 gives power to the State Bar Councils to make rules on some matters connected with the preparation of rolls, training and examinations for admission of advocates, form of application for enrolment and conditions for enrolment. Any rule made by State Bar Council, whether under Section 15 or 28 shall have effect only if it has been approved by the Bar Council of India. It may be noted in this connection that under the Indian Bar Councils Act, 1926, the rules made by the Bar Councils required the previous sanction of the High Court.

Section 49 confers on the Bar Council of India a general power to make rules for discharging its functions under the Act. Besides the rules referred to earlier in this article they include rules on standards of professional conduct and etiquettes by Council advocates, principles for guidance of the State Bar Councils and the manner in which directions issued or orders made by the Bar council of India may be enforced, and 'any other matter which may be prescribed'. The Bar Council of India has made its rules on all these matters.

Supreme Court Rules to regulate the legal profession

Prior to the coming into force of the Constitution, the Federal Court was empowered under Section 214 of the Government of India Act, 1935 to make rules, with the approval of the Governor General, for regulating the practice and procedure of the Court including rules as to the persons practicing before it. The Federal Court rules, 1942 prescribed the qualifications of persons to be enrolled before it. The rules permitted the persons of ten year standing to be enrolled as senior advocates. No person could appear as an advocate before the Federal Court unless instructed by an agent.

Article 145(1) of the Constitution empowers the Supreme Court to make rules, with the approval of the President inter alia as to persons practicing before it. The Advocates Act, 1961 confers on all advocates whose names are on the rolls maintained under that Act to practice, inter alia, in the Court. The Supreme Court Rules, 1950 made in exercise of powers under Article 145(1) provides for the enrolment of persons as advocates who are entitled to practice before it. The rules laid down that the role of Supreme Court shall be in two parts, seniors and others. Persons who had more than ten years standing could be enrolled as senior advocates.

Order IV of the Supreme Court Rules deals with the Advocates. Rule 2(b) places some restrictions on the senior advocates. Rule 3 provides that every advocate appearing before the court shall wear robes and costumes as may from time to time be directed by the Court. In pursuance of this rule the Chief Justice of India directed that the costume that be worn by the advocates appearing before the Supreme Court should be black coat, robe and band worn by the barristers appearing before the High Courts. The rules also provide for registration of advocates on record and advocate who is not a senior advocate. Rule 5 lays down that an advocate shall not be qualified to be registered as an advocate on record unless he has undergone training for one year with an advocate on record approved by the Court and has thereafter passed such tests as may be held by the Court for advocates who apply to be registered as advocates on record. The particulars of the test are to be notified in the official gazette from time to time. The rules however, exempt an attorney from such training and test. An advocate on record is required to have an office in Delhi within a radius of ten miles from the Court house and give an undertaking to employ within one month of his being registered as an advocate on record, a registered clerk. He is also required to pay a registration fee of twenty-five rupees.

The Supreme Court Advocate (Practice in High Court) Act, 1951, conferred the right on every advocate of the Supreme Court, to practice in any High Court whether or not he is an advocate of that High Court. In ***Aswani Kumar Ghosh v. Arabindha Ghosh***, the Supreme Court held by a majority that an advocate of the Supreme Court became entitled as of right to appear and plead as well as act in all the High Courts in India and that he is also entitled to appear on the original side of the West Bengal and the Bombay High Courts without being instructed by an attorney and free from the restrictions in this regard to the Rules of the High Courts of West Bengal and Bombay.

In view of the provision of the Advocates Act, 1961, there has been no further admission of persons as advocates of the Supreme Court after 1.12.1961, when Chapter III of the Advocates Act came into force.

Under Section 50 (3) (d) of the Advocates Act, 1961- the Supreme Court Advocates (Practice in High Court) Act, 1951 shall stand repealed on the date when Chapter IV of the Advocate Act comes into force and as noted earlier, Section 35 in Chapter IV of the Act has not yet been brought into force.

CONCLUSION

What has been enumerated above will show that the Advocates Act, 1961, has marked the beginning of a new era in the history of the legal profession by vesting largely in the Bar Councils the power and the jurisdiction which the Courts till then exercised, by fulfilling the aspirations of those who had been demanding an all Indian Bar and effecting a unification of the Bar in India, power to practise in all the Courts and bound by rules made and code of conduct laid down by their own bodies to which the members of Council resort to for the protection of their rights, interests or privileges. The Act has enabled representatives from the several States to come together to a common forum and has brought about integration.

The conferment of the power in respect of legal education and the recognition of the degree in law and the power to visit and inspect universities imparting legal education, have resulted in a uniform pattern of legal education, while at the same time preserving intact the powers and responsibilities of the universities. A word of caution is necessary at this stage. The problem of language in so far as any rate as regards legal education might present difficulties and would seem to be of utmost magnitude. This would require defect less handling.

An attempt had been made to provide by legislation for the Attorney-General of India to be the ex-officio Chairman of the Bar Council of India and for the Advocate-General in the States to be the Chairman of the Bar Councils. But this had been stoutly resisted by the Bar Councils, on the ground that it would encroach upon the autonomy given to the Bar Councils. As a result, the Government had to drop the matter.

A few matters have to be set right by legislation. Of these may be mentioned the existing provisions under Section 49-A. Agitations have been there for putting an end to the dual system.

In the last ten years, the Bar Council has had an onerous task to perform. The foundation having been laid, the members of the legal profession and the public are entitled to look forward to the Bar Councils for the discharge of their functions and obligations.

धर्म मूलम्/Dharma Moolam*

Sources of Law*

The ancient Dharmashastra declared that Dharma, which included the 'law', was binding on the king. According to Rajadharma, the king was given the power only to enforce the law. Dharmashastra did not confer on or recognise any legislative power in the king. This is the most important distinction between the concept of kingship in India and the concept of kingship in the western countries. According to western concept, the King was the fountain of all the three important limbs of the State viz., the Legislature, the Executive and the Judiciary. But under the kingship as recognised and established under the Dharmashastra the laws were those laid down by the Dharmashastra themselves. They did not authorise the king to lay down new laws or amend the provisions of Dharmashastra. On the other hand, Dharmashastra also laid down the laws governing the conduct of the king himself (Rajadharma).

1. King not to legislate

Apart from not recognising the power to make law in the king, Dharmashastra positively ordained that the king shall not legislate.

Kat. 45:

तस्माच्छास्त्रानुसारेण राजा कार्याणि साधयेत् ।
वाक्याभावे तु सर्वेषां देशदृष्टेन सन्नयेत् ॥
अस्वर्गा लोकनाशाय परानीकभयावहा ।
आयुर्बीजहरी राज्ञां सति वाक्ये स्वयं कृतिः ॥

A king should decide causes according to rules of Shastras. In the absence of a provision in the texts he should follow the usages.

The king should never act according to his own fiat. Such an action on the part of the king causes danger to him and brings ruin to the people.

2. Recognised sources of law

The sources of law which were recognised and accepted were:

Manu II.6:

वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ॥

Veda is the first source of Dharma. The expression by the Seers (Smritikaras), handed down from generation to generation by memory, the virtuous conduct of those who are well versed in the Vedas, and lastly, what is agreeable to the good conscience, are the other sources.

Yajnavalkya 1-7:

श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक्सङ्कल्पजः कामो धर्ममूलमिदं स्मृतम् ॥

* Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* 13-18 (LexisNexis Publication, 1st edn., 2022).

The Vedas, the Smritis, good conduct or approved usage, what is agreeable to conscience proceeding from good intention, are the sources of law.¹

Gautama p.234-19-20:

तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणम् ।
देशजातिकुलधर्माश्चाम्नायैरविरुद्धाः प्रमाणम् ॥

Administration of justice shall be regulated by the Veda, the institutes of the sacred law, the Vedangas and the Purana. The customs of countries, castes and families which are not opposed to the sacred laws have also authority. Cultivators, traders, herdsmen, moneylenders and artisans have authority to lay down rules for their respective classes. (Br. p.278-28 is to the same effect).

The rule of Manu read with that of Yajnavalkya, Gautama and Brihaspati indicates that the Smriti writers were fully conscious of the changing needs of the society. Therefore, they specifically made Sadachara i.e. good custom or practice agreeable to the conscience of the people, who are well intentioned and who have regard for the welfare of society, as a source of law. The expression Sadachara was defined by Harita:

Harita Q.P.M. 1-Part I, p. 144:

साधवः क्षीणदोषाः स्युः सच्छन्दः साधुवाचकः ।
तेषामाचरणं यत्तु स सदाचार उच्यते ॥

The word sat means good, and the good are those who are pure and free from stigma, and the practice of such people is called Sadachara.²

The above definition impressed that it was not any and every custom that could acquire the force of law. The custom or usage, in order to secure social recognition, must be that acceptable to honest and reasonable persons, whose character and conduct were beyond reproach. This was the residuary provision, which enabled the adaptation of an existing law, to suit the needs of time or to provide for matters not covered by the Shruti and Smritis. This provision was fully utilized by the great galaxy of jurist commentators, to mould the law to suit the requirements of the changed circumstances, as pointed out later in this book.

3. Superiority inter se between the sources of law

As more than one source was indicated as the sources of law, the basic principles regarding the superiority inter se of the laws as found in the various sources, whenever there was conflict, were also laid down.

Vyasa 1-V-4. states:

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वे स्मृतिचक्रा ॥

Whenever there is conflict between Shruti (Vedas), Smritis and Puranas, then what is stated in the Shruti should be taken as authority.³

4. Resolving conflict as between the Smritis

¹ Sarvadhikari, p. 107-108, also H. D. Vol. III p. 100.

² H. D. Vol. III p. 856.

³ T. L. L. 1905 p. 68

Yaj. II 21-1:

स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।

Where two Smritis conflicts, principles of equity as determined by popular usages shall prevail.

The above rule indicates, even in the cases of conflict between two Smritis, the king was not given any power or discretion to make a choice, but he was required to apply the law as approved by custom and usage by the people themselves.

5. Usage to have an overriding effect

Sm. Ch. p. 58- quotes Pitamaha and states:

यद्यदाचरति श्रेष्ठो धर्म्यै वाऽधर्म्यमेव वा ।
कुलादिदेशाचरणाच्चरित्रं तत्प्रकीर्तितम् ॥
ग्रामगोष्ठपुरश्रेणीसार्थसेनानिवासिनाम् ।
व्यवहारश्चरित्रेण निर्णेतव्यो बृहस्पतिः ॥
देशपत्तनगोष्ठेषु पुरग्रामेषु वासिनाम् ।
तेषां स्वसमयैर्धर्मशास्त्रतोऽन्येषु तैस्सह ॥

Whatever be the best practice, whether in accordance with law or not, that is declared to be the usage by reason of being practised by families and the country. Transactions between inhabitants of a village, colony, town and farmers' guild, caravan etc., should be decided according to the usage as laid down by Brihaspati. This has reference to disputes inter se among the members of a village, family etc. In regard to a dispute between them and others, a decision had to be taken according to the dictates of Sastras alone.⁴

The principle enunciated by Pitamaha shows that the rules of custom or be applied when both parties to a usage of a group such as families or a village was to be a dispute belonged to the same group and in cases where they belonged to different groups, they were to be governed by the written text.

Nar. p. 15-39-40: (Dharmakosa-p. 90)

श्रुतिस्मृतिविरुद्धं च भूतानामहितं च यत् ।
न तत्प्रवर्तयेद्वाजा प्रवृत्तं च निवर्तयेत् ॥
न्यायापेतं यदन्येन राज्ञाऽज्ञानकृतं भवेत् ।
तदप्यन्यायविहितं पुनन्ययेऽनिवेशयेत् ॥

- i. When the rules of sacred law and the dictates of prudence are at variance, he (king) must discard the dictates of prudence and follow the rules of sacred law.
- ii. When it is impossible to act up to the precept of sacred law, it becomes necessary to adopt a method founded on reasoning because custom decides everything and overrules the sacred law.

The above provisions laid down that dictates of prudence could not be given an over-riding effect over the Dharmashastra. This rule meant that no one should claim to be wiser than the sacred texts of law and refuse to obey on the grounds that they were opposed to reason. However, the superiority of customs evolved on the basis of good reason and accepted and acted upon by society, over the Dharmashastra was recognised. Asahaya, an eminent commentator on Narada, holds the view that by virtue of the above provisions of Narada, in case of conflict between the sacred law and approved usage or custom the latter prevails. Therefore, Narada as also Gautama and Brihaspati, recognised the right of the people to evolve and accept by consensus and practice any changes in the law which were good for society though contrary

⁴ Gharpure, p.46 47

to written texts. This latitude gave sufficient scope for adjusting the law so as to suit the changing needs of the society and was fully utilised by the later commentators.

6. Registration of conventions under Royal Seal

So far as Shruti and Smriti were concerned they were specific and therefore the provisions contained therein were always known and ascertainable. As regards the conventions or trade usage which formed another source of law. In order to make them known to the public, specific provision was made in the Smritis for the registration of such provisions under the Royal Seal.

Kat. 48-50:

देशस्यानुमतेनैव व्यवस्था या निरूपिता ।
लिखिता तु सदा धार्या मुद्रिता राजमुद्रया ॥
तस्मात् तत्संप्रवर्तेत नान्यथैव प्रवर्तयेत् ।
प्रमाणदेशदृष्टं तु यदेवमिति निश्चितम् ॥

Whatever conventions are settled in accordance with the consent of the people (of a country) should always be preserved in writing sealed with the Royal Seal. Such conventions should be enforced just like the sacred law and the king should decide after considering them. Whatever trade conventions are reduced to writing by traders as fit to be carried out, these must be given effect to and the king should not lay down anything contrary to them.⁵

The above provision also reinforces the idea that it was for the people to evolve the law even in respect of fields uncovered by the Shruti or Smritis and that the duty of the king was only to register and enforce the law accepted by the people, against individuals who contravened them.

7. King to decide in certain cases

Pitamaha vide Sm. Ch. II p. 38:

यत्र चैते हेतवो न विद्यन्ते तत्र पार्थिववचनान्निर्णयः ।

In cases where no principle of law is found in the Shruti, Smritis or custom, the king should decide according to his conscience.⁶ (Br. P. 387-2 is similar.)

The above provision also did not authorise the king to legislate. The authority recognised that in the absence of law on any point the king could give a decision according to his best of judgment having due regard to all the facts and circumstances of the case. This is similar to the principle in the modern law which authorises the courts to decide according to justice, equity and good conscience⁷ in matters not covered by any specific provision of law.

8. Parishad to lay down or make new law

The power to decide complicated questions of law by resolving the conflicts or to lay down a new legal provision was recognised in an assembly of persons with prescribed qualifications,⁸ called the Parishad, vide Manu VIII 110-114.⁹ Even in such a situation no legislative power was vested in the king.

⁵ See Charter of Vishnu Sena issued in 725 AD vide Appendix-I which is in conformity with this provision.

⁶ Gharpure, P. 47.

⁷ See for further information, Part VII- 'Administration of Justice'.

⁸ For the composition of Assembly etc., see 'Rajadharma' under the topic Legislative Power of the King.

⁹ Classical a of India-Robert Lingat, pp. 15-16.

Kings, however, were empowered to issue Raja Shasana (Royal Edict) subject to the law declared in the Shruti and Smritis. This matter is dwelt with in greater detail under Rajadharma.

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CUSTOM AS A SOURCE OF LAW IN INDIA*

In any scheme of teaching Jurisprudence custom has an important place as a source of law. Indian teachers generally introduce this topic to their students through English and sometimes Continental materials. Even the Indian authors on Jurisprudence refer mainly to foreign materials and not to Indian materials. There is, however, a rich material in Indian social and legal history which can more appropriately be made use of in explaining the place of custom in society. A growing use of this material will help to focus attention on some of the main problems of new India. This paper is a brief attempt at noticing some of this Indian material.

I

Western Jurists

In the evolution of human society, it appears to be beyond doubt that custom arose first, law came later. Law denotes a more definitive organization of human society with some kind of power structure established. Customs arise whenever a few human beings come together, as no association of human beings can exist permanently without adopting consciously or unconsciously some definite rules governing reciprocal rights and obligations. [Vinogradoff, *Collected Papers* 420. As Paton observes, "Indeed custom is coeval with the very birth of the community itself". *Jurisprudence* 143 (2nd ed. 1951). Even a primitive tribe may have a legal order long before it has developed a state (1941) 55 *Harv. L.R.* 66-7]. It also looks to be axiomatic that, to start with, law was built upon custom. One example which immediately comes to mind is that of the English common law which in its origin was built upon custom and which later absorbed into itself the customs of the mercantile community to give to the common law world the modern Mercantile Law. [Paton, *Jurisprudence* 148 (2nd ed. 1961). "Mercantile Law, perhaps, provides one of the most interesting examples of custom". Keeton, *The Elementary Principles of Jurisprudence* 77, 81 (2nd ed. 1949). The Twelve Tables of Rome were based upon the customs of the people [Maine, *Ancient Law* 18(1946)].

Custom is regarded as a source of law by the Western jurists, though they assign importance to it to a varying degree depending upon their approach and outlook. Austin, having defined 'law' as the command of a political superior or definite human authority addressed to political inferiors and enforced by a penalty or sanction, held that custom becomes a law only when it receives judicial or legislative recognition. [According to Austin, nothing is entitled to the name 'Law' which does not possess all the attributes of state-created and state-enforced law and so, on this approach, logically, one shall have to say that customary law is not law at all, or that it is 'imperfect' or 'inchoate' law]. This excludes from the pale of law those customs which exist with all the force of law but have not come before the courts unlike those which through accident have come before the courts and have been recognized there. The rigors of Austin's theory have been mitigated by other Analytical Jurists following Austin. Holland, though practically adopting Austin's definition of law, nevertheless, holds that courts do not *proprio motu* for the time make custom a law, that they merely decide as a fact that there exists a legal custom about which there might have been some question up to that time, just as there might be about the meaning and interpretation of an Act of Parliament, and the observance of a custom is not the cause of law; but is evidence of its existence [Holland, *The Elements of Jurisprudence* 53, 55, (8th ed. 1896)]. Courts give operation to customs not prospectively from the date of such recognition, but also retrospectively; so far implying that custom was law before it received the stamp of judicial authentication. Allen also disagrees with Austin's thesis. He regards custom as "self-contained, self-sufficient, and self-justified law" and says that the function of the court is "declaratory rather than constitutive" [Allen, *Law in the Making* 67, 125-151 (5th ed. 1951)]. When a custom is proved in court by satisfactory evidence, the function of the court is merely to declare the

* M.P. Jain, "Custom as a Source of Law in India", 3 *Jaipur Law Journal* 96 (1963).

custom operative law. Thus, custom does not derive its inherent validity from the authority of the Court. The difficulty in the way of accepting this view is the veto which a court wields to declare a custom invalid on the ground of unreasonableness.

The Historical Jurists attached much greater importance to custom. They held that all early laws were customary, and that the function of legislation is limited to supplementing and redefining custom. According to Savigny, the real basis of all positive law is to be found in the general consciousness of people (*Volkgeist*). The source of law is not the command of the sovereign, not even the habits of a community, but the 'instinctive sense of right possessed by every race. Since this consciousness is invisible, it is to be discovered by the external acts which manifest itself in usages, manners and customs. Custom is thus evidence of law whose real source lies deeper in the minds of men. As a necessary consequence it follows that custom, as the external evidence of law in the abstract, possesses the force of law before it is received by the courts, and not as a result of this process. According to Savigny, the acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise; the authors of the acts must have performed them with the consciousness that they spring from a legal necessity. [Kantorowicz, "Savigny and the Historical School of Law", (1937) 53 *LQR*. 326. Thibaut seems to concede to each class of persons a power of establishing the law by their own will, but he mentions certain restrictions to narrow down the power materially. "Custom is, for the people that has established it, a mirror in which that people may recognise itself", says Puchta. To Puchta, custom was only self-sufficient and independent of legislative authority but was a condition precedent, of all sound legislation]. Of course, the flaw in this theory is that there are customs which are not based on an instinctive sense of rights in the community as a whole, but on the interests of a strong minority, for example, slavery. Though it is also true that not all customs are consciously created, growth of much customary law is not the result of conscious thought, but of tentative practice.

The fact, however, remains that for those on whom a custom operates, it is finding by itself whether or not the stage ever comes when it is debated or discussed in a court. In the consciousness of the followers of the custom, it has a obligatory force. Take the examples of India; here for long before the advent of the British, customs were observed by the people and were enforced not by the courts but by the village or community *panchayats*; the Government did not interfere with the prevalent norms. When the British system of Justice came, these very customs came to be pleaded before the courts which enforced them. In such a situation, customs did not become effective for the first time after judicial recognition. It was there already in full force; the difference was that instead of the *panchayats* it came to be enforced by the courts. Thus, the Analytical Theory does not very much fit the Indian condition.

II

Hindu View of Custom

Custom has always been given a very important place as a source of law by the Hindu Jurists. Two views have prevailed regarding the relative value of custom *vis-a-vis* the *sruti* and *smriti*. The *Dharmashastra* writers subordinated customs to *sruti* and *smriti* which were given higher authority. Thus, according to Gautam, *Dharma* (customs) of countries, castes and families, which are not opposed to *Vedic* scriptures, are authoritative and binding. Manu and Yajnavalkya declare that sources of *Dharma* are *sruti*, *smriti* and *sadachara* in that order. Apararka held the view that a custom repugnant to any 'clear' text of '*Vedas*' is to be rejected. Mitakshara, Dayabhaga, Mayukha also places custom as subordinate to *sruti* and *smriti*. This, however, was not the unanimity of opinion. There were dissenting voices against the view of subordinating customs. Visvarupa, Medhatithi favour the view that prescriptions of *smritis* (and even of *sruti*) need not be observed when they are vehemently condemned by the people (e.g. *niyoga*, though sanctioned by the texts, are, nevertheless, abhorred by custom) [Vrihaspati, Narada, Asahaya were in favour

of unqualified acceptance of custom even when they were in conflict with the written laws. Some of the *smritis* underlined the significance of customs by saying that suppression of customs would give rise to resentment and rebellion]. In one text of the *Manusmriti* itself, there is a hint to regard custom as superior to everything. According to it, *smritis* themselves embody practices of the people current in their days: *Acharya* is transcendental law, and so are the practices declared in the *Veda* and *smriti*; therefore, a twice born person desirous of his own welfare should always make efforts to follow it [Kane, *Hindu Customs and Modern Law* 33 (1950)]. The *Arthashastra* writers, e.g., Kautilya, held that usages and customs were of equal authority as evidence of law; and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice.

Whatever theory the *Dharmashastra* writers propounded of the validity of custom, the fact remains that customs have played a very important role as a material source of ancient Hindu law. The process of integrating custom with the law has always been going on; the Hindu Jurists were liberal in their attitude towards recognising and accepting them, e. g. the eight forms of marriage were recognised by *Dharmashastra* writers even though some of the forms were highly objectionable. To start with, the *dharmasutra* tried to bring the text of the *sruti* in conformity with the customs prevailing in the contemporary society at the time they were composed. Then the *smritis* drew heavily on the customs of the people for whom they were designed. That largely explains why so many various *Dharmashastra* came into being, and why they differed from each other. When the *smritis* failed to satisfy the growing needs and changing conditions of the people, the commentaries adapted the *smriti*-law, by the process of interpretation, to bring in it the customs which had taken roots in the contemporary society. What the commentaries did was to take up an old text of the *Dharmashastra* and interpret it in such a manner that it came in harmony with social mores and customs of the people. As the Privy Council has stated, "The Digest subordinates in more than one place the language of texts to custom and approved usage" [*Bhyah Ram Singh v. Bhyah Ugur Singh* (1870) 13 MIA 373, 390]. It is how, starting with the same texts as the base, two major schools of Hindu law developed in India, and that one of them came to have four sub-schools. [As observed in *Mulhukaruppa v. Sellathammal* (1916) ILR 39 Mad. 298, 301, "The commentaries indicate an attempt to reconcile the text law with the actual usages of the people". In *Rutheputty v. Rajunder* (1839) 2 MIA 132, the Privy Council has stated that different schools of law chiefly arose from the difference of local custom; the propounders of law interpreted the ancient texts in such a way as to make them harmonize with local usages, in other words, they had to harmonize the written with the unwritten. In *Balwant Rao v. Baji Rao* (1921) ILR 48 Cal. 30, 41, the Privy Council said that 'the commentators do not enact, they explain and are evidence of the congeries of customs which form the law'. In *Jogdamba v. S. S.* (1889) ILR 16 Cal. 3C7, at 375 the Calcutta High Court remarked, 'The truth is that commentaries and digests ...owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression'. It may also be pointed out that the process was not entirely one-sided; while customs were recognised, it would also be correct to say that customs also, to some extent, were modified and supplemented by the opinions of the Hindu Jurists.

In Sanskrit, the word for custom is *sadachar*. The exact import of *sadachar* has been shifting from age to age and among commentators. In the earliest days, *achara* to be followed was that observed or declared by *brahmins* who were learned in the *Vedas* and were highly moral and selfless (*sistas*). This standard gave a kind of choice or freedom to a particular jurist to be selective in accepting or recognising custom. If there was any custom which he thought was immoral or anti-social, he could discourage it by calling it as being not consonant to good conduct. Gradually, this harsh standard came to be relaxed so much so that every usage, having no visible secular purpose, came to be looked upon as binding and, lastly, the usages even of the *sudras* came to be enforced by the king.

From Gautama, Manu, Brahaspati etc., it follows that the customs and usages of which account is to be taken are those of districts (*desa* or *janpada*), towns and villages, castes, families, guilds, corporations or groups (*gana*, *sreni*, *sangh*, *naigam*, *varga*).

III

Muslim View of Custom

The two principal sources of the Islamic law are the *Koran*, as containing the word of God, and the *hadis* or traditions, being the inspired utterances of the Prophet and precedents derived from his acts. Next important sources are : *ijma*, the consensus of opinion amongst the learned; *urf* or custom; and *qiyas*, the analogical deductions from the first three.

There is no doubt that, during his life time, the Prophet himself recognised the force of customary law. He either gave his express sanction to certain pre-Islamic usages prevalent amongst the Arabs, or suffered such usages to continue without expressing disapprobation. His companions, after his death, recognised many customs which were not inconsistent with the teaching of the Islamic faith. The *hadis* contained, to a large extent, the customary law of pre-Islamic Arabia. In *Koran*, there is not much of law. Hence the rule that it must be read in conjunction with the customs then in vogue. It is thus clear that in its formative stages the Muslim law drew a good deal from the customs prevailing in Arabia. When, however, the principles of the law became settled, custom was relegated to an inferior position. Though the Muslim Jurists continued to recognise custom as a source of law on the principle "treat whatever the people generally consider to be good for themselves is good in the eye of God", nevertheless, it is now relegated to an inferior position, coming after *ijma*, i. e., it is considered inferior to the *Koran*, the *hadis* and *ijma*, but superior to *qiyas*. Hence, according to the strict rule of Muslim law, a custom opposed to the principles derived from the former sources is illegal. The conditions laid down for the validity of custom, under the Muslim law are : first, it must be generally prevalent in the country; second, it must not be merely a local usage in a village or a town, though it need not be ancient or immemorial; third, it must be an established course of conduct, not merely a practice on a few occasions; and, fourth, custom being essentially territorial, it cannot affect the law in other lands, and as it is confined to a particular period it cannot affect the custom in another age [Abdur Rahim, *Muhammadan Jurisprudence* 55, 136, 137 (1958); Tyabji, *Principles of Muhammadan Law* 415 (3rd ed. 1940)].

IV

Custom in the Modern Indian Legal System

What place was given to custom in the scheme of administration of justice in India during the British period. The Englishmen were very particular in leaving the personal laws of the people undisturbed as much as possible and this attitude characterised the whole of the British period. In 1781, the Act of the settlement passed to remove defects from the Regulating Act, 1773, directed the Supreme Court at Calcutta to decide 'matters arising out of inheritance and succession to land and goods', and matters of 'contract and dealing between party and party', 'by the laws and usages of Muhammadans', in the case of Muhammadans and 'by the laws and usages of the Gentoos' in case of the Gentoos. Provisions on the same lines were made for other Presidency towns and were repeated from time to time with slight verbal variations.

As to the *mofussil* area, i.e., the territories beyond the Presidency towns, the starting point is 1772, when for the first time, Warren Hastings created an *adalat* system in Bengal, Bihar and Orissa. The *adalats* were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to the laws of the *Koran* with respect to the Muhammadans and the laws of the *Shaster* with respect to the Hindus. In 1781, this provision was supplemented by a provision to the effect that in all cases for which no specific directions were given, the *adalats* were to act according to justice, equity and good conscience. Practically the same was repeated in S. 37 of the Bengal, Agra and Assam Civil Courts

Act of 1887 where Muhammadan law and Hindu law were substituted for 'the law of the *Koran* and the law of the *Shaster*' respectively. No mention was made in this provision of custom. Warren Hastings had supposed that the Hindus and Muslims were governed by their religious or sacredotal texts; he failed to appreciate that more than these texts, the local and personal usages had come to play an important role in the lives of the people. In course of time, better knowledge came to prevail amongst the British administrators regarding the Indian conditions, and then custom came to be given its due importance. Thus in 1827, when Monstuart Elphinstone legislated for the territories annexed to the Bombay Presidency, Regulation IV of 1827, in S. 26, deviated from the Bengal model by giving precedence to custom; it laid down that "the law to be observed in the trial of suits shall be Acts of Parliament and regulations of Government applicable to the case; in the absence of such Acts and regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and, in the absence of specific law and usage, justice, equity and good conscience alone". In S. 16 of the Madras Civil Courts Act, 1873, it was laid down that to decide any question regarding succession, inheritance, marriage or caste, or religious institution, "the Muhammadan law...and the Hindu law..., any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision. "

The above provisions did not follow a uniform pattern insofar as the question of the relative position of custom *vis-a-vis* the personal law (as contained in the religious books) was concerned. Except for the Bombay Regulation, all other provisions left the question vague. Only the Bombay Regulation clearly assigned precedence to custom over the personal law. The Madras provision did mention 'custom' but did not explicitly give any precedence to it over rules of personal law. The Bengal provision did not mention custom at all. Courts were thus confronted with the question: in case of conflict between the custom and the written text of law, what was to be followed? Insofar as the Hindus were concerned, the courts, taking note of the great importance given to custom in the ancient India, ruled early that "under the Hindoo system of law, clear proof of usage will outweigh the written text of the law", which came to mean that if a custom is proved to be established on a point of Hindu law, then the courts are bound to follow it even though it may be inconsistent with some express text in the *Dharmashastra* or the commentaries [*Collector of Madura v. Moottoo Ramalinga* (1868) 12 MIA 397, 436; *Bhyah Ram Singh v. Bhyah Ugur Singh* (1870) 13 MIA 373, 390]. The point was made still more specific in *Neelkisto Deb v. Beerchunder* [(1869) 12 MIA 523] where it was said that where customs were proved to exist it would oust the general law, which, however, will regulate all outside the custom. The courts in laying down that immemorial usage is transcendental law have depended on the text of Manu which has been quoted above. This judicial approach to custom in the area of Hindu law, even though not in conformity with the orthodox approach, was yet in conformity with the genius of the law which always gave a high regard to custom.

The position of custom in the area of Muslim law remained doubtful for quite some time. The difficulty arose because, traditionally, the Muslim Jurists placed custom at a low level of priority. Early in the day, the Bombay Supreme Court was called upon to decide, [*Hirbae v. Sonabae*, 4 Ind. Dec. 100, 112] with reference to the Bombay Presidency town, whether Khojas and Cutchi Memons, who were Muslim by religion, but who followed the Hindu customs of inheritance and succession, should be governed by their customs or by the orthodox Muslim law. Referring to the expression 'laws and usages' of the Muslims in the clause referring to the Presidency towns, Perry, C. J., refused to read it as meaning the application of the *Koran* only to the Muslims without regard to their usages. He pointed out that the clause in question was framed on political grounds solely, and without reference to orthodoxy, or the purity of any religious belief. The underlying purpose of the clause was to give the benefit of their laws to the people of India. The effect of the clause was not to adopt the text of the *Koran* as law any further than it has been adopted in the laws and usages of the Muhammadans; and if any class of Muhammadans are found to be in possession of any usage which was otherwise valid as a legal custom, and which did not conflict with any express law of the English Government, they were just as much entitled to the protection of this clause as the most orthodox *sunni*.

It has been already mentioned that the rule of decision (S. 37 of the Act of 1887) for Bengal, Bihar and Orissa, did not mention 'custom' as a source of law. It, therefore, remained a matter of doubt whether in case of Muslims, custom could prevail in derogation to the Muslim law in this territory. [As late as 1866, the Privy Council in **Jowala Buksh v. Dharum Singh** (1860) 10 MIA 511, 538 stated: "Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so"]. As late as 1904, the Allahabad High Court held in **Jammya v. Diwan** [(1901) ILR 23 All. 20. The High Court said that the terms of the provision in question were very positive and emphatic in terms that Muhammadan law was to be applied to the Muhammadans]. that a family custom among Muslims excluding daughter from inheritance could not be proved as the provision did not provide an opening to custom as against the Muslim law. This view had been held by the courts since long for, as early as 1866, in **Surmust Khan v. Kadir Dad Khan** [1 F.B. Rulings, N.W.P. (1866); also **Jowala Buksh v. Dharum Singh** (1866) 10 MIA 511, 538] the same view was propounded. It may be mentioned that this attitude of the court was due to the low place allotted to custom traditionally by the Muslim Jurists. So far as the Hindus were concerned, the same provision was interpreted differently and custom was given a high place in the scheme of law because of the high place traditionally allotted to custom by the Hindu Jurists. It was only when the Allahabad ruling came before the Privy Council for review in **Mohd. Ismail v. Lala Sheomukh** [17 CWN 97] that custom got the precedence over the Muslim law and was made legally enforceable even in derogation to the orthodox Muslim law [**Ali Asghar v. Collector of Bulandshahar** (1917) ILR 39 All. 574; **Mt. Jaffro v. Chatta**, 163 IC 650; **Roshan Ali Khan v. Chaudhri Asghar Ali** (1929) 57 IA 29. In **Md. Ibrahim v. Shaik Ibrahim**, AIR 1922 PC 59, it was stated that in India "custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedans"]].

A special reference needs to be made to Punjab which is pre-eminently a land of customary law. Neither the sacred books of the Hindus nor those of the Muslims have made much of an impact on the rural life of the Punjab and people are mostly governed by their customary law. In the pre-British times, these customs were enforced by the village or tribal *panchayats* or *jirgas*. On the annexation of Punjab by the British in 1849, the Governor-General, while constituting the Board of Administration, gave assurance to the people; that the "native institutions and practices shall be upheld as far as they are consistent with the distribution of justice to all classes". Soon after, directions were issued that the *lex loci* or "local customs which had been obeyed by any tribe or sect" will be enforced [Sir George Campbell, Lt. Governor of Bengal, who had served in Punjab earlier, observed in the Legislative Council that not one out of a hundred persons in the Punjab was governed by the strict provisions of the Hindu and Muhammadan law]. Section 5 of the Punjab Laws Act, 1872 [The section runs as follows : "In questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be - (a) any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority, (b) the Mohammedan law", in cases where the parties are Hindus except insofar as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or is modified by any such custom as is referred to in the preceding clause of this section] expressly directed the courts to observe any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience, and has not been altered or abolished by law, or declared by competent authority to be void, in deciding questions regarding succession, marriage, special property of women, betrothal, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions of any religious usage or institution. Custom was thus made the first rule of decision. It was at one time held by the courts in Punjab that the effect of this provision was to make custom the primary law of the Punjab in relation to

the matters specified in that section and to cast upon anyone alleging that he was governed by personal law the burden of so proving. Bringing out the implications of the above provision, the Privy Council has stated in *Abdul Hussein v. Sona Dero* [1917] 45 IA 10] that the section raises no presumption that the parties are to be governed by custom rather than by personal law which must be applied unless the custom is proved. The clause puts the custom in the forefront as the rule of decision: the legislature has recognised the fact that in Punjab, customs largely govern the people. But, before a custom may be enforced, it must be established by the ordinary processes of evidence [Also, *Vaishno Ditti v. Rameshri* (1928) 55 IA 407, 421, *Salig Ram v. Munshi Ram*, AIR 1961 SC 1374]. A person asserting the custom has to prove it before the courts can apply it.

There is no such thing in Punjab as a 'general custom'. Custom there is mainly tribal, and even with the same tribe, it may vary from locality to locality. Each tribe has its own customs and in the Punjab there are many tribes. Origins of the tribes differ; even with the tribes of the same origin, local and social conditions have greatly differed resulting in varying customs. There is thus no single body of customary or tribal law common to the whole of Punjab [*Ujagar v. Mst. Jeo*, AIR 1959 SC 1041]. While the custom in Punjab is mainly agricultural, even the urban people are not completely free from it [*Ramkishore v. Jainarayan* (1921) 48 IA 405].

Customs prevail in Oudh, mainly in the matter of succession and they have figured before the courts from time to time both among Hindus and Muslims [*Roshan Ali Khan v. Chaudhri Asghar Ali* (1929) 57 IA 29, 33]. In Oudh Laws Acts, 1876, S. 3, a provision similar to the Punjab provision has been enacted. Similarly, S. 27 of the N. W. F. P. Reg. VII of 1901 made an equivalent provision giving custom precedence over the personal laws. The Central Provinces Laws Act, 1875, did the same thing. On the Malabar Coast, Maramakatayam law of inheritance in which descent is traced in the female line, a person's heirs being the children of his sister, came to be judicially recognised on the basis of custom [*Krishnan v. Sridevi* (1889) ILR 12 Mad. 512].

The Kumaon Hills constitute another tract of land where customs preponderate. Among others, the hills are inhabited by people known as Khasis who have stuck to their customs on various points which are at variance with the Mitakshara. On the coast of Malabar, people known as Mopalas, who are Muslims by religion, follow not the orthodox system of Muslim law but the Hindu law known as Marumukthayam or matriarchal system and their customs have been applied by the courts.

It may however be mentioned that the clauses giving precedence to custom, did not have much of any special significance, for even without them, custom would have been preferred over the personal law as was held by the Privy Council in the *Moottu Ramalinga* case. To some extent, these clauses did away with the doubt, in the area of Muslim law, regarding the relative position of custom *vis-a-vis* the personal law, but even here the Privy Council's verdict had gone in favour of the custom.

V

Kinds of Customs Enforced

From the above it is clear that during the British Period, the customs came to be given a pre-eminent place as a rule of decision. This happened as a result of statutory provisions, or where these were deficient, by the judicial interpretation. The courts accepted and applied customs of all types, e.g., tribal, communal, sectarian, local, family etc.

Most of the customs brought before the courts are tribal, communal or sectarian, i.e., those which apply to a particular caste, community, or group residing in a particular territorial area [*Parandhamayya v. Navaratna Sikhamani*, AIR 1949 Mad. 825; *Venkata Subba Rao v. Bhujangayya*, AIR 1960 AP 412]. A few examples may be noted here ; Customs in Punjab, Malabar coast, Kumaon hills are all of this category. Apart from these, courts have recognised several miscellaneous customs of various groups. The Kamma community in Andhra has a custom of affiliating a son-in-law and giving him a share in the

property; this adoption known as *illatom* adoption has been recognised by the Court. The Jain community, irrespective of its various sects in which it is divided, has a custom that a widow can make an adoption without the consent of her husband (except in Madras and Punjab) [(1947) 74 IA 254 : AIR 1948 PC 177; **Sheo Singh Rai v. Mussumut Dakho** (1878) 5 IA 87; **Chotay Lal** case (1878) 6 IA 15]. Recently, the Supreme Court in **Munnalal v. Raj Kumar** [AIR 1962 SC 1493] reviewed the large number of cases having a bearing on this point and sustained the custom as one prevailing in the Jain community as such irrespective of the locality where they may reside or the sect in which they are divided. Another custom of Jains recognised by the courts is that a widow has full power to alienate the self-acquired property of her deceased husband [**Sheo Singh Rai v. Mussumut Dakho** (1876-1878) ILR 1 All. 688; **Shimbhu Nath v. Gayan Chand** (1894) ILR 16 All. 379; **Chotay Lall v. Chunnoo Lall** (1879) ILR 4 Cal. 744, 752]. A custom prevails among the Chetti inhabitants of a few villages in Madura District whereby when a husband during the life of his wife marries another wife, he sets aside a portion of his property for the first wife's maintenance (called *moopu*) and the rest of the property is divided in two parts, each part going to the sons of each wife [**Palanjappa Chettiar v. Alayan Chetti** (1921) 48 IA 539]. Nairs in South Malabar have peculiar usages. Some of them have been judicially established. Amongst them, polyandry was legally recognised, and descent of property was through females. Adoption of females with the family when necessary to preserve it was also recognised [**Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon** (1900) 27 IA 231].

A family custom is one which applies to a particular family only. At an early stage in the evolution of the Indian legal system, doubt had been entertained by the courts on the question whether a family custom, different from a local custom, could be regarded as legally enforceable. In **Tarachand v. Reeb Ram** [3 Mad. HCR 50] the Judges of the Madras High Court referred to the jurisprudential theories and said that they all referred to customary law, antagonistic to the general law, to be established by evidence of the acts of a single family confessedly subject to the general law. In **Basvantrav v. Mantappa** [1 Bom. HCR, app. XLII], the Bombay High Court refused to give effect to a family custom saying that "it would be a dangerous doctrine that any petty family is at liberty to make a law for itself, and thus to set aside the general law of the country". But this view could not remain in force very long. From the very beginning, the trend of the Privy Council was different. To the same effect were the observations of the Privy Council in **Serumah v. Palathan**, 15 Cal. W. Rep. P.C. 4], a family was held to have retained the mithila law even though it migrated from there, and had been residing in Bengal, for generations. In **Abraham v. Abraham** [(1863) 9 MIA 199. In this case the parties were left free to adopt the law. It was also seen that Thibaut supports the view that a family is capable of making an applicable custom], the Privy Council had definitely accepted the possibility of a Christian family, converted from Hindu or Muslim religion, to have its law. These cases made the Bombay and Madras views regarding the efficacy of a family custom completely untenable and so the courts changed their opinions. [**Shidhojiray v. Naikojiray**, 10 Bom. HCR 228; **Bhau Nanaji Utpat v. Sundrabal**, 11 Bom. HCR 249. The Court held that the words usage of the country in Reg. IV of 1827 are sufficiently general to allow either of a very large or restricted application].

In a number of cases, too many to recount here, family customs have been applied by the courts. A family of *jats* migrated from Delhi to U.P. in 1858. It was held that according to customs applied to *jats* in Delhi, adoption of an orphan was valid and that the family must be presumed to have carried this custom with it to U.P. and so it must be applied to it. Impartibility of estates is a creature of custom and it has been enforced in a large number of cases as a family custom. In certain cases where impartibility of zamindari has been sustained because of a family custom, a right to maintenance in certain members of the family has also been recognised because of the family custom. An interesting institution created by custom, prevalent among certain families in certain parts of the country, is that of a 'composite family', i.e., two or more families agree to live and work together, pool their resources, throw their gains and labour into the joint-stock, shoulder the common risks, utilise the resources of the units indiscriminately for the purposes of the whole family. A Jain family became Vashnabs, but even then the Jain custom was applied to it and it was held that change in religion did not affect the laws and customs by which the

personal rights and status of the members of the family were governed. A family custom governing succession of a Muslim family in Oudh has been upheld by the Privy Council.

Commenting upon the legal enforceability of a family custom of succession, the Privy Council stated in *Shiba Prasad Singh v. Prayag Kumari* [(1932) 59 IA 331] that "a Hindu family, no doubt, cannot by agreement between its members make a custom for itself of succession to family property at variance with the ordinary law. But where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law. The rule of succession in such a case is recognised by the state as part of the law of the family, though it is no more than the result of a course of conduct of individual subjects of the state constituting the family". It has been held judicially that a family custom is capable of being destroyed by disuse.

A local custom is one which is binding on all persons in the local area where it prevails. A few examples of such customs can be found in the Indian case-law, though it will be seen that they are few as compared to the tribal or family customs which have been noticed above. Another point to note is that while customs in India in the area of family relations and succession to property are either tribal or communal or family, the local customs are more of a secular nature and do not affect family relations or succession; they create other rights. One of the most widely spread customs in several parts of India is the right of pre-emption. Pre-emption is essentially a Muslim concept and the Muhammadan law deals with it in details. But in certain areas of India, the right of pre-emption came to be recognised as prevailing amongst the non-Muslims also as a matter of custom. It has also been held that the rules of Muhammadan law of pre-emption would apply to non-Muslims also except insofar as such rules are modified.

Section 18 of the Indian Easements Act stipulates that an easement may be acquired by custom. It has thus been held that a right of privacy may be established as a customary easement in a locality. Rights not amounting to easements have been recognised by the courts as customary rights. Thus the right of pasturage in the land of another, right to bury dead on another's, right to worship, right to hold festivals, right to remove earth from a portion of a field, right to a village pathway, have all been judicially conceded. In a number of cases, the Calcutta High Court has held that a fluctuating body of persons cannot acquire a customary right in the nature of a profit-a-prendre. Patna High Court disagrees with this view. But Bombay High Court has held that members of a village are not a fluctuating body.

VI

Requisites of a Valid Custom

A custom is a rule which in a particular family or in a particular district, has, from long usage, obtained the force of law. It is not that each and every custom can be legally enforced. A custom to be legally recognisable and enforceable must fulfil several requisites, viz., it must be ancient, certain and reasonable, and, being in derogation of the general rules of law, must be construed strictly. A neat formulation of a valid custom is contained in the Hindu Marriage Act and the Hindu Succession Act wherein it is said that the expression 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time obtained the force of law among Hindus in any local area, tribe, community, group or family : Provided that the rule is certain and not unreasonable or opposed to public policy.

One of the attributes of an enforceable custom is that it should be certain and not vague; that the course of conduct upon which the custom rests must not be left in doubt but be proved with certainty. The reason behind this rule is simple to understand. If one is left in doubt as to what the custom is, he cannot apply it. If a custom is vague, the courts cannot be definite about its content and so cannot give effect to it.

A custom to be valid must be ancient. The Royal Court in England laid down the rule that country custom was only valid if immemorial. It could not be transferred from one country to another, nor could it be changed. At first, immemoriality must have referred to the actual memory of any person living, since, in the first centuries after the Conquest, law was preserved by oral tradition. Later, it was necessary to

prove that there was no record of any different rule. The problem can be illustrated by an important case in 1346 (Y.B. 20, Ewd. III). The Prince of Wales held a court at Macclesfield which tried a plea of covenant on simple contract. The defendant demanded judgment "saying that, by the common law used in the country of Cheshire and elsewhere throughout the whole realm of England no one need answer any claim of covenant without a special deed testifying to that covenant". The plaintiff claimed a contrary custom at the Eyres of Macclesfield. The King's Bench held that there was no such custom, since the Eyres had first been held in the time of Edward I, "after the time of memory". As records were maintained in writing, the Central courts appear gradually to have limited customs to those recognised when the earliest records started, or not contradicted since that time. They fixed on the year 1189 (Throne of Richard I, from which date the earliest rolls of the King's Bench are available) as the beginning of legal memory, an appropriate date as most royal court rolls start about that time [Lord Blackburn in *Dalton v. Angus* (1880-81) 6 AC 740, 811; *Wolstanton Ltd. v. Newcastle Under-Lyme Corporation* (1940) AC 860. The courts, however, have decided that in the case of an alleged custom it is sufficient to prove facts from which it may be presumed that the custom existed at that remote date and this presumption should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go. This presumption is rebuttable (1940) AC 860, 876].

But the expression 'immemorial origin' in India does not have the same sense as in England. Though in the beginning, the Privy Council appeared to be of the view that a custom should be ancient, the judicial attitude somewhat softened later. The Allahabad High Court frankly stated, "We cannot in these provisions apply the principles of the English Common Law, that a custom is not proved if it is shown not to be immemorial. To apply such a principle...would be to destroy many customary rights of modern growth in villages and other places. It would be inexpedient...to attempt to prescribe any such period." In one case, the Calcutta High Court held that a right of pasturage being enjoyed for 40 years was not immemorial and hence not customary. In fact, the general view taken by the Calcutta High Court is that either 1773 A.D. or 1793 A.D. is the date for treating a custom which has been in existence as immemorial. The Bombay High Court has taken the view that if within the last 20 years, there have occurred a number of instances in which the alleged custom has been recognised, the presumption arises of immemorial usage. In *Mt. Subhani v. Nawab* [(1940) 68 IA 1, 31, AIR 1941 PC 21], the Privy Council held that in India it is not of the essence of the rule that the custom to be binding must be ancient and its antiquity must be carried back to a period beyond the memory of man - still less, that it is ancient in the English technical sense. It depends upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long time as to show that it has, by common consent, been submitted to as the established governing rule of the particular locality. In the instant case, a custom proved to be in existence over a period of nearly 30 years was held legally enforceable. The Privy Council has held that customary law, if found to exist in 1880, must be taken to have the ordinary attribute of a custom that it is ancient.

The Supreme Court of India has stated that a custom derives its force from the fact that by long usage it has obtained the force of law, but the English rule that a custom to be legal and binding must have been used so long that the memory of man runneth not to the contrary should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.

The Andhra High Court has held that a custom being in existence for 40 years, is an enforceable custom. The Calcutta High Court has held recently that the rule of legal memory does not apply to custom in India, even though it is proved or assumed that the law was otherwise previously; proof of existence of a custom for 50 years is enough to give it validity of law, even though it is proved that previous to that period a different state of things existed. In *Bari v. Tukaram* [AIR 1959 Bom. 54], the Court held legally enforceable as a customary right, a right to remove earth from a portion of a field which right had been

enjoyed for the last 30 years. In **Bhiku v. Sheoram** [AIR 1928 Nag. 87], a right enjoyed for 20 years by kumhars to take earth from a portion of a field was held valid as a customary right.

From the above, it is clear that there is no uniform rule regarding the time factor for which a custom must have been in operation before it is legally recognised. The minimum period for this purpose appears to be 20 years. But the High Courts differ in their approach on this point. Now, the definition of custom adopted by the Hindu legislation says 'for a long period' instead of 'immemorial', which denotes that the English rule has not been adopted, but as 'long period' has not been defined, uncertainty as to what that is continues in the views of the various High Courts.

A custom should not be unreasonable. It should not be against reason, but the reason referred to here "is not to be understood as meaning every unlearned man's reason but artificial and legal reason warranted by authority of law", and, further, "it is sufficient if no good legal reason can be assigned against it".

Examples of customs held unreasonable by the courts are not many [In **Wolstanton Ltd. v. Newcastle Under-Lyme Corporation** (1940) AC 860, the House of Lords held that a custom for the lord to get minerals beneath the surface of copyholds or customary freehold lands without making compensation for subsidence and damage to buildings, was not a reasonable custom]. One or two examples of unreasonable customs may be considered here. A custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, has been held to be unenforceable in law both because it is unreasonable and uncertain [**Shibnarain Mookerjee v. Bhutnath Guchait** (1918) ILR 45 Cal. 475].

A right of pasturage over the land of another may be regarded as unreasonable if it completely deprives the owner of his right to the lands. It is not possible to deprive the owner of his land completely. In the instant case, right of pasturage was being enjoyed on swampy land. Later the land became fit for cultivation. The Court held that a part of the land may be given on rent so long as sufficient land was left for pasturage for those who are entitled to it and that no such right can be claimed over the whole of the land. It has been held that it is the usage which makes the law, and not the reason of the thing for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law. The circumstance that the reason for the custom has subsequently been found to be wrong cannot affect its validity. It is no requirement of a valid custom that it should be deducible from any accepted principle of law. A right having been established 50 years ago and which has not been shown to have since been denied or disputed in any decided case cannot be overthrown on the strength of recently expounded theories regarding its basis.

A custom should not be immoral or opposed to public policy or against justice, equity and good sense. There is, however, no fixed test to judge the morality or otherwise of a custom. In **Gopi v. Jaggo** [(1936) 63 IA 295], the Privy Council allowed a custom which recognised and sanctioned remarriage of a woman who had been abandoned and deserted by her husband. According to the custom, desertion by the husband dissolved the marriage tie leaving the woman free to re-marry. In **Nanee Tara Naikin v. Allarakia Soomar**, the Bombay High Court had recognised the custom of adoption of girls by the dancing girls. But the judicial view changed. In **Mathura Naikin v. Esu Naikin** [(1880) ILR 4 Bom, 545], the Court held the custom to be immoral, for the profession of dancing girls was immoral, and adoption by them of girls was designed to perpetuate this profession. But in matters of succession, *dasis* (dancing girls) have been held to be governed by their customs and a custom excluding married *dasis* from inheritance to another *dasis* has been judicially accepted.

Following customs regarding divorce have been held to be immoral; a custom permitting a woman to desert her husband at her pleasure and marry again without his consent, a custom by which the marriage tie could be dissolved by either husband or wife against the wish of the divorced party on payment of a sum of money.

There was nothing immoral in a custom permitting divorce by mutual agreement. In certain cases it has been held that unless both the parties had specifically agreed, a divorce granted by a caste *panchayat* would be against public policy and could not be enforced by the courts. The Madras High Court has recently held the proposition to be too wide.

A custom abhorrent to decency or morality however long practised and recognised by a community cannot be enforced by the courts. Thus a custom permitting marriage with daughter's daughter was held immoral.

It is under this heading, that the courts exercise a kind of 'censorial' power on the customs.

VII

Proof of a Custom

Before the advent of the British period, the customs of the people were mostly unwritten and unrecorded and were enshrined in the "unexpressed consciousness of the people" and were enforced by the village *panchayat*. With the coming in of the British methods and forms of administration of justice, it became necessary and imperative to establish customs in the courts before they could be enforced. It thus became necessary to ascertain the customs and record them in writing. No longer could the custom remain in the consciousness of the people.

The first important principle laid down by the courts in a large number of cases is that a party alleging that he is governed by a custom must specifically allege the same and prove its existence; there is no presumption that a particular person or class of persons is governed by a custom and the onus to prove it rests on him who alleges it. This principle is followed strictly so much so that even in those areas, like Punjab and Oudh, where the statutes give preference to customs over the personal law of the party concerned, there is no presumption that a custom exists; it must be alleged and proved. The Privy Council has stated that what is required before an alleged custom can receive the recognition of the courts, and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district of the country.

The custom must be established by clear and unambiguous proof, by cogent and satisfactory evidence. In the absence of such an evidence the court cannot come to a conclusion whether any custom is really operative or what is its content and scope. But, at the same time, the Privy Council has made it clear that rigorous and technical rules of proof, such as are insisted upon in England, are not required in India.

A custom cannot be enlarged or extended by parity of reasoning, analogy or logical process. One custom cannot be deduced from another. As the Supreme Court has stated: "Theory and custom are antithesis; custom cannot be a matter of mere theory but must always be a matter of fact. Thus a community living in one part of the country may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom". In the Kamma Community in the Andhra Pradesh, there is a custom that if estrangement between wife and husband occurs, dowry and all presents given to the bridegroom by the bride's people at the time of the marriage must be handed back to the bride. The Andhra High Court refused to extend it by the analogy to a situation when the bride died on the ground that there could be no greater estrangement than 'death'. But on evidence tendered the custom was held proved. Thus a custom has to be established by evidence and not by *a priori* methods.

What the courts want is clear and unambiguous evidence with instances of the enforcement of the custom, though it has also been laid down that proving of specific instances was not absolutely necessary at all times. A family custom can be proved by establishing to the same group, i.e., families having a common origin, and settled in the same part of the country. A custom maybe proved by general evidence

as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy. This may be said to be the effect of Ss. 48 and 49 of the Evidence Act [Section 48 runs as follows : “When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant”. Section 49 runs as : “When the court has to form an opinion as to the usages and tenets of any body of man or family, ...the opinions of persons having special means of knowledge therein, are relevant facts”]. Decisions of courts regarding a custom are relevant under S. 42 of the Indian Evidence Act, though under that section they are not conclusive. It has been held again and again that where a custom is repeatedly brought to the notice of the courts, the courts may hold that custom was introduced into the law and that no further proof was necessary of the custom in each case. This is the effect of S. 56 of the Evidence Act according to which nothing need be proved of which courts can take judicial notice. Therefore, a custom by repeated recognition by courts becomes entitled to judicial notice.

Very great reliance has often been placed by the courts on *wajib-ul-arz* or *riwaz-i-am* for proof of customs. Those are village administration papers which were directed to be prepared by Regulation VII of 1822. These papers have been received in evidence under S. 35 of the Indian Evidence Act which says that An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by law of the country in which such book, register or record is kept, is itself a relevant fact. The *riwaz-i-am* is a public document or record and is admissible in evidence to prove the facts entered thereon subject to rebuttal. The statements therein may be accepted even if unsupported by instances, as the Supreme Court has emphasized that 'the fact that the entries therein are the result of careful research of persons who might also be considered to have become experts in these matters after an open public inquiry, has given them a value which should not be lightly underestimated. Thus an entry in the *wajib-ul-arz* or *riwaz-i-am* may be given in evidence as a relevant fact because being made by a public officer; it contains an entry of a fact which is relevant.

These documents contain a record of customs prevalent in the villages in respect of whom they are prepared. The manner to prepare these papers with respect to custom appears to be that the officer recorded the statements of persons who were connected with the villages.

Some of the persons whose evidence is taken may be the proprietors of villages who made statements declaring the existence of the custom in question.

Entries in these documents constitute a *prima facie* evidence of the customs, but it is not conclusive and it may be rebutted by other reliable evidence. Also, the weight to be attached to the documents depends upon their intrinsic quality. As the Privy Council has stated, its weight may be very slight or may be considerable according to circumstances. A *wajib-ul-arz*, as stated by the Privy Council in **Balgobind v. Badri Prasad** [(1923) 50 IA 196], when properly used, affords most valuable evidence of custom and is much more reliable than oral evidence given after the event. On the other hand, as observed by the Privy Council in **Uman Parshad v. Gandharp Singh** (1887) 14 IA 127], they at times contain statements which would appear to have been concocted by the persons making them in their own interest and are therefore to be disregarded, being worse than useless. With this precaution taken, the courts have depended on the records and decided a large number of cases on the bases of the entries therein of the customs without calling for any additional supporting evidence. And they regard the record as more valuable and reliable than subsequent oral evidence given by the parties after a dispute as to custom has arisen. The evidentiary value of these documents can be shaken by showing that the officer preparing them neglected his duties or was misled in recording a custom. In **Uman Parshad. v. Gandharp Singh** [(1887) 14 IA 134], the Privy Council refused to treat *wajib-ul-arz* as authoritative because it found that it was a concoction and was made at the instance of one of the parties to the dispute and that her views were entered in the record not as her views but as the official record of a custom. This, however, is an extreme case of its kind. Invariably,

the courts follow these documents as evidencing custom and rarely has the basis or the authenticity of these documents been ever challenged. It may however be noted that courts have held that presumption in favour of customs as recorded in these documents would be weak where women are adversely affected as they have no opportunity to appear before revenue officers and only a few instances would suffice to rebut it.

Further manuals of customary law in accordance with *riwaz-i-am* have been issued by authority for each district which stand on much the same footing as the *riwaz-i-am* itself as evidence of custom. Even if there be no evidence of instances, still the custom mentioned in the manual of the customary law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instance.

The inhabitants of the Kumaon Hills, known as Khasis, are governed by customs which are at variance with the Mitakshara on many points. As usual when any case came from this territory for decision, the court demanded strict proof of the custom and at times ignorant and simple people could not always muster sufficient proof to prove their customs. With the result, the people suffered injustice because many of their customs failed to get recognition at the hands of the courts. The U.P. Government felt that it was inequitable and imposing an impossible task to require the people of Kumaon, unsophisticated and uneducated as they were, to make them adduce proof to establish their customs and, therefore, it undertook to investigate and ascertain the customs of these people. In 1919, the Government appointed Shri Panna Lal, I. C. S., to make a collection of local customs of Kumaon and the result was the *Hindu Customary Law in Kumaon* published in 1920 by the authority of the Government. This book has been held to be admissible in evidence in the courts under S. 35 of the Indian Evidence Act as it was compiled by making a local inquiry into the actual existing customs of the people.

Besides the above-mentioned official attempts at ascertaining the customs of the people, some private attempts have been made in that direction. Based on the *riwaz-i-ams* and the judicial decisions, some treatises came to be prepared by scholars. One such book was brought out by Mr. William Rattigan in 1880 containing customs of the Punjab; it has run into several editions since its publication, and has assumed a great authority in matters of Punjab Customary Law, so much so that it has been noticed even by the Privy Council in *Mt. Subhani v. Nawab* [AIR 1941 PC 21], as a book "of unquestioned authority in Punjab". This Digest of Customary Law has invariably been cited in judicial decisions. The Supreme Court has recently stated that the authoritative value of Rattigan's Compilation of Customary Law is now beyond controversy, having been recognised by the Punjab courts and even by the Privy Council. But where there is a conflict between *riwaz-i-am* and Rattigan's Digest, the entries in the former ordinarily prevail. In Jammu and Kashmir, the High Court has referred to Sant Ram Dogra's *Code of Tribal Custom*.

There is some difference of opinion in the judgments of the Privy Council itself over the question whether questions of the existence of an ancient custom are generally questions of law or are mixed questions of law and fact or simply of fact. In *Palaniappa Chetty v. Deivasikamony Pandara* [(1917) 44 IA 147], the Privy Council held it as a mixed question of law and fact. In several other cases, it held it to be a question of fact only.

VIII

Abrogation of Custom

While it was the settled policy of the British administration to preserve customs of the people in the administration of justice, there were certain forces which were working for their abrogation. One such effort, on a very big scale, was made through the Muslim Shariat Act, 1937, which abrogated custom applicable to Muhammadans and restored to them their personal law. Except agricultural land, all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution

of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubarrat*, maintenance, dower, guardianship, gifts, trust and trust property, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims should be the Muslim Personal Law (Shariat) [To a limited extent, custom was abolished by the Cutchi Memons' Act, 1920. These people were governed by the Hindu law of inheritance and succession. This Act gave them an option to place themselves under the Muslim personal law by means of a declaration and thus abrogate custom]. Option was given to the Muslims to adopt the personal law in preference to their customary law in matters pertaining to adoption [Muslim law does not recognise adoption, but custom permits adoption in Punjab. *Nur v. Bhawan*, 162 IC 854], wills and legacies. The provisions of S. 2 are coercive, while those of S. 3 are persuasive. The reasons which were given to abrogate custom were 'uncertainty and the expense of ascertaining custom' and 'inadequate rights granted to women under the customary law as compared to the Muslim law'. It was pleaded that customary law was uncertain and indefinite whereas the Muslim personal law existed in the form of a veritable code and was too well-known to admit of any doubt or to entail any great labour in the shape of research, and so abolition of customs would ensure certainty and definiteness to the mutual rights and obligations of the public. This argument, of course, may not stand the test of scrutiny. But a much more sound reason to abrogate custom was that under it the position of women in matters of inheritance was inferior to that under the Muslim law. The general rule of intestate succession under custom was agnatic succession which excluded all females except a widow and daughter who were allowed a life interest or maintenance. The Muslim personal law accords a better position to women. The abrogation of customary law was a result of the agitation carried on by such bodies as the *Jamiat-ul-Ulema-i-Hind*, an organisation of Muslim religious men. Support was lent by many Muslim Women Organisations which condemned the customary law as adversely affecting their rights.

With a view to introducing uniformity in, and to liberalize, the law applicable to the Hindus, certain portions of it have been codified recently. By far and large, the effect of this legislation has been to reduce the importance of custom though it is not correct to say that custom has been completely abrogated. Some force is still given to customary law. Thus while S. 4 (a) of the Hindu Marriage Act, 1955, gives overriding effect to the Act and abrogates a custom with respect to any matter for which the Act makes a provision, customs in respect of following matters have been left intact, *viz.*, recognition of marriage between parties within degrees of prohibited relationship, and *sapindaship* rites and ceremonies regarding celebration of marriage, divorces and thus a customary right to obtain dissolution of a Hindu marriage is not abrogated.

Section 4 of the Hindu Succession Act, 1956, provides for the overriding effect of the Act in respect of matters dealt with by it. Any custom inconsistent with it is abrogated. The Act does not recognise impartibility except that created by *sanad* or government grant. Impartibility by custom has now been abrogated and succession to such property would now be regulated by the rules which apply to other property. Custom regarding power of disposal is not abrogated; whether a person has power to dispose his property by will is a matter outside the Succession Act; it is to be decided by reference to custom.

Similarly, S. 4 of the Hindu Adoptions and Maintenance Act, 1956, gives overriding effect to the Act. On two matters, however, customs have been saved : Adoption of a married person or of a person over 15 years of age, only if custom permits.

Concluding Remarks

The foregoing survey would show that, after the advent of the British in India, custom came to be given a place of honour in the administration of justice. A large volume of case-law arose in India having a bearing on custom. Custom came to play a very important part as a source of law; it took a place second only to the statutory law; custom was given preference over the religious laws of the parties. This was a reasonable and just approach for, in practice, the law of the *shastra* and the *shara* was not observed by the people in all its pristine purity and that all kinds of customs had ingrained themselves in the scheme of things. It was only just and equitable that the customs which people had been observing in practice be

enforced rather than the theoretical law contained in the books; it would have been harsh with the people to force them to forego their customs in favour of the orthodox system of law.

All kinds of customs - family, local, tribal - came to be applied. Formally, the tests applied to adjudge the legal enforceability of a custom were the same as those laid down in England, but in their practical application, they were not rigidly enforced, and the courts showed a great amount of flexibility of approach and toleration towards customs. Thus about the qualification that a custom to be applicable should be antiquated, we have already seen the liberality of approach which the courts adopted towards this maxim in India, and, in a large number of cases, customs were enforced when there was evidence of their operation over a period of twenty years or so. This is not so in England where a custom must be in existence since 1189 A.D. Similarly, the courts, earlier in the day, declared that they would not insist upon technical methods of proof, and many customs were held proved even though the quantity and quality of evidence in support of them left something to desire [While generally that was the attitude, there are a few cases on record where the courts showed some intolerance towards some customs without any rational reason. One such case is **Gopalayyan v. Raghupatiayyan**, 7 Mad. HC 250. The Civil Judge found that among the *Brahmins* of the locality there prevailed a custom, 'uniform and uninterrupted', 'for the last 134 years', of adoption of sister's son. Nevertheless, the Madras High Court refused to accept the custom saying, "In the case of *Brahmins* it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong"]. Further, in England, there is nothing like a family or a tribal custom; there the custom is 'local' having the force of law in a particular locality. But in India, it is not so; here family customs came to be fully recognised and enforced. Similarly, the communal or tribal customs were enforced, whereas such would not be the case in England. It may be noted that a large mass of custom here is tribal or sectarian.

In England, the term 'usage' is used for a general line of conduct adopted by persons in a particular department of business life. In India, the term 'usage' has been used in a completely different sense. Usages accepted by the courts have had nothing to do with trade or commerce but covered all aspects of family relations. By and large, the term 'usage' has been used synonymously and interchangeably with custom. Bombay Regulation IV of 1827 speaks of the 'usage of the country', the Punjab Act, 1872, of the 'customs of the parties'. In the recent Hindu legislation, customs and usage have been defined in the same way. In some earlier cases, it was said that a custom is a usage of long standing [In **Edward v. Sheikh Gozaffar Hussein** [3 CWN 21], the Court stated: "A long time must elapse before a custom can grow up; but this is not necessarily the case with respect to usage. There is a great difference between a 'custom' and 'usage' and that clearly the latter may be established in a much less period of time than a custom. We are not prepared to say how long a period must elapse before such a usage can grow up, but it can grow even in 12 years"] but, in effect, it makes no difference, for in India the rule of immemorial antiquity does not operate, and a usage of twenty years standing even if it may not be characterised as custom, is followed nevertheless.

Another doctrine adopted in India, for which no parallel can be found in England, is that a family can renounce customs applicable to it and adopt other customs. Another English rule was held not applicable to India which is that if a custom was alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by the people outside the district, the custom would fail.

The looseness with which the English tests of a valid custom were applied in India had a good result in the formative stages of the judicial system, for, that way most of the customary law of the people was preserved. Even in matters of proof, the courts were not very technical or scrutinising. [In two cases, **Rup Chand v. Jambu Parshad** (1909) 37 IA 93 (adoption of a married person amongst Jains) and **Chiman Lal v. Hari Chand** (1913) 40 IA 156 (adoption completed merely by unequivocal declaration to that effect and treatment of the adoptee as adopted son) though the Privy Council was not satisfied with the evidence, as it was 'somewhat limited' in character and so cautioned against treating these cases as precedents for

the future, did, nevertheless, apply custom to the instant situations at hand]. Had those tests been rigidly applied, most of the customary law would have disappeared resulting in great injustice to the unsophisticated people; it would have created a great void in the judicial system because in the early British days the legislature was not active, did not enact laws in the area of private law, and judges had to decide cases, in the absence of law, by justice, equity and good conscience. In part, the judicial attitude of tolerance and indulgence to custom may be explained by the fact that legislature being inactive, and there being no *lex loci* in the country, if customs were rejected on technical grounds, there would be no law to apply and the courts would be forced to invent principles to decide cases. Rather than resort to principles borrowed from a foreign Jurisprudence and unknown to people, it was better to enforce such customs as were available even though they might not fulfil all the rigours of English law. The judicial attitude was thus to some extent born out of necessity of the situation. This attitude towards custom did introduce an element of uncertainty and confusion as to the rights of individuals but that was for long the bane of the Indian legal system, and this uncertainty was not so dangerous as would have arisen had the customs been abrogated and principles foreign to the people introduced.

Not only were customs recognised and legally enforced, a great effort was made to ascertain them and to reduce them in writing. It was done administratively, like compilation of *riwaz-i-am*, in addition to what happened judicially when a custom was held proved. Thus, the customs which so long had been unwritten, and lived in the consciousness of the people, became certain and written. This made the system more definite, but it did, on the other hand, stereotype customs; the element of flexibility and growth disappeared; customary law became rigid and lost its capacity of organic growth. Thereafter, the system could grow and be developed by legislation, and it was not the policy of the British administration to interfere with the personal laws of the people except when there was public opinion for it. To take an example, in the area of Muslim law, the Shariat Act was passed as a result of the demand of the Muslim people. This Act abrogated, to a large extent, custom modifying the Muslim law. In the area of Hindu law reformatory legislation was undertaken from time to time as a result of public opinion, which abrogated custom as well as regarded Hindu law as backward. One difference of approach between Hindus and Muslims may however be underlined. Whereas custom was abrogated to restore orthodox Muslim personal law, there is no example where a custom was abrogated to restore a principle of *Dharmashastra*. Whatever changes were made were to reform Hindu law and to that extent, custom or text, whatever came in the way was abrogated. So much so, that through recent Hindu legislation, Hindu law has been codified and reformed and made uniform throughout the country, certain customs have been still preserved even at the cost of uniformity.

It appears that customs have had their heyday, and they have practically exhausted their efficacy as law-creating agency. They have now ceased to act as a fruitful agency of law reform. New customs are difficult to get recognition from the courts. Their ascertainment has also led to their fixity. The future legal growth in India will be mostly due to legislation, and to some extent, judicial interpretation and precedent, though comparatively, the latter would be less important than the former. And, usually, when a new legislation is passed custom to that extent is abrogated as is depicted by the recent Hindu legislation. This trend, however, is in line with the developments which have taken place in every complex society, where the custom becomes less effective. The test of custom is continued observance and customs *ex hypothesi* cannot be suddenly created to meet a new problem. Customs are useful for situations which have already occurred but cannot create a rule to deal with a future difficulty.

The predominance of custom makes the system less uniform; it varies from family to family, from region to region and from community to community. It places a double burden on the judiciary which has to decide not only questions of fact, but also to take evidence to decide the existence and content of the custom alleged to be applicable to the facts. Judicial proceedings thus become dilatory and time-consuming. It becomes expensive for parties for they have to produce witnesses not only to testify to the facts of the case but also to custom. Till a custom is judicially accepted, position remains vague and indefinite for no one can feel sure whether the custom would be accepted as valid or not. All these

considerations point to one inevitable result - abrogation of custom and enactment of legislation instead. This has already been achieved to some extent. As time passes on, custom is bound to lose its pre-eminent position which it has enjoyed so long in India. It was inevitable till the legal system itself was in its formative stages. But when the legal system has achieved maturity, people have also become sophisticated and literate and, therefore, time is ripe for uniform legislation and abolition of custom. In every mature and developed system, custom plays a very minor role. Take the example of England. There is one other very important reason as to why custom should now be abrogated. Most of the customs are tribal and communal or sectarian, and so long as custom survives, these class distinctions are also bound to survive. It would lead to a better integration of the people, if the sense of separation of each community arising out of its distinctive customs were removed. As it happens, in every progressive society, custom ceases to play an important role after a stage of social evolution is reached which appears to have been reached in India. It may be that customs of certain tribes may have to be preserved for a little longer time; the Constitution seeks to do that with respect to certain very backward areas like NEFA and Nagaland. These people are in a backward state of evolution, and their modes should not be changed suddenly till they have reached a stage of evolution where they can assimilate new ideas and principles and give up their habitual and traditional patterns without much violence to their feelings and susceptibilities. But, as regards the rest of the people, these considerations do not prevail; and with them, no justification to keep their disparate customs appears to be imperative any longer.

JUSTICE IN DECIDING DISPUTES: PRECEDENT*

R.M.W. Dias

The forth major task of justice, and one which lies especially within the province of lawyers, is giving just decision in disputes. In Aristotelian terms this would fall under ‘corrective justice’.

Deciding disputes involves three kinds of knowledge knowing the facts, knowing the law applicable to those facts, and knowing the just way of applying the law to them. Knowing the law involves knowing how to find it in judicial precedents, statutes and immemorial customs and will be dealt with in that order in this and the following two chapters; knowing the just way of applying the law will be dealt with in Chapter 10.

As mentioned before, the doctrine of precedent in Britain has assumed a have binding force and enjoy law-quality per se; Bindingness depends on the hierarchy of courts; higher courts bind lower courts, never vice versa law to the principle behind a decision, its ratio decidendi, as stated by Jessel MR: ‘The only thing in a Judge’s decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided.’¹ The two aspects are independent. A decision of the High Court, for example, is ‘law’ although it is not binding on any court superior to itself. Two conditions had to be satisfied before stare decisis could become established. (1) There had to be a settled judicial hierarchy before there could be any clear-cut doctrine of binding authority, for until then it could not be known whose decisions bound whom. (2) There had also to be reliable reports of cases; if cases are to be authoritative as ‘law’, there should be precise records of what they lay down. Only about the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine emerges.

Stare decisis should also be distinguished from another doctrine known as *res judicata*, which means that the final judgment of a competent court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding. The main differences between the two doctrines are:

- (1) *Res judicata* applies to the decision in the dispute, while *stare decisis* operates as to the ruling of the law involved.
- (2) *Res judicata* normally binds only the parties and their successors. *Stare decisis*, relating as it does to the ruling of law, binds everyone, including those who come before the courts in other cases.
- (3) *Res judicata* applies to all courts. *Stare decisis* is brought into operation only by decisions of the High Court and higher courts.
- (4) *Res judicata* Takes effect after the time for appealing against a decision is past. *Stare decisis* operates at once.

LAW-QUALITY PRECEDENTS

Before any kind of doctrine of precedent can operate, there have to be reliable records of the decisions in previous cases and this is especially necessary for the doctrine of stare decisis.

Law reports

It has been pointed out by many writers that the history of stare decisis is the history of law reporting. Although the strict doctrine could not come into existence until reporting had attained an efficient standard, it is equally true that it was the habit of reply on precedents that gradually improved law reporting. The

* R.M.W. Dias, *Jurisprudence* (Ed. 5, 2013) Chapter 7, pp. 126-164.

¹ *Osborne v Rowlett* (1880) 13 ChD 774 at 785.

absence of reports, though inconvenient, did not preclude recourse to previous decisions. Memory was often relied on; and in the early days of equity, for instance, the absence of reports only led judges to refer to the Registrar's Books in which the facts, the steps in suit and the principles were set out.²

Among the earliest writers no reliance on cases is to be found. Glanville, writing at the end of the twelfth century, cited only one judgment in his treatise; Fleta and Hengham at the end of the thirteenth century quoted hardly any. The same is true of Fortescue in the late fifteenth century. The notable exception was Bracton, who compiled a Notebook of some two thousand cases as material for his treatise and employed some five hundred of them.³ There was nothing resembling the modern use of precedent; he stated his view of what a rule should be and added an illustrative case.

It is possible that Bracton's use of cases may have had something to do with the appearance of the Year Books. These constituted the earliest law reports, but bore no resemblance to modern reports. Many were anecdotal in character, the authors being concerned to record asides and points of pleading rather than principle, and the decisions often passed unmentioned. Nevertheless, the Year Books were used by students and it is clear from occasional statement that judicial decisions were being treated as authoritative pronouncements of the law. Thus, Prisot CJ said in 1454:

'And moreover if this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the Year Books, for they would never have confidence in their books if now we were to adjudge the contrary of what has no soften been adjudged in the Books.'

An utterance like this should not, however, be overestimated, and there was as yet no doctrine of stare decisis.

The Year Books, though useful, were not reliable reports and citation remained largely a matter of memory. The original record was the only official source of information,⁴ but resort to this was impractical in the daily work of the court and, indeed, access to records was normally accorded only to lawyer acting for the Crown. The appearance of private compilations of cases was therefore the next landmark. Among the first, the of deservedly high repute, were the reports of Dyer and of Plowden, followed by the famous reports of Coke, which ceased in 1916. None of them was in modern dress for they consisted of lengthy account of pleadings and disquisitions upon the branches of the law involved. Shortly after this, but still in the seventeenth century, there emerged the idea that decisions of the court of Exchequer Chamber were of binding authority.⁵ This was perhaps because such decisions were given by groups of judges. The same idea did not apply to decisions of the King's Bench, Common Pleas or even of the House of Lords. Indeed, decisions of the last mentioned body, which enjoy such authority today, enjoyed virtually none in those days. One reason was that lay peers took part in the deliberations, often to the confusion and embarrassment of lawyers, and it was not until 1844 that they ceased to participate in purely judicial matters.⁶ Another reason was that this assembly did not distinguish between its legislative and judicial functions, both of which were covered by parliamentary privilege. The publication even of judicial proceedings would have continued a breach of it. Only in 1813 did Dow begin a series of House of Lords reports.

² Winder 'Precedent in Equity' (1941) 57 LQR 245-249.

³ Cf the Practises of early Scots law in which important decisions were noted by judges and counsel for their own use; Smith The Doctrine of Judicial Precedent in Scots Law p2.

⁴ For the distinction between 'record' and 'report', see Pollock 'Judicial Records' in Essays in the Law ch. 9, especially at p 233; A First Book of Jurisprudence p 293.

⁵ Herbert CJ in *Godden v Hales* (1686) State Tr 1166 at 1254-55.

⁶ *O'Connell v. R* (1844) 11 CI & Fin 155 at 421-426.

After Code a period of indifferent reporting set in until the publication of Burrow's reports, which cover the period from 1757 to 1771. These admirable compilations marked the beginning of the modern practice, for they distinguished between headnote, facts, argument and decision with a proper report of the judgment. The doctrine of stare decisis was beginning to cast its shadow. Thus Blackstone spoke of 'an established rule' to follow previous cases 'unless flatly absurd or unjust'⁷ it would appear also that from about 1785 judges began to favour particular reporters chosen for each court and to prefer citation from them and no other.⁸ Eighty years later, in 1865, the serious of reports known as the 'Law Reports' was inaugurated by the Incorporated Council of Law Reporting. These enjoy the advantage of being revised by the judges before publication, but beyond that they are in no sense official. Law reporting remains, as always, a matter of private enterprise.

The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter. 'Utility to the profession is the only test', said Pollock.⁹ Another aspects of the matter is that there is, on the one hand, a need for a expeditious a service as possible, and on the other, that it is no easy matter to decide how useful a particular case is likely to prove. In 1936 the All-England Law Reports began providing a rapid weekly service of cases both useful and otherwise. In 1953 the Council of Law Reporting introduced an alternative weekly service with an indication as to which of the reported cases would subsequently be more fully reported in the 'Law Reports'. These are by no means all; there are other current series.

Assessment of reports

A 'law report' means any account of a case vouched for by a barrister who was present at the hearing.¹⁰ Today it is usual for a report to begin with catch-words indicating the main points involved. Followed by a headnote summarising the facts and decision, then the arguments of counsel, but these are included only in some series, and finally the judgment or relevant portion of it.

The following points may be borne in mind in estimating the value of a report. In the first place, any of the old reports may be consulted, but their authority varies. Some, for example those of Coke or Burrow, are viewed with approval, while others, for example those of Barnardiston or Epinasse, are not.¹¹ In all old reports it is important to observe how fully the facts are stated and whether the judgment in reported verbatim or not. Secondly, if a case is reported in more than one report, all the versions should be compared, for significant discrepancies may appear.¹² Thirdly, as a general rule the Law Reports version;

⁷ Bl Com I, 70.

⁸ Daniel The history and Origin of 'The Law Report' p 265. For a list of 'authorised reporters' just prior to 1865, see Moran The Heralds of the Law p 20.

⁹ Pollock Essays in the Law p. 249.

¹⁰ Pollock Essays in the Law p 243. It must be by a barrister. *Birtwistle v. Tweedale* [1953] 2 All ER 1598, [1954] 1 WLR 190, on which see Megarry 'Reporting the Unreported' (1954) 70 LQR 246. Cf Moran The Heralds of the Law p 13, where there is no mention of barrister; but see also p 120. For a solicitor's note of proceedings, see *Thompson v Andrews* (1968) 2 All ER 419, [1968] 1 WLR 777.

¹¹ 38 Eg Denman CJ in *Small v. Nairne* 1849) 13 QB 840 at 844; *Evershed, LJ in Hamps v. Darby* [1948] 2 KB 311 at 317-318 [1948] 2 All ER 474 at 475-476; *Denning LJ in Warren v. Keen* [1954] 1 QB 15 at 20-21, [1953] 2 All ER 1118 at 1121.

¹² See Pollock A First Book of Jurisprudence p 317, who also points out the importance sometimes of comparing the report with the record; Essays in the law p 231. On *Williams v. Carwardian* and the Common Law p 11. Other examples of significant divergences: *Edwards v. Jones* [1947] KB 659 at 664, [1947] 1 All ER 830 at 833 where not quite the same reason is given for refusing to follow a prior decision. *Barker v. Levinson* [1951] 1 KB 342 [1950] 2 All ER 825 where a statement as to the criminal liability of masters for the acts of servants does not where a statement as to the criminal liability of master for the acts of servants does not appear in the latter report; *Perry v. Stopher* [1959] 1 WLR 415 at 420, where *Hodson LJ* alludes to a difference in the report of a previous case in [1953] 1 WLR 1486, and his observation is in fact omitted in [1959] 1 All ER 713 the report of *Woods v. Vartin's Bank Ltd.* [1959] 1 QB 55 at 72 is preferable to those in [1958] 3 All ER 166 and [1958] 1

by virtue of having been revised by the judges, should be consulted in preference to others.¹³ The question may be asked; which is more authoritative – the original as taken down in court, or the subsequent revision? The Court of Appeal has ruled that it is the latter, since the former is only provisional and awaits approval by the judge. The Judge should not of course, later the whole character of his judgement.¹⁴ Fourthly, the best type of report is one which indicates, the arguments of counsel and sets out the judgment, or relevant portion of it, verbatim. A report which only summaries the judgment should only be used in the absence of a fuller report, but may not even then carry much weight.¹⁵ Finally in the absence of all else the oral account of a case by a barrister is admissible, though again this may be of limited value.¹⁶

Application of precedents

A precedent influences future decision. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee, the precise situations that will arise, so that rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and ‘malleable’. As pointed out at the beginning of the book, no word has one proper meaning, nor can anyone see to fix the meaning of words for others, so that interpretation of the rule remain flexible and open-ended.¹⁷

Applying a precedent to the instant case is a process of matching the fact –pattern of the precedent and the ruling thereon with the fact-pattern of the instant case; if they match, the rule is applied, if not, it is distinguished. This involves the first two kinds of knowledge mentioned at the start of this chapter, namely, knowing the facts and knowing the law applicable to those facts.

Knowing the facts

Knowing the facts of the instant case involves an exercise of discretion. This lies initially in believing or disbelieving the testimony of witnesses and weighing it on a balance of probability. Judges are human, so the quirks of individual personalities may also play some part occasionally.¹⁸ The discretionary element is

WLR 1018; *Re Philpot* [1960] 1 KB 394 at 398, and in [1949] 2 All ER 810 at 812, which the phrases must be and should be appear respectively with reference to appoint of procedure; in *R v. Agricultural Land Tribunal for the South Eastern Areas, Ex p Bracey* (1960) 2 All ER 518, the applicant relied on a statement reported in [1953] 2 All ER 4 at 6, but which is omitted in [1953] 2 QB 147. The weekly issue [Part 14] of the All England Law Reports version of *Schelesinger* [1960] P 191, contains a fuller report than that which subsequently came out in the bound volume of the same parts.

¹³ *Leather Cloth Co v. Lorscheider* (1869) LR 9 Eq 345 at 351; *Brentnall and Cleland v. LCC* (1994) 2 All ER 552 at 555; *Duke of Buccleuch; IRC* {1967} 1 AC 506 at 527 -528 (1967) 1 All ER 129 at 133; *National Bank of Greece SA v. Westminster Bank Executor and Trustee co (Channel Islands) Ltd.* (1970) 3 All ER 656 n. [1970] 1 WLR 1400. Cf *CHT Ltd. V. Ward* [1963] 2 All ER 835 at 842 where the LR version of a case was rejected as unsatisfactory.

¹⁴ *Bromley v. Bromley* (1965) P 111 [1965] 3 All ER 226 See also *Young v. North Riding Justices* (1965) 1 QB 502 at 508, (1965) 1 All ER 141 at 143-144, where the omission from the revised version of a point included in the Justices of the Peace Report was considered; and *R v. Cockburn* [1968] 1 All ER 466 at 468, [1968] 1 WLR 281 at 283-284, where the court repudiated a remark in another case, which is reported in the All England Law Reports and Weekly Law Reports, but is eliminated from the Law Report and Criminal Appeal Reports.

¹⁵ *Hallett J in Rivoli Hats Ltd. V. Gooch* [1953] 2 All ER 823 at 824, [1953] 1 WLR 1190 at 1192 commenting on the summarized report of *Clayton Newbury Ltd. V. Findlay* in (1951) Current Law Consolidation 65 (a fuller report was immediately included in [1953] 1 WLR 1194; and, less fully, in [1953] 2 All ER 826. See also *Haley v. London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, commenting on *Pritchard v. Post Office* as reported in [1950] WN 310 and (1950) 114 JP 370.

¹⁶ See the observations of Lord Morton in *Champan v. Chapman* [1954] AC 429 at 464-465, [1954] 1 All ER 798 at 815-816.

¹⁷ See *Stone Legal System and Lawyers' Reasonings* pp 35-36.

¹⁸ See pp 220-225 post.

most significant in knowing how to state the facts, for, as pointed out in Chapter 1,¹⁹ it is not knowledge of facts, but knowledge of how to state facts that is relevant; and this applies to the statement of facts of both the instant and the precedent cases. As Lord Simon has said. 'What is relevant is not only the statement of material facts by the deciding judge, but also their re-statement by other judges in later cases.'²⁰

First, the art of knowing how to state facts involves the distinction between statements of primary and secondary (or/inferential) facts: between saying, e.g. that A did so and so at such a time in such a place and saying that A acted negligently. 'Negligence' is commonly treated as a question of fact, but since it is a matter of inference from a set of primary facts two courts may state the inferential fact differently while agreeing on the primary facts.²¹

Secondly, there is knowledge of how to state facts at different levels of generality, which makes it possible for the deciding judge and a judge in a later case to make different statements of facts. Thus, A may have driven a Rolls Royce car at 30 mph through Piccadilly Circus at 2 pm on a certain Wednesday, run into B and Broken his right leg. The individual A may be generalized into 'person'; the Rolls Royce car may be generalized into 'vehicle'; Piccadilly Circus into 'public highway'; 30 mph through Piccadilly Circus at 2 pm. On Wednesday into negligence; and B's broken right leg into physical injury to the person. A restatement of these facts at a more general level would be: 'a person inflicted of physical damage'; and more generally still: 'the negligent infliction of damage. The higher the level of generality, the wider the scope of the proposition. It is clear at a glance that negligent infliction of damage' is wider than just 'the breaking of a given person's right leg by the careless driving of a Roll Royce Car'. A later judge is at liberty to accept as the fact- statement of A v B a proposition at any level along the scale. Thus, one who is confronted with situation in which a careless false statement has caused damage to person or property, and who wishes to utilise the decision in A v B in order to hold the defendant liable, would no doubt regard that case as authority for the negligent infliction of physical damage', since only at this level of generality would the ruling become wide enough to cover the instant case.²² On the other hand, another judge, wishing to impose liability for pecuniary loss would no doubt prefer the widest interpretation of A v. B, namely, the negligent infliction of damage.²³

Thirdly, it is necessary to know how to select the material facts. The fewer material facts included in a statement, the wider is its scope. In *Rylands v. Fletcher*²⁴ the facts were as follows: (i) A had a reservoir built; (ii) A employed B to build it; (iii) A was not himself negligent; (iv) B was negligent; (v) water escaped owing to B's negligent construction of the reservoir and damaged C's property. Only facts (i) and (v) were treated as material by the court. By ignoring the absence and presence of negligence in A and B respectively, and by generalising fact (i) into 'anything likely to do mischief, the decision creates the sweeping rule that whoever brings a 'mischievous substance' on to his land is liable for damage²⁵ caused by its escape, irrespective of negligence.

¹⁹ See pp 7-8 ante.

²⁰ *FA & AB Ltd v. Lupton (Inspector of Taxes)* [1972] AC 634 at 659, 659, [1971] 3 All ER 948 at 964, 965.

²¹ *Benmax v. Austin Motor Co Ltd.* [1955] AC 370, [1955] 1 All ER 326.

²² Eg. *Asquith LJ in Candler v. Crane, Christmas & fCo* [1951] 2 KB 164 at 189, [1951] 1 All ER 426 at 439; *Clayton v. Woodman & Son (Builders) Ltd* [1962] 2 QB 533, [1961] 3 All ER 249 (revd on the facts without affecting the principle [1962] 2 QB at 546, [1962] 2 All ER 891.

²³ Eg *Ross v Caunters* [1980] Ch 297, [1979] 3 ALL ER 580; *Junior Books Ltd. V. Veitchi Co Ltd.* [1983] 1 AC 520, [1982] 3 All ER 201.

²⁴ [1868] LR 3 HL 330, and see Goodhart 'The Ratio Decidendi of a Case' in *Essays in jurisprudence* and the Common Law pp 17-18.

²⁵ Subsequent Interpretation of damage leaves open whether it includes personal injury: *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500; *Shiffmtan v. Order of St John* [1936] 1 All ER 557 *Hale v. Jennings* [1938] 1 All ER 579; *Perry v. Kendricks Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85 Cf *Read v. J Lyons & Co Ltd.* [1947] AC 156, [1946] 2 ALL ER 471.

Connected with this, fourthly, is the ability of a later judge to review the material facts of the precedent and add to or subtract from the sub-total of facts selected by the deciding judge; or he may re-state the facts at a different level of generality. Such re-statements extend or restrict the ambit of the precedent in *Wilsons and Clyde Coal Co Ltd. English*²⁶ the employers were held liable for the death of one of their employees owing to the default of another employee. At that date a servant could not hold his employer vicariously liable for an injury inflicted by a fellow-servant because of the prevailing doctrine of common-employment, which has since been abolished. Therefore, to hold the employers liable, it was essential to the ratio decidendi to ignore the fact that the party at fault was a servant and to say that the employers were being held liable, nor vicariously, but for the breach of a personal non-delegable duty to ensure that reasonable care would be taken. So stated, the rule would attach liability to the employer of even an independent contractor. In *Davie v. New Merton Board Mills Ltd*,²⁷ however, Viscount Simonds and Lord Reid appeared to place an interpretation upon *Wilsons' Case* which would dismantle this rule. They stressed the materiality of the fact that it was not a contractor but a servant who had been at fault, which would involve a fundamental reinterpretation of the case²⁸ The Employer's Liability (Defective Equipment) Act 1969, how now overruled *Davie* and restored the original interpretation of *Wilsons* in statutory form. The point is even more vividly brought out in the two *Wagon Mound* cases. A quantity of furnace oil was carelessly allowed to spill overboard from the SS *Wagon Mound* into the waters of a harbour. In *Wagon Mound*²⁹ the Judicial Committee of the Privy Council proceeded on the finding of the lower court that, according to scientific opinion at that date, the ignition of the oil in such circumstances was not reasonably foreseeable, and accordingly held that there was no answerability in negligence for damage by fire. In *Wagon Mound (No. 2)*,³⁰ however, brought by different plaintiffs but based on the same occurrence, the lower court stated that a bare possibility of fire might have been foreseeable, but that the chance was so remote that it should be ignored. Accordingly, the defendants were held not liable on the basis that fire was not reasonably foreseeable. The Judicial Committee fastened on this advertence to even a bare possibility of fire as constituting a material difference between the first and the second case, and, reversing the lower court, held the defendant liable in negligence for fire damage after all. It will thus be seen how stressing one factor as material not only enabled two different courts to reach opposite results in the same case, but also enabled the same court to reach opposite results in two cases based on the same happening.

Fifthly, there is the art of knowing how to make different statements by taking different combinations of facts. The facts in *Donoghue v. Stevenson*³¹ may be listed as follows, (i) A was a manufacturer of ginger beer; (ii) A was assumed to have been negligent in that a snail was alleged to have been found in one of the bottles; (iii) acting under contract with a retailer, B, A delivered the tainted bottle to B without knowing that it contained a snail and thereby committed a breach of his contract with B; (iv) B, acting under contract with C, innocently passed the bottle to C, thereby committing a breach of his contract with C; (v) C innocently passed the bottle to D; (vi) there had been no opportunity for an intermediate examination of the bottle at any stage since it left A; (vii), D was allegedly poisoned by drinking the remains of the snail; (viii) this being a Scottish case, D sued A in the Scottish courts, and the case was referred to the House of Lords on a preliminary point. It was held that, assuming A had been

²⁶ [1938] AC 57, [1937] 3 All ER 628.

²⁷ [1959] AC 604, [1959] 1 All ER 346 (overruled by the Employer's Liability (Defective Equipment) Act 1969).

²⁸ [1959] AC at 621-622, 631, [1959] 1 All ER at 351-353, 358. See now Clerk & Lindsell on Torts, & 10-102. See also the attenuation of *Bailey v. Deddes* [1938] 1 KB 156, [1937] 3 All ER 671, in *Knight v. Sampson* [1938] 3 All ER 309; *Chisholm v. London Passenger Transport Board* [1939] 1 KB 426, [1938] 4 All ER 850; *Wilkinson v. Chetham-Strode* [1940] 2 KB 310, [1940] 2 All ER 643; *London Passenger Transport Board v. Upson* [1949] AC 155, [1949] 1 All ER 60.

²⁹ [1961] AC 388, [1961] 1 All ER 404.

³⁰ [1967] 1 AC 617, [1961] 2 All ER 709.

³¹ [1932] AC 562.

negligent in leaving a snail in the bottle, A would be liable to D. the case was remitted to the Scottish court for a decision on fact (ii), namely, whether there had in truth been a different combinations of the above facts. In the first place, on fact (viii) alone it might have been argued that an appeal from Scotland is not binding on English courts, since Scots law is a different system.³² Secondly on facts (i), (ii), (vi) and (vii) it could be said that a negligent manufacturer is liable for damage to the ultimate consumer where there is no likelihood of an intermediate examination the manufacturer proposition. Thirdly, on facts (ii), (ii), (vi) and (vii) it could be said that anyone who negligently mis performs a contract and physically damages a thirdly party, whom he ought reasonably to have contemplated as likely to be affected, is liable to such thirdly party in tort, though he would not be liable in contract. Fourthly, on facts (ii) and (vii) it could be said that anyone who negligently damages another, whom he ought reasonably to have contemplated as likely to be affected, it liable the neighbour proposition. Only in the light of later cases is it possible to determine the ratio decidendi of this important case. In recent years courts have come to regard the fourth proposition as being its ratio,³³ while previously they generally adopted the second.³⁴ It is clear, therefore, that until recently tribunals had the choice of adopting one or the other.³⁵ In this way a case may even be given an interpretation quite other than that of the deciding judge.

Finally, as an aside, it may be remarked that Donoghue's case strikingly illustrates the point that what is important in law is the statement of facts rather than even their truth. The house of lords remitted the case to the Scottish court for trial on the ruling laid down by the House, but this did not take place because of the death of one of the parties. So the truth as to whether or not there was a snail in the bottle was never established and is irrelevant to the ruling.

Wide though the possibilities are of making different statements of facts, they are limited by the consensual domain of the usual meanings of words. The facts of Donoghue's case would support any of the statements given above, but not, e.g. the statement that the defendant caused a public nuisance.

Knowing the law

What is 'law' in a precedent is its ruling or ratio decidendi, which concerns future litigants as well as those involved in the instant dispute. Knowing the law in this context means knowing how to extract the rationes decidendi from cases. Statements not part of the ratio decidendi as obiter dicta and are not authoritative. Three shades of meaning can be attached to the expression 'ratio decidendi'. The first, which is the translation of it, is the reason for (or of) deciding.³⁶ Even a finding of fact may in this sense be the ratio decidendi. Thus, a judge may state a rule and then decide that the facts do not fall within it. Secondly it may mean the rule of law proffered by the judge as the basis of his decision'; or thirdly, it may mean the rule of law which others regard as being of binding authority.

There is a temptation to suppose that a case has one fixed ruling which is there and discoverable here and now and once and for all. This is not so, for the ratio is not only the ruling given by the deciding judge for his decision, but any one of a series of rulings as elucidated by subsequent interpretations³⁷ the pronouncement of the judge who decided the case is a necessary step towards ascertaining the ratio, but the

³² Not after *Heyman v. Darwins* [1942] AC 356 at 401, [1942] 1 ALL ER 337 at 361.

³³ *Home office v. Dorset. Yacht co. ltd.* [1970] AC 1004, [1970] 2 ALL ER 294; *Anns v. Merton London Dorough Council* [1978] AC 728, [1977] 2ALL ER 492; *Ross v. Caunters* [1980] Ch 297, [1979] 3 ALL ER 580; *Junior Books Ltd. V. Veitchi Co Ltd.* [1983] 1 AC 520, [1982] 3 ALL ER 201.

³⁴ *Eg Howard v. Walker and Lake (Trustees) and Crisp* [1947] DKB 860 at 863g.

³⁵ 'Wherever the court wishes to find for the plaintiff, that doctrine (the fourth proposition) will be invoked, just as it will be disregarded when the defendant is the favoured party: *Landon in Pollock on Torts* p 329.

³⁶ Lord Dinning MR in *Paal Wilson & Co A/S v. Partenreeder Hannah Blumenthal* [1983] 1 AC 854 at 873, [1982] 3 ALL ER 394 at 400, (varied [1983] 1 AC 854, [1983] 1 ALL ER 34, HL).

³⁷ *Goodhart Essays in Jurisprudence and the Common Law* pp.

process by no means ends there; subsequent interpretation is at least as significant, sometimes more so. 'it is not sufficient', said Jessel MR.

That the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case, and it is for a subsequent judge to say whether or not, it is a right principle, and, if not, he may himself lay down the true principle.³⁸

Cases of overruling and reversal by superior authority are obvious instances of subsequent correction, but they are not within the scope of the immediate discussion. For, apart from these, the judge in a later case may restrict or enlarge the ruling as stated by the deciding judge, or he may reinterpret that ruling in such a way as to relegate it to the status of an obiter dictum. Accordingly, ratio is best regarded as a pointer towards the direction which subsequent decision should take within a broad spectrum of variations. It is not something identifiable once and for all, but a continuing process, and as such it has to be viewed in a continuum of time.

1. Difficult though the task of finding the ratio is, there would be a measure of agreement in propounding that no rule should be treated as ratio which would not support the ultimate order.³⁹ Where a stated rule obviously bears no relation to the facts, it is no more than a dictum.
2. Even when the deciding judge has given no reason for the decision, it may be possible for a subsequent tribunal to extract one from it.⁴⁰ However, no judge is required to accomplish the impossible. If it is not clear', said Viscount Dunedin, 'then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it.'⁴¹
3. It follows from what has previously been said that different ratios may be extracted from a case depending on different ways of stating the facts.
4. More rarely, a judge may demote a proposition in a previous case from its status of ratio to that of dictum. Thus, the 'neighbour' proposition in *Donoghue v. Stevenson* used to change its category according to whether the plaintiff or the defendant was thought entitled to succeed.⁴²

³⁸ *Osborne v. Rowlett* (1880) 13 ChD 774 at 785. Lord Reid, in attempting to find the ratio decidendi of an earlier case, said 'If I had to try, the result might depend on whether or not I was striving to obtain a narrow ratio: *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] 1 All ER 1 at 12. Cf *Devlin J. v. Behrens v. Bertram Mills Circus Ltd.* [1957] 2 QB 1 at 24, [1957] 1 All ER 583 at 594.

³⁹ The reason sine qua non: Cardozo 'Jurisprudence' in *Selected writings* (ed Hall) p 33. See also Lord Denning in *Penn-Texas Corp'n v. Murat Anstalt (No. 2)* [1964] 2 QB 647 at 660-661, [1964] 2 All ER 594 at 597; *Harper v. National Coal Board (Intended Action)* [1974] QB 614 at 621, [1974] 2 All ER 441 at 446. In *Pinchin v. Santam Insurance Co. Ltd.* 1963 (2) SA 254 (WLD) the ruling on a point which did not affect the ultimate decision was nevertheless made part of the ratio by being made the basis of the order on costs. See also *The Wagon Mound (No. 2)* [1967] 1 AC 617, [1966] 2 All ER 709, for the relationship between rulings and the ultimate order.

⁴⁰ Eg *Giles v. Walker* (1890) 24 QBD 656, discussed in *Davey v. Harrow Corp'n* [1958] 1 QB 60 at 71-72, [1957] 2 All ER 305 at 309-310.

⁴¹ *Great Western Ry Co. v. Mosyn (Owners), The Mostym* [1928] AC 57 at 73. A remark by Lord Reid in *Nash (Inspector of Taxes) v. Tamplin & Sons Brewery, Brighton, Ltd.* (1952) AC 231 at 250, [1951] 2 All ER 869 at 880, to the effect that every case must have a ratio decidendi and that this should either be applied or distinguished appear to have been contradicted by Lord Reid himself in *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] AC 446 at 479, [1962] 1 All ER 1 at 14, which he despaired of finding the ratio decidendi of a previous case.

⁴² See *Fairman v. Pertetual Investment. Building Society* [1923] AC 74, as interpreted by Scott LJ in *Haseldine v. CA Daw & Son Ltd.* [1941] 2 KB 343, [1941] 3 All ER 156, and in *Doylan v. Dublin Corp'n* [1949] IR 60, and in *Pearson v. Lambeth Borough Council* [1950] 2 KB 353, [1950] 1 All ER 682. See also *Jacobs v. LCC* [1950] AC 361; [1950] 1 All ER 737. See further *Adam v. Ward* [1917] AC 309, as interpreted in *Egger v. Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406.

5. Certain types of cases do not deserve to be authorities. One type, already alluded to, is that in which there is no discoverable ratio decidendi. Others are cases turning purely on facts,⁴³ those involving the exercise of discretion,⁴⁴ and those which judges themselves do not think worthy of being precedents.⁴⁵ Decisions on the interpretation of documents are sometimes used as precedents, which is regrettable since a court may find itself construing, not the document before it, but judicial interpretations of similar working in other, slightly different documents.⁴⁶ 'I do not think it right', said Lord Denning MR, 'to look at previous cases in this way. The only legitimate purpose is to use them as a guide towards the meaning of words, so as to help in the search for the testators' intention. They should never be used so as to defeat this intention.'⁴⁷

The difficulties so far considered by no means exhaust the problems that may arise, some of which are incapable of solutions. A case may involve two points, A and B, and a decision on either in favour of the defendant, be it supposed, is conclusive of the matter, while the plaintiff has to win on both A and B in order to win. Suppose that the judge decides in the defendant's favour on both issues. Which is the ratio, since either is sufficient to support the decision?⁴⁸ On the other hand, if he decides in favour of the plaintiff on point A, but in favour of the defendant on point B, who accordingly win, and if it is accepted that no ruling can be ratio unless it supports the order made, then the decision on point A is obiter. Even as a dictum it may nevertheless carry such authority that a subsequent tribunal may feel obliged to follow it. If so, the nomenclature ratio decidendi or obiter dictum for the decision on point A ceases to matter. In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*⁴⁹ the House of Lords overthrew a rule by virtue of which the defendant had succeeded in the court of appeal and propounded a different rule, but with a qualification attached so that the defendant was still able to win. This rule and qualification together constitute the ratio; but even if it were said to be a dictum, the distinction is immaterial at this level of authority.

A judge may embark upon a line of reasoning involving a rule which justifies a certain conclusion. He may then proceed along another line of reasoning involving a different rule, wider or narrower, which also justifies that conclusion.⁵⁰ Lord Simon once declared that if two reasons are put forward by a court for its decision, both should be accepted as part of the ratio decidendi.⁵¹ One may later be rejected, as in *Fisher v. T aylor's Furnishing Stores Ltd.* 9 where the Court of appeal rejected as incorrect one of the two grounds which it had given in an earlier case, and the rejection was later confirmed by both the Court of Appeal and the House of Lords. Again, if the House of Lords has given two reasons for a decision, and declares subsequently that one of them is correct and the other wrong, the authoritative ruling is the correct

⁴³ *Simpson v. Peat* [1952] 2 QB 24 at 28, [1952] 1 All ER 447 at 449; *R v. Young* [1953] 1 All ER 2g1.

⁴⁴ *Bragg v. Crosville Motor Services Ltd.* [1959] 1 All ER 613 at 615, [1959] 1 WLR 324 at 326.

⁴⁵ *R v. Stokesley (Torkshire) Justices, ex p Bartram* [1956] 1 All ER 563 at 565, [1956] 1 WLR 254 at 258.

⁴⁶ See the observations of Jessel MR in *Aspden v. Seddon* (1875) 10 Ch App 394 at 397, 398. As to whether such cases should be reported, see Moran *The Heralds of the Law* ch 7, summarizing the views of Lord Lindley, Mews and Burrows.

⁴⁷ *Re Jebb, Ward-Smith v. Jebb* (1966) Ch. 666 at 672, [1965] 3 All ER 358 at 361.

⁴⁸ In *Said v. Butt* [1920] 2 KB 497, the judge made it clear that his decision on point B was additional, which makes it a dictum.

⁴⁹ [1964] AC 465, [1963] 1 All ER 575. In the South African case of *Pinchin v. Santam Insurance Co. Ltd.* 1963 (2) SA 254 (WLD) the judge made his decision for the plaintiff on point A part of the ratio decidendi by basing his order as to costs on it. See also *The Wagon Mound (No. 2)* [1967] 1 AC 617, [1966] 2 All ER 709.

⁵⁰ *Eg Denning LJ in Broom v. Morgan* [1953] 1 QB 597 at 609-610, [1953] 1 All ER 849 at 854-855.

⁵¹ *Jacobs v. LCC* [1950] AC 361 at 369-371, [1950] 1 All ER 737 at 741-742. To the same effect, Lord Bramwell in *Membery v. Great Western Rly co.* (1889) 14 App Gas 179 at 187; Lord MacNaghten in *New South Wales Taxation Comrs v. Palmer* [1907] AC 179 at 184; Greer LJ in *London Jewellers Ltd.*

V. Attenborough [1934] 2 KB 206 at 222; *Pearce LJ in Cane (Valuation Officer) v. Royal College of Music* [1961] 2 QB 89 at 114; [1961] 2 All ER 12 at 24; Stamp J in *Rogers v. Longsdon*

one. This shows how subsequent interpretation determines the ratio decidendi as between two stated rulings. Another illustration of the difficulty is *Donoghue v. Stevenson*¹² in which there are three rulings justifying the result, the wide 'neighbour' rule, the narrower 'manufacturer' rule and the 'fallacy of contractual privity's' rule. It has been pointed out that judges used to regard the first as being ratio or dictum according to the way in which they wished to decide. On the other hand, even the considered opinion of a judge on a point not raised or argued will probably be treated as a dictum. The Same applies to a proposition which is merely a proposition of law assumed by the [Board] to be correct for the purpose of that particular case.

These complications multiply in appellate tribunals where there is a plurality of judgments. It may happen that all the judges agree in the result for different reasons. Suppose that each of five judges gives a different reasons for arriving at the same result and without disagreeing with the reasons given and a subsequent tribunal may be said to have five competing reasons and a subsequent tribunal may adopt any of them for the purpose of deciding the case before itself. Suppose instead that each of the five not only gives a different reason for the same conclusion, but also rejects the reasons given by the other four. Here the difficulty in the way of adopting any one opinion is that it has been condemned in four others. Such a case, it is submitted, has no discoverable ratio and is, in any event, worthless as an authority. It has so far been assumed that the judges agree in the result. Whether they disagree, further difficulties arise. As long as three at least out of five, or two out of three, concur in the result for the same reason, their view may be said to constitute the ratio. Where the majority differ in their reasons while the minority agree on the reason for their dissent, it is difficult to say what the discretion. Finally, if a case has more than one issue and the tribunal is not that arise cannot be resolved by any test. The judge in a subsequent case interpretation he chooses upon it. All this does not imply that the solution would be to have only one judgement, even if the court is agreed. Differences in presentation and working will avoid the danger of any one judge's utterance being treated like an Act of Parliament.

Obiter Dicta

Pronouncements of law, which are not part of the ratio decidendi, are classed as obiter dicta and are not authoritative. Rationes and dicta tend to shade into each other. The former have law-quality and are binding on lower courts, dicta, too, have law-quality, but are not binding at all. Vis-a-vis a higher court even the ratio decidendi of a lower court decision has only persuasive force like that of a dictum. It has been pointed out that some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are propositions stated by way of illustration or on hypothetical facts. Greater difficulties attend ruling of law which are subsequently relegated to the status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the judges. An example would be the treatment of Lord Atkin's 'neighbour' proposition in subsequent cases.

The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. 'Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement¹. On the other hand, dicta which have been acted upon over the years may acquire increasing respect. A dictum may also be adopted as the ratio decidendi of a subsequent decision and will then acquire the authority of that tribunal. In *Zeidman v. Owen*³ Lord Goddard CJ said 'If we thought that the dicta, though obiter, expressed the true construction of the Act, we should feel we ought to follow them. Finally, a suggestion has been offered that a distinction be drawn between obiter dicta, those irrelevant to the case, and judicial dicta, those relevant to some collateral matter but no part of the ratio⁴. The latter will generally be more persuasive than the former.

Subsequent history of a case

It should be abundantly clear from all this that the ratio decidendi of a case depends on the interpretation put upon it no less than on what the deciding judge himself propounded. Later history is thus an indispensable and continuing part of ratio. It also shows the limits of bindingness.

Reversal

A case may be reversed on appeal. The effect of reversal is normally that the first judgment ceases to have any effect at all. The situation is different if the case is affirmed or reversed by an appellate court on a different point from that on which the decision in the lower court was based. In one case, Master of the Rolls said that in such a situation the previous decision will be of no effect at all. This probably goes too far, and in another case it was said that the first judgment remains binding. The truth seems to be that in such a situation a later court has freedom to deal as it pleases with the earlier decision.

Refusal to follow

Before the doctrine of stare decisis came into being, judges freely refused to follow cases which they considered to be contrary to principle. A judge may even now refuse to follow a decision of co-ordinate authority, in which event the conflict awaits resolution by a superior tribunal. Repeated refusals to follow will weaken the authority of a case; as also the refusal by a higher court to adopt the rule enunciated by a lower court, but only if such refusal implies disapproval of it.

The growing volume of reported cases often leads to unavoidable overlooking of relevant authorities. Sometimes, however, a precedent may be deliberately put on one side, though this is done rarely and perhaps as a last resort. Thus, Sellers LJ once said 'the best way to deal with that case is to say that it goes into the limbo of lost causes.

Distinguishing

Repeated distinguishing of a case is evidence that the decision is not approved, and the effect may also be to confine it more and more closely to its own special facts.

It should be evident already that the bindingness of stare decisis is not rigid since judges have some latitude in evading unwelcome authorities. All that the doctrine means is that a judge must follow a precedent except where he can reasonably distinguish it; but the possibilities of the latter are such that they reduce bindingness to the semblance of a cloud, solid looking and clear cut when viewed from afar, but less so when one actually gets into it. A judge may, in the first place, restate the factual part of the precedent by lowering the level of generality in order to effect the necessary distinction. 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it': so said Lord Halsbury¹⁰, and these words are classic authority for this particular distinguishing technique. The two decisions then, as Lord Simon put it, are like 'binary stars each part of which lives within the field of the other and is essentially influenced by it. In this way it is theoretically possible to confine the authority of *Donoghue v Stevenson* to the manufacture of ginger beer and to distinguish it from a case concerning the manufacture of fruit-salad; but it is obvious that the lengths to which this technique can be carried have to be regulated by common sense. A distinction has to be reasonable, else it will not satisfy the desire that justice should be done. Alternately, a judge may restate the factual part of the precedent by treating as material such additional facts as will move it away from the case in hand¹³. Again, it is possible to evade a precedent by treating the less appropriate of alternate principles as its ratio. Or, the ruling hitherto regarded as being the ratio may be rejected as dictum. Asquith LJ once quoted the following remarks; "the rule is quite simple: if you agree with the other bloke you say it part of the ratio; if you don't, you say it's obiter dictum, with the implication that he is a congenital idiot" a And this may well, as a matter of pure psychological fact, have more underlying truth than we know, or care to avow¹⁴.

On occasions it may be difficult to decide whether a case has been overruled in a subsequent decision, or merely distinguished. Where the House of Lords, for example, has commented adversely on earlier decisions of inferior courts, there is often a great deal of discretion for future courts in deciding whether the House of Lords has by its comments destroyed the authority of those cases, or merely distinguished them and left their authority unimpaired.

Changed conditions

Although a case has neither been reversed nor overruled, it may cease to be 'law' owing to changed conditions and changed law: *cessante ratione cessat ipsa lex*. It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law; the other is where a case, which is acknowledged to have been law at the time, has ceased to have that character owing to altered circumstances. It is the latter that is under consideration. If the law-making function of courts is admitted, then it would be easy to reject out-of-date precedents openly on the ground of changed conditions and not have to resort to the threadbare fiction that cases only reflect what always has been law.

Willes CJ once said, 'When the nature of things changes, the rules of law must change too'. This is a truism in that the legislature and, within limits, the court should change rules to keep the law abreast of change. The question under review is whether changed conditions may deprive a case of its law-quality. For instance, the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co. Ltd.* was disapproved by the Privy Council in *The Wagon Mound*, but although it has never been overruled, it has been declared to be no longer law in the light of the change in the law of remoteness of damage that had taken place. There is also a strong suggestion in *The Heron II* that *The Parana*¹, which had laid down a rule for assessing damages in the bygone days of sailing ships, had ceased to be law in the conditions of modern transport. When sterling changed from being a stable to a floating currency and after Britain's entry into the EEC, the Court of Appeal departed from the rule laid down by the House of Lords in an earlier case. Later, in following their decision, Lord Denning MR remarked 'When the nature of sterling changes, the rule of law may change too'. On appeal, the House of Lords affirmed the Court of Appeal and refused to follow their previous decision, but indicated that it was for the House, and not the Court of Appeal, to do so. The 'changed conditions' rule applies only to decision which are not binding. In an important statement of the position Lord Simon said:

'To sum up on this part of the case: (1) the maxim in the form 'cessante ratione cessat ipsa' reflects one of the considerations which your Lordships a previous decision of your Lordships' House; (2) in relation to courts bound by the rule of precedent the maxim "cessante ratione cesat ipsa lex", in its literal and widest sense, is misleading and erroneous; (3) specifically, courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency; (4) the maxim in reality reflects the process of legal reasoning whereby a previous authority is judicially distinguished or an exception is made to a principal legal rule; (5) an otherwise binding precedent or rule may, on proper analysis, be held to have been impliedly overruled by a subsequent decision of a higher court or impliedly abrogated by an Act of Parliament; but this doctrine is not accurately reflected by citation of the maxim "cessante ratione cessat ipsa lex."

Overruling

This refers to the action of a superior court in upsetting the ratio laid down by a lower court in some other case. Reversal, which is the overthrow of a decision on appeal in the same case, may involve disapproval of the ratio as stated by the lower court; but it need not, as where the decision is reversed on some other point. Overruling necessarily involves disapproval of the ratio but never affects the previous decision so that the parties in the *judicata*; and accounts that have been settled also are not affected. A theoretical

question arises when a superior court declares that a ratio enunciated previously by a lower court is wrong, but at the same time decides the present case with similar facts in the same way but for a different reason. If it is accepted that, whatever is held to constitute the ratio decidendi of a case, at least nothing can be ratio which does not support the order that is made, then the new ruling is ratio; but even if it is not, it may well prove to be so authoritative as to reduce the distinction between ratio and dictum to vanishing point. If a case is overruled by statute, there is some ground for saying that its ratio is no longer authoritative. A case may first be overruled and then reversed, as when the ratio is overthrown by superior authority in another case while there is still time within which to appeal in the first case, and an appeal is then lodged against the decision, which is duly reversed. It is also possible for a case to be first reversed and then overruled, as when the decision is reversed on appeal on some other point without affecting the ratio, and the ratio is then overthrown in another case. If a case is overruled and the overruling case is itself reversed, or overruled, the first will revive. Statutory repeal operates prospectively, unless the statute itself subsequently overruled by statute. Does case A revive? By analogy with the case law position it is submitted that it does.

It is not possible to lay down a rule as to when it is or is not permissible to overrule. There will sometimes be a bold rejection even of settled doctrine, at others there will be a timid refusal to eradicate obsolete and Lords considered whether or not to overrule a previous decision of its own. Various considerations were mentioned. In the first place, it was said to be (a) Finality is necessary in developing the law; (b) a tenable view taken in case 1 should not be cast aside by an equally tenable opposite view in case 2, or this in turn may be cast aside in case 3; and (c) it is important not to encourage the re-opening of questions. Secondly, overruling is legitimate when broad issues of legal principle are involved, or if a decision has been disapproved, or distinguished on inadequate grounds. Thirdly, it is earlier to overrule a recent decision before it has been acted on. Fourthly, overruling should rarely occur in matters of statutory construction according to two of their Lordships, but two others thought the earlier case to have been wrongly decided, only a minority were prepared to overrule it.

Circumstances which might tend to strengthen the authority of a case and which would work against it being overruled are the unanimity of the court, the eminence of the judges who composed it, the approval of the decision in later cases and by the profession at large, the evidence in the report that the issue was fully and carefully argued by counsel and that the court took time to deliberate, and the length of time for which the decision has stood. This last is especially important since the longer a case has stood, the more people will have governed their transactions on the basis of what is thought to be law. Similarly, factors which might make a court more ready to overrule an earlier case are a lack of unanimity in the judgments, the failure to take notice of relevant authorities, the lack of eminence of the judges who decided notice of relevant authorities, the lack of eminence of the judges who decided it, the fact that the report is of poor quality, the fact that the issue was not fought out fully but was compromised, the fact that the judgment was extempore and the matter had not been properly argued, the fact that the case has been doubted or criticised in subsequent decisions or by the profession or in commentaries of jurists, and, by no means least, if the decision is thought to be plainly wrong.

Overruling may be express or implied. It is implied when the ratio of the later decision of a superior court is inconsistent with that of the inferior court. In view of the difficulty of ascertaining the ratio of a case, it follows that it is equally difficult to decide whether a case has been impliedly overruled or not, but it does give court a loophole for escaping from stare decisis.

That effect of overruling is retroactive except that it does not unsettle matters which are res judicata as between the parties to the overruled decision, and accounts which have been settled. Retroactivity is logically reconcilable with the theory that judges do not make law but only declare what always has been law on the hypothesis that the overruled decision was an erroneous declaration of the law and hence void ab initio. This reason may be an ex post facto rationalisation. A more fundamental reason seems equally plausible, namely that just quality is inherent in every law. Therefore, an unjust (hence erroneous) precedent can never have been 'law'. However, the retroactive rule creates a difficulty. The House of Lords insists

that only the House can declare its own decisions wrong and that lower courts must follow them. This implies that such previous decisions are 'law', albeit 'bad law', since no court can be bound to follow that which is not 'law', albeit 'bad law, since no court can be bound to follow that which is not law. If so, the overruling by the House of Lords of one of its own decisions must operate prospectively, unless there is express provision to the contrary. Everything that occurred prior to repeal; remains governed by the repealed statute.

Even if it is be conceded that judges do make law, the question of hardship would remain in that those who had acted in reliance on the law prevailing at the time would be judged on the basis of a different law made *ex post facto*. This consideration weighs powerfully against overruling except for compelling reasons. A suggestion that merits serious attention is that overruling, like repeal, should take effect for the future only, and that the decision in the instant case should abide by the previous law for the last time¹. The objections do not appear to be conclusive. It might be said that if the new rule, which is to supplant the old, does not support the actual decision it can only be a dictum. This might be countered by the argument that the tribunal is only freeing itself for the future from any constraining effect of its own decision, thus enabling itself to adopt the dictum later. It might also be objected that a litigant would not be encouraged to appeal against a bad precedent if the overruling of it would not avail him. There is probably some substance in this in a limited number of cases, but against it there is a factor which often stands in the way of much-needed reform. Besides, the objection would be met by coupling prospective overruling with a discretion to overrule for the future and for the instant case, or for the future only, or for the future, the instant case and retrospectively. Prospective overruling will be helpful where the object is to create a new criminal offence, or extend an existing one, by overruling a case which had held that there is no liability in that situation; for this would avoid having to punish the accused in the instant case for conduct which was not a crime when he did it.

Following and applying

The ratio decidendi of a previous case may be followed or applied in a subsequent case. If a case has been repeatedly followed, this is a factor which enhances its authority. A case may be said to be followed, this is a factor which enhances its authority. A case may be said to be followed when the use made of it does not affect its ratio, for example, when the judge only trims the facts of the case before him to fit it into the precedent. A case may be said to be applied when the use made of it does affect its ratio, which could occur when the judge raises the level of its generality by reducing the material facts, or selects the more appropriate of alternative rationes. He may also adopt a dictum in it as the ratio of the case before him³.

Explaining

A judge may place a certain interpretation on a precedent and he may then follow it, or he may refuse to follow it, or he may distinguish it. Explaining is an indication that the ratio decidendi is being reshaped.

Judicial discretion

Since there is no fixed ratio of a case, there is an element of choice in determining it. The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law⁴. This doctrine is the product of many factors. It would appear to result from thinking exclusively in the present time-frame, which gives rise to the belief that there must be some rule which is always 'there' at any given moment and waiting to be applied. In Blackstone's day another important foundation for the doctrine was the belief in natural law, which was supposed to be part of English Law. Despite the derision which this theory encountered⁵, and in the face of evidence to the contrary, its vitality is remarkable. Again, during the seventeenth-century struggle against the prerogative the judges maintained that the king was subject to the law and could not legislate, the corollary of which was that they, too, were subject to the law and unable to make law and bound only to apply it. The doctrine of the separation of powers also insisted upon the theoretical dissociation of judicial and legislative functions. The climate of opinion in the

nineteenth century was favourable to the theory in so far as the prevailing positivism concerned itself only with the law as found, whether thought to have been produced by custom or laid down by sovereign authority. Also, public confidence is more easily retained by fostering the illusion that judges do but administer the law impersonally and that none of them can make the rules, especially since judicial law-disputes, particularly those in lower tribunals, which constitute the bulk of instigation. Judges, for their part, seek refuge in the theory when giving a harsh decision. Indeed, it has even been suggested that the theory satisfies the psychological preference of human beings to be led rather than have to find their own way, the need, in short, for a 'father –symbol'. Another factor is that judicial decisions in their nature have to pronounce on the legality of conduct after it has taken place⁶. Anything savouring of attainer is unpopular and the orthodox theory conceals this suggestions under the pretence that the law has always been there. It should also be noted that, whether or not a creative element enters into a particular decision, it becomes for future purposes evidence of what the law is, and this evidential function overlays the creative factors that operated to bring it into being.

Finally, and by no means least, the orthodox theory finds support in the syllogistic form of reasoning by which the conclusion is ultimately reached. For a syllogism requires that the premises, from which the conclusion is deducted, should already be in existence. Thus: 'All men are mortal' (major premise); 'X is a man' (minor premise); 'Therefore X is mortal' (conclusion). In a judgement the syllogism assumes the following form: 'Facts of Type A are governed by Rule B, (major premise); 'Facts of the instant case are of Type A' (minor premise); 'Therefore the facts of the instant case are governed by Rule B', (conclusion). A syllogism can only make explicit that which is implicit in the premises; it neither creates nor reveals anything new. With reference to a judicial decision this gives rise to the idea that the result is deducible from a rule, which is already 'there'.

The syllogistic form appears only in the way the conclusion is stated at the end of a judgment. Before a judge can deduce his conclusion, however, he has to find, and sometimes make, suitable premises and there is flexibility at every stage of the decisional process. First, he has to establish the major premise that 'Facts of Type A are governed by Rule B' by finding it in a precedent, statute or custom; or, if not, he creates one by analogy with other rules or by a process akin to indication or, in the absence of any other guide, he creates one out of his own sense of justice. When there is a rule of precedent, he has to consider whether or not to follow it either because it is binding and is not reasonably distinguishable, or, if not binding, because it is consonant with his sense of justice.

Next, he has to establish the minor premise that 'Facts of the instant case are of Type A'. Every case begins with the facts, but the finding of facts depends on opinion as to the credibility of witnesses and interpretation of the evidence generally. The facts have then to be stated at an appropriate level of generality and the statement is governed by linguistic conventions. It may also be coloured by a convenient rule which is to hand. The rule-statement, too, for its part is often trimmed according to the view taken of the facts so that it can be made to yield the conclusion which the judge wants to reach. The formulation of fact statements and rule statements are parallel processes.

In establishing that the facts of the instant case are of Type A, a distinction to be borne in mind is that between 'similarity' and 'identity'. It is unlikely that the factual part of a rule will be identical with the facts of the instant case because the chance of identity between facts in different situations occurring at different times is inconceivably remote and because rules are stated in general terms so as to accommodate variations and often utilise vague concepts, such as 'negligence', and 'possession'. As will be seen later, these have no fixed content and can be given different meanings in different context. What is crucial, therefore, is the perception of similarity, not identity, between the fact-situation of the case and the fact part of the rule; which is subjective, since perception of similarities and dissimilarities is a matter of choice and a desire to reach a justice decision.

Finally, there is the conclusion that 'The facts of the instant case are governed by Rule B. Once the major and minor premises have been manipulated so as to show that the fact-statement in the instant case

is similar to that of the rule, the conclusion will appear to follow syllogistically. The judicial process thus stands in a class of its own; it involves different kinds of reasoning.

A. INDUCTION: This applies to finding a major premise. The term 'induction' is not a happy one but will serve for want of a better. The process bears only a board parallel to scientific induction in so far as it proceeds from instances of particular cases to a generalized rule. 'Faces of case A were decided Y'; 'Facts of case B were decided Y'; 'Therefore, strictly, facts A and B should be decided Y'. It may, however, be reasonable to extract a broader proposition capable of yielding decision Y in situation C (and perhaps D and E) as well. Any such broader proposition has to be reasonably warranted by the material out of which it was extracted, or it is liable to be cut down at being too wide by a later court.

There are differences between this type of reasoning and scientific induction:

- a) A scientist can repeat his experiment and verify his principle; a judge cannot.
- b) Scientific principles result from observations of data; judicial principles result from statements of fact and value-judgments.
- c) A judge can reason by analogy and choose between competing analogies; a scientist does not.
- d) A scientific principle has to be modified so as to accommodate new data; judicial principles are modified in response to moral and policy considerations.
- e) A judge induce a principle in order to decide the case before him; for scientist the case before him is part of the data out of which the principle is drawn, or by which it is tested.
- f) A scientist must accommodate all the data and has no choice; a judge can select his material by discarding unwelcome cases.

B. ANALOGY: This applies to finding the minor premise. The reasoning proceeds case-by-case and by means of contrasting examples, first one way and then another to see which way one's judgment is swayed. In this way the scope of the 'facts' contained in the major premise is widened so that it can accommodate a new set of facts. Professor Wisdom expressed it best when he said:

It is a presenting and re-presenting of those features of the case which severally co- operate in favour of the conclusion, in favour of saying what the reasoned wishes said, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a clain'.

THE PROVINCE OF JURISPRUDENCE DETERMINED*

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are concluded, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects:- Law set by God to his human creatures, and laws set by men to men.

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or to the law of *nature* (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled *positive* law, or law existing *by position*. As contradistinguished to the rules which I style *positive morality*, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, *positive law*: though rules, which are *not* established by political superiors, are also *positive*, or exist *by position*, if they be rules or laws, in the proper signification of the term.

Though *some* of the laws or rules, which are set by men to men, are established by political superiors, *others* are *not* established by political superiors, or are *not* established by political superiors, in that capacity or character.

Closely analogous to human laws of this second class, are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or

* John Austin, *The Province of Jurisprudence Determined* 9 – 221 (1954).

felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term *law* are the expressions – “The law of honour;” ‘The law set by fashion;’ and rules of this species constitute much of what is usually termed ‘International law.’

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they *should* be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were, therefore, deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptance of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

Having suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy: I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of ‘*command*’: an analysis which I fear, will task the patience of my hearers, but which they will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. ‘*Preces erant, sed quibus contradici nan posset.*’ Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

I observe that Dr. Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a *duty* to regard it.

If he means, by a *violent* motive, a motive operating with certainty, his proposition is manifestly false. The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on that same event, the greater, no doubt, is the *chance* that the wish will *not* be disregarded. But no conceivable motive will *certainly* determine to compliance, or no conceivable motive will render obedience inevitable. If Paley's proposition be true, in the sense which I have now ascribed to it, commands and duties are simply impossible. Or, reducing his proposition to absurdity by a consequence as manifestly false, commands and duties are possible, but are never disobeyed or broken.

If he means by a *violent* motive, an evil which inspires fear, his meaning is simply this: that the party bound by a command is bound by the prospect of an evil. For that which is not feared is not apprehended as an evil: or (changing the shape of the expression) is not an evil in prospect.

The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.

By some celebrated writers (by Locke, Bentham, and, I think Paley), the term *sanction*, or *enforcement of obedience*, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this

extension of the term is pregnant with confusion and perplexity.

Rewards are, indisputably, *motives* to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms.

If *you* expressed a desire that *I* should render a service, and if you proffered a reward as the motive or inducement to render it, *you* would scarcely be said to *command* the service, nor should *I*, in ordinary language be *obliged* to render it. In ordinary language, *you* would *promise* me a reward, on condition of my rendering the service, whilst *I* might be *incited* or *persuaded* to render it by the hope of obtaining the reward.

Again: If a law hold out a *reward* as an inducement to do some act, an eventual *right* is conferred, and not an *obligation* imposed, upon those who shall act accordingly: The *imperative* part of the law being addressed or directed to the party whom it requires to *render* the reward.

In short, I am determined or inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also determined or inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring *evil*, that I am *bound* or *obliged* to compliance. It is only by conditional *evil*, that duties are *sanctioned* or *enforced*. It is the power and the purpose of inflicting eventual *evil*, and *not* the power and the purpose of imparting eventual *good*, which gives to the expression of a wish the name of a *command*.

If we put *reward* into the import of the term *sanction*, we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.

It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following: 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It also appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded', are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

But when I am talking *directly* of the expression or intimation of wish, I employ the term *command*: The expression or intimation of the wish being presented *prominently* to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation*: The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction*, or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath:- Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of '*occasional or particular* commands.'

The term *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner.

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

The statement which I have given in abstract expressions I will now endeavour to illustrate by apt examples.

If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specially determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders shall be given would be called a *general* order, and *might* be called a *rule*.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of acts being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be *called* a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands.

Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

Whether such an order would be *called* a law, seems to depend upon circumstances which are purely

immaterial: immaterial, that is, with reference to the present purpose, though material with reference to others. If made by a sovereign assembly deliberately, and with the forms of legislation, it would probably be called a law. If uttered by an absolute monarch, without deliberation or ceremony, it would scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number.

To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determines a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus:- Acts or forbearances of a *class* are enjoined *generally* by the former. Acts *determined specifically*, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner:- A law obliges *generally* the members of the given community, or a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

For, *first*, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptance of the term. For, though it obliges generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded that *black* should be the dress of his subjects, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular.

And, *secondly*, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or a rule.

For example, A father may set a *rule* to his child or children: a guardian, to his ward: a master, to his slave or servant. And certain of God's *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so called, oblige generally the members of the political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless. Most of the laws established by political superiors

are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.

But if we suppose that Parliament creates and grants an office, and that Parliament binds the grantee to services of a given description, we suppose a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects.

It appears, from what has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is, emphatically, the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, is also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which

proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That *laws* emanate from *superiors*' is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from *superiors*', or to affirm of laws universally 'that *inferiors* are bound to obey them', is the merest tautology and trifling.

Like most of the leading terms in the sciences of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of *commands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands; and which, therefore, are *not* laws, properly so called.

Accordingly, the proposition 'that laws are commands' must be taken with limitations. Or, rather, we must distinguish the various meanings of the term *laws*; and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.

I have already indicated, and shall hereafter more fully described, the objects improperly termed laws, which are *not* within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called, or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence. These I shall endeavour to particularise:-

1. Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. Working no change in the actual duties of the governed, but simply declaring what those duties *are*, they properly are acts of *interpretation* by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of *authentic* interpretation.

But, this notwithstanding, they are frequently styled laws; *declaratory laws*, or declaratory statutes. They must, therefore, be noted as forming an exception to the proposition 'that laws are a species of commands.'

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition 'that laws are a species of commands.' In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. They authorize or permit the parties, to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do. And, considered with regard to *this*, their immediate or direct purpose, they are often named *permissive laws*, or, more briefly and more properly, *permissions*.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived.

But this is a matter which I shall examine with exactness, when I analyse the expressions

‘legal right’, ‘permission by the sovereign or state’, and ‘civil or political liberty.’

3. Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition ‘that laws are a species of commands.’

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of *the Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *morals*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply, that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation. The term *imperfect* does not denote that the law imposing the duty wants the appropriate sanction. It denotes that the law imposing the duty is *not* a law established by a political superior: that it wants that *perfect*, or that surer or more cogent sanction, which is imparted by the sovereign or state.

I believe that I have now received all the classes of objects, to which the term *laws* is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. There are laws, it may be said, which *merely* create *rights*: And, seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlating rights, and which, therefore may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute.

The meaning of the term *right*, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here. I proposed, in my earlier lectures, to determine the province of jurisprudence; or to distinguish the laws established by political superiors, from the various laws, proper and improper, with which they are frequently confounded. And this I may accomplish exactly enough, without a nice inquiry into the import of the term *right*.

2. According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary laws* must be excepted from the proposition ‘that laws are a species of commands.’

By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist *as positive law* by the spontaneous adoption of the governed, and not by the position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all the law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge made law, or all judge-made law established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment’s reflection, that each of these opinions is groundless: that customary law is *imperative*, in the proper signification of the term; and that all judge- made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observes spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules, which he makes, derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will ‘that his rules shall obtain as law’ is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not

from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party, which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules, which emerge from the customs, are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, ‘that they shall serve as a law to the governed.’

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following:-

1. Declaratory laws, or laws explaining the import of existing positive law;
2. Laws abrogating or repealing existing positive law;
3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.

Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or remote analogy, to the following objects:- 1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

I shall finish the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to give an explanation of the marks which distinguish positive laws, I shall analyze the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments *ought* to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential

difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) 'the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.'

Having stated the topic or subject appropriate to my present discourse, I proceed to distinguish sovereignty from other superiority or might, and to distinguish society political and independent from society of other descriptions.

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters:- 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus:- If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or a *state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are *dependent*: or to that certain person, or certain body of persons, the other members of the society are *subject*. By 'an independent political society', or 'an independent and sovereign nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

To show that the union of those marks renders a given society a society political and independent, I call your attention to the following positions and examples.

1. In order that a given society may form a society political, the generality or bulk of its members must be in a *habit* of obedience to a determinate and common superior.

In case the generality of its members obey a determinate superior, but the obedience be rare or transient and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society. In other words, that determinate superior and the members of that given society do not become thereby an independent political society. Whether that given society be political and independent or not, it is not an independent political society whereof that certain superior is the sovereign portion.

For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those commands, and in spite of that obedience, the French government was sovereign or independent. Or in spite of those commands, and in spite of that obedience, the French government and its subjects were an independent political society whereof the allied sovereigns were not the sovereign portion.

Now if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been changed by the obedience into a society political. And it would not have been changed by the obedience into a society political, because the obedience was not habitual. For, inasmuch as the obedience was not habitual, it was not changed by the obedience from a society political and independent, into a society political but subordinate. A given society, therefore, is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior.

Again: A feeble state holds its independence precariously, or at the will of the powerful states to whose aggressions it is obnoxious. And since it is obnoxious to their aggressions, it and the bulk of its subjects render obedience to commands which they occasionally express or intimate. Such, for instance, is the position of the Saxon government and its subjects in respect of the conspiring sovereigns who form the Holy Alliance. But since the commands and the obedience are comparatively few and rare, they are not sufficient to constitute the relation of sovereignty and subjection between the powerful states and the feeble state with its subjects. In spite of those commands, and in spite of that obedience, the feeble state is sovereign or independent. Or in spite of those commands, and in spite of that obedience, the feeble state and its subjects are an independent political society whereof the powerful states are not the sovereign portion. Although the powerful states are permanently *superior*, and although the feeble state is permanently *inferior*, there is neither a *habit* of command on the part of the former, nor a *habit* of obedience on the part of the latter. Although the latter is unable to defend and maintain its independence, the latter is independent of the former in fact or practice.

From the example now adduced, as from the example adduced before, we may draw the following inference: that a given society is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior. By the obedience to the powerful states, the feeble state and its subjects are not changed from an independent, into a subordinate political society. And they are not changed by the obedience into a subordinate political society, because the obedience is not habitual. Consequently, if they were a natural society (setting that obedience aside), they would not be changed by that obedience into a society political.

2. In order that a given society may form a society political, habitual obedience must be rendered, by

the *generality* or *bulk* of its members, to a determinate and *common* superior. In other words, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to *one and the same* determinate person, or determinate body of persons.

Unless habitual obedience be rendered by the *bulk* of its members, and be rendered by the bulk of its members to *one and the same* superior, the given society is either in a state of nature, or is split into two or more independent political societies.

For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is in one of the two positions which I have now supposed. As there is no common superior to which the bulk of its members render habitual obedience, it is not a political society single or undivided. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies. If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved or broken into its individual elements, or into numerous societies of an extremely limited size: of a size so extremely limited, that they could hardly be styled societies independent and *political*. For, as I shall show hereafter, a given independent society would hardly be styled *political*, in case it fell short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute.

3. In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior *determinate* as well as common.

On this position I shall not insist here. For I have shown sufficiently in my fifth lecture, that no indeterminate party can command expressly or tacitly, or can receive obedience or submission: that no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.

4. It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must *not* be habitually obedient to a determinate human superior.

The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes. The given society may form a society political and independent, although that certain superior renders occasional submission to commands of determinate parties. But the society is not independent, although it may be political, in case that certain superior habitually obeys the commands of a certain person or body.

Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. Now though he commands habitually within the limits of his province, and receives habitual obedience from the generality or bulk of its inhabitants, the viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. The viceroy, and (through the viceroy) the generality or bulk of its inhabitants, are habitually obedient or submissive to the sovereign of a larger society. He and the inhabitants of his province are therefore in a state of subjection to the sovereign of that larger society. He and the inhabitants of his province are a society political but subordinate, or form a political society which is merely a limb of another.

A natural society, a society in a state of nature, or a society independent but natural, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it, lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.

Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. And considered as entire communities, and as connected by mutual intercourse, independent political societies form, it is commonly said, a natural society. These expressions, however, are not perfectly apposite. Since all the members of the related societies are members of a society political, none of the related societies is strictly in a state of nature: nor can the larger society formed by their mutual intercourse be styled strictly a natural society. Speaking strictly, the several members of the several related societies are placed in the following positions. The sovereign and subject members of each of the related societies form a society political: but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

Besides societies political and independent, societies independent but natural, society formed by the intercourse of independent political societies, and societies political but subordinate, there are societies which will not quadrate with any of those descriptions. Though, like a society political but subordinate, it forms a limb or member of a society political and independent, a society of the class in question is not a political society. Although it consists of members living in a state of subjection, it consists of subjects considered as private persons. A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyze many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose. To the accomplishment of my present purpose, it is merely incumbent upon me to determine the notion of sovereignty, with the inseparably connected notion of independent political society. For every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author.

The definition of the abstract term *independent political society* (including the definition of the correlative term *sovereignty*) cannot be rendered in expression of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every *independent* society, whether it were *political* or *natural*. It would hardly enable us to determine of every *political* society, whether it were *independent* or *subordinate*.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The *generality* or *bulk* of its members must be in a *habit* of obedience to a *certain* and *common* superior: whilst that certain person, or certain body of persons, must *not* be habitually obedient to a certain person or body.

But, in order that the *bulk* of its members may render obedience to a *common* superior, *how many* of its members, or *what proportion* of its members, must render obedience to *one and the same* superior? And, assuming that the bulk of its members render obedience to a common superior, *how often* must they render it, and *how long* must they render it, in order that that obedience may be *habitual*? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

In the cases of independent society which lie, as it were, at the extremes, we should apply that positive test without a moment's difficulty, and should fix the class of the society without a moment's hesitation. In some of those cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *political*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were in a *habit* of obedience or submission to a certain and *common* superior. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization. In other of those cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent and broken, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *natural*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were *not* in a *habit* of obedience to a certain and *common* superior. Such, for example, is the state of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

But in the cases of independent society which lie between the extremes, we should hardly find it possible to fix with absolute certainty the class of the given community. We should hardly find it possible to determine with absolute certainty, whether the generality of its members did or did not obey one and the same superior. Or we should hardly find it possible to determine with absolute certainty, whether the general obedience to one and the same superior was or was not habitual. For example: During the height of the conflict between Charles, the First and the Parliament, the English nation was broken into two distinct societies: each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, was a common government completely re-established? Or at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and was the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the *bulk* of the nation were *habitually* obedient to the body which affected sovereignty? And after the conflict had subsided, and until that juncture had arrived, what was the class of the society which was formed by the English people? These are questions which it were impossible to answer with certainty, although the facts of the case were precisely known.

The positive mark of sovereignty and independent political society is therefore a fallible test. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

The negative mark of sovereignty and independent political society is also an uncertain measure. It would not enable us to determine of every *political* society, whether it were *independent* or *subordinate*. Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a habit of obedience to a determinate person or body? Is that

common superior sovereign and independent, or is that common superior a superior in a state of subjection?

In numerous cases of political society, it were impossible to answer this question with absolute certainty. For example: Although the Holy Alliance dictates to the Saxon government, the commands which it gives, and the submission which it receives, are comparatively few and rare. Consequently, the Saxon government is sovereign or supreme, and the Saxon government and its subjects are an independent political society, notwithstanding its submission to the Holy Alliance. But, in case the commands and submission were somewhat more numerous and frequent, we might find it impossible to determine certainly the class of the Saxon community. We might find it impossible to determine certainly where the sovereignty resided; whether the Saxon government were a government supreme and independent; or were in a *habit* of obedience, and therefore in a state of subjection, to the allied or conspiring monarchs.

The definition or general notion of independent political society, is therefore vague or uncertain. Applying it to specific or particular cases, we should often encounter the difficulties which I have laboured to explain.

The difficulties which I have laboured to explain, often embarrass the application of those positive moral rules which are styled international law.

For example: When did the revolted colony, which is now the Mexican nation, ascend from the condition of an insurgent province to that of an independent community? When did the body of colonists, who affected sovereignty in Mexico, change the character of rebel leaders for that of a supreme government? Or (adopting the current language about governments *de jure* and *de facto*) when did the body of colonists, who affected sovereignty in Mexico, become sovereign *in fact*? And (applying international law to the specific or particular case) when did international law authorize neutral nations to admit the independence of Mexico with the sovereignty of the Mexican government?

Now the questions suggested above are equivalent to this:— When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the *bulk* of the inhabitants of Mexico were *habitually* disobedient to Spain, and probably would not resume their discarded habit of submission?

Or the questions suggested above are equivalent to this:— When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the inhabitants of Mexico were independent of Spain in practice, and were likely to remain permanently in that state of practical independence?

At that juncture exactly (let it have arrived when it may), neutral nations were authorized, by the morality which obtains between nations, to admit the independence of Mexico with the sovereignty of the Mexican government. But, by reason of the perplexing difficulties which I have laboured to explain, it was impossible for neutral nations to hit that juncture with precision, and to hold the balance of justice between Spain and her revolted colony with a perfectly even hand.

This difficulty presents itself under numerous forms in international law: indeed almost the only difficult and embarrassing questions in that science arise out of it. And as I shall often have occasion to show, law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions, *reasonable* time, *reasonable* notice, *reasonable* diligence? Than the line of demarcation which distinguishes libel and fair criticism; than that which constitutes a violation of copyright; than that degree of mental aberration which constitutes idiocy or lunacy? In all these cases, the difficulty is of the same nature with that which adheres to the phrases sovereignty and independent society; it arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived. And this, I suppose, is what people were driving at when they have agitated the very absurd enquiry whether questions of this kind are questions of law or of fact. The truth is that they are questions neither of law nor of fact. The fact be perfectly ascertained, and so may the law, as far as it is capable of being ascertained. The rule

is known, and so is the given species, as the Roman jurists term it; the difficulty is in bringing the species under the rule; in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.

I have tacitly supposed, during the preceding analysis, that every independent society forming a society political possesses the essential property which I will now describe.

In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Now, since it is not a limb of another and larger community, the society formed by the parents and children is clearly an independent society. And, since the rest of its members habitually obey its chief, this independent society would form a society political, in case the number of its members were not extremely minute. But, since the number of its members is extremely minute, it would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. Without an application of the terms which would somewhat smack of the ridiculous, we could hardly style the society a society *political* and independent, the imperative father and chief a *monarch* or *sovereign*, or the obedient mother and children *subjects*.— ‘*La puissance politique*’ (says Montesquieu) ‘*comprend necessairement l’union de plusieurs families.*’

Again: let us suppose a society which may be styled independent, or which is not a limb of another and larger community. Let us suppose that the number of its members is not extremely minute. And let us suppose it in the savage condition, or in the extremely barbarous condition which closely approaches the savage.

Inasmuch as the given society lives in the savage condition, or in the extremely barbarous condition which closely approaches the savage, the generality or bulk of its members is not in a habit of obedience to one and the same superior. For the purpose of attacking an external enemy, or for the purpose of repelling an attack made by an external enemy, the generality or bulk of its members, who are capable of bearing arms, submits to one leader, or to one body of leaders. But as soon as that exigency passes, this transient submission ceases; and the society reverts to the state which may be deemed its ordinary state. The bulk of each of the families which composes the given society, renders habitual obedience to its own peculiar chief: but those domestic societies are themselves independent societies, or and not united or compacted into one political society by general and habitual obedience to a certain and common superior. And, as the bulk of the given society is not in a habit of obedience to one and the same superior, there is no law (simply or strictly so styled) which can be called the law of that given society or community. The so-called laws which are common to the bulk of the community, are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions. The state which I have briefly delineated, is the ordinary state of the savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent. It was also the ordinary state of many of the German nations whose manners are described by Tacitus.

Now, since the bulk of its members is not in a habit of obedience to one and the same superior, the given independent society would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. But such it could not be esteemed, unless the term *political* were restricted to independent societies whose numbers are not inconsiderable. Supposing that the

term *political* applied to independent societies whose numbers are extremely minute, each of the independent families which constitute the given society would form of itself a political community: for the bulk of each of those families renders habitual obedience to its own peculiar chief. And, seeing that each of those families would form of itself an independent political community, the given independent society could hardly be styled with strictness a natural society. Speaking strictly, that given society would form a congeries of independent political communities. Or, seeing that a few of its members might not be members also of those independent families, it would form a congeries of independent political communities mingled with a few individuals living in a state of nature. Unless the term *political* were restricted to independent societies whose numbers are not inconsiderable, few of the many societies which are commonly esteemed natural could be styled natural societies with perfect precision and propriety.

For the reasons which I have now produced, and for reasons which I pass in silence, we must, I believe, arrive at the following conclusion:- A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

And arriving at that conclusion, we must proceed to this further conclusion: In order that an independent society may form a society political, it must not fall short of a *number* which may be called considerable.

The lowest possible number which will satisfy that vague condition cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or exceed not a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

The definition of the terms *sovereignty* and *independent political society*, is, therefore, embarrassed by the difficulty following, as well as by the difficulties which I have stated in a foregoing department of my discourse. In order that an independent society may form a society political, it must not fall short of a *number* which may be called considerable. And the lowest possible number which will satisfy that vague condition cannot be fixed precisely.

But here I must briefly remark, that, though the essential property which I have not described is an essential or necessary property of *independent* political society, it is not an essential property of *subordinate* political society. If the independent society, of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state for political or public purposes is a society or body politic: and it continues to bear the character of a society or body politic, although its number be reduced, by deaths or other causes, to that of a small family or small domestic community.

Having tried to determine the notion of sovereignty, with the implied or correlative notion of independent political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

Distinguishing *political* from *natural* society, Mr. Bentham, in his Fragment on Government, thus defines the former: 'When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*), such persons altogether (*subjects* and *governors*) are said to be in a state of *political* society.' And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should

be capable of indefinite duration. Considered as a definition of independent political society, this definition is inadequate or defective. In order that a given society may form a society political and independent, the superior habitually obeyed by the bulk or generality of its members must not be habitually obedient to a certain individual or body: which negative character or essential of independent political society Mr. Bentham has forgotten to notice. And, since the definition in question is an inadequate or defective definition of *independent* political society, it is also an inadequate or defective definition of political society in general. Before we can define political society, or can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not independent is a member or constituent parcel of a political society which is. Or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignty committed by sovereigns to subjects.

According to the definition of independent political society which is stated or supposed by Hobbes in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But if power to maintain its independence by its own intrinsic strength be a character or essential property of an independent political society, or to any of the past societies which occur in the history of mankind. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations. Any political society is (I conceive) independent, if it be not dependent in fact or practice: if the party habitually obeyed by the bulk of generality of its members be not in a habit of obedience to a determinate individual or body.

In his great treatise on international law, Grotius defines sovereignty – Now in order that an individual or body may be sovereign in a given society, two essentials must unite. The generality of the given society must render habitual obedience to that certain individual or body; whilst that individual or body must not be habitually obedient to a determinate human superior. In order to an adequate conception of the nature of international morality, as in order to an adequate conception of the nature of positive law, the former as well as the latter of those two essentials of sovereignty must be noted or taken into account. But, this notwithstanding, the former and positive essential of sovereign or supreme power is not inserted by Grotius in his formal definition. And the latter and negative essential is stated inaccurately. Sovereign power (according to Grotius) is perfectly or completely independent of other human power; inasmuch that its acts cannot be annulled by any human will other than its own. But if perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet *sovereign* will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments. Every government defers frequently to those opinions and sentiments which are styled international law. And every government defers habitually to the opinions and sentiments of its own subjects. If it were not in a habit of obedience to the commands of a determinate party, a government has all the independence which a government can possibly enjoy.

According to Von Martens of Göttingen (the writer on positive international law already referred to), ‘a sovereign government is a government which *ought* not to receive commands from any external or foreign government.’ Of the conclusive and obvious objections to this definition of sovereignty the following are only a few. 1. If the definition in question will apply to sovereign governments, it will also apply to subordinate. If a sovereign ought to be free from the commands of foreign governments, so ought every government which is merely the creature of a sovereign, and which holds its powers or rights as a mere trustee for its author. 2. Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. Though, according to that morality, it *ought* to be sovereign

or independent, it is subordinate or dependent in practice. 3. It cannot be affirmed absolutely of a sovereign or independent government, that it *ought* not to receive commands from foreign or external governments. The intermeddling of independent governments with other independent governments is often repugnant to the morality which actually obtains between nations. But according to that morality which actually obtains between nations (and to that international morality which general utility commends), no independent government ought to be freed completely from the supervision and control of its fellows. 4. In this definition by Von Martens (as in that which is given by Grotius) there is not the shadow of an allusion to the positive character of sovereignty. The definition points at the relations which are borne by sovereigns to sovereigns: but it omits the relations, not less essential, which are borne by sovereigns to their own subjects.

I have now endeavoured to determine the general notion of sovereignty, including the general notion of independent political society. But in order that I may further elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will call the attention of my hearers to a few concise remarks upon the following subjects or topics. 1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary limits which bound the power of sovereigns, and by which the power of sovereigns is supposed to be bounded. 3. The origin of government, with the origin of political society: or the causes of the habitual obedience which is rendered by the bulk of subjects, and from which the power of sovereigns to compel and restrain the refractory is entirely or mainly derived.

An independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. The sovereignty can hardly reside in *all* the members of the society: for it can hardly happen that some of those members shall not be naturally incompetent to exercise sovereign powers. In most actual societies, the sovereign powers are engrossed by a single member of the whole, or are shared exclusively by a very few of its members: and even in the actual societies whose governments are esteemed popular, the sovereign number is a slender portion of the entire political community. An independent political society governed by itself, or governed by a sovereign body consisting of the whole community, is not impossible: but the existence of such societies is so extremely improbable, that, with this passing notice, I throw them out of my account.

Every society political and independent is therefore divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. In case that sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*. In case that sovereign portion consist of a number of members, the supreme government may be styled an *aristocracy* (in the generic meaning of the expression). And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy or government of one, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy or government of a number, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. In the case of an aristocracy or government of a number, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts.

In every society, therefore, which may be styled political and independent, *one* of the individual members engrosses the sovereign powers, or the sovereign powers are shared by a *number* of the individual members less than the number of the individuals composing the entire community. Changing the phrase, every supreme government is a *monarchy* (properly so called), or an *aristocracy* (in the generic meaning of the expression).

Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms: namely, *oligarchies*, *aristocracies* (in the

specific meaning of the name), and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an *oligarchy*. If the proportion be deemed small, but not extremely small, the supreme government is styled an *aristocracy* (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled *popular*, or is styled a *democracy*. But these three forms of *aristocracy* (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it. A government which one man shall deem an oligarchy, will appear to another a liberal aristocracy: whilst a government which one man shall deem an aristocracy, will appear to another a narrow oligarchy. A government which one man shall deem a democracy, will appear to another a government of a few: whilst a government which one man shall deem an aristocracy, will appear to another a government of many. The proportion, moreover, of the sovereign number to the number of the entire community, may stand, it is manifest, at any point in a long series of minute degrees.

The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

HART'S CONCEPT OF LAW*

Law as the Union of Primary and Secondary Rules

1. A Fresh Start

In the last three chapters we have seen that, at various crucial points, the simple model of law as the sovereign's coercive orders failed to reproduce some of the salient features of a legal system. To demonstrate this, we did not find it necessary to invoke (as earlier critics have done) international law or primitive law which some may regard as disputable or borderline examples of law; instead we pointed to certain familiar features of municipal law in a modern state and showed that these were either distorted or altogether unrepresented in this over-simple theory.

The main ways in which the theory failed are instructive enough to merit a second summary. First, it became clear that though of all the varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats. Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription. Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitations, failed to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign person or persons could not be identified with either the electorate or the legislature of a modern state.

It will be recalled that in thus criticizing the conception of law as the sovereign's coercive orders we considered also a number of ancillary devices which were brought in at the cost of corrupting the primitive simplicity of the theory to rescue it from its difficulties. But these too failed. One device, the notion of a *tacit* order, seemed to have no application to the complex actualities of a modern legal system, but only to very much simpler situations like that of a general who deliberately refrains from interfering with orders given by his subordinates. Other devices, such as that of treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distort the ways in which these are spoken of, thought of, and actually used in social life. This had no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer. The device, designed to reconcile the self-binding character of legislation with the theory that a statute is an order given to *others*, was to distinguish the legislators acting in their official capacity, as *one* person ordering *others* who include themselves in their private capacities. This device, impeccable in itself, involved supplementing the theory with something it does not contain: this is the notion of a rule defining what must be done to legislate; for it is only in conforming with such a rule that legislators have an official capacity and a separate personality to be contrasted with themselves as private individuals.

The last three chapters are therefore the record of a failure and there is plainly need for a fresh start. Yet the failure is an instructive one, worth the detailed consideration we have given it, because at each point where the theory failed to fit the facts it was possible to see at least in outline why it was bound to fail and what is required for a better account. The root cause of failure is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law. It is true that the idea of a rule is by no means a simple one: we have already seen in Chapter III the need, if we are to do justice to the complexity of a legal system, to discriminate between

* H.L.A. Hart, *The Concept of Law* 79-99 (1961).

two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may be doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.

We have already given some preliminary analysis of what is involved in the assertion that rules of these two types exist among a given social group, and in this chapter we shall not only carry this analysis a little farther but we shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.' We shall not indeed claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations - often of analogy of either form or content - to a central case. What we shall attempt to show, in this and the succeeding chapters, is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. The justification for the use of the word 'law' for a range of apparently heterogeneous cases is a secondary matter which can be undertaken when the central elements have been grasped.

2. The Idea of Obligation

It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea. It is, however, here, at this crucial first step, that we have perhaps most to learn from the theory's errors.

Let us recall the gunman situation. A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large; A must be the sovereign habitually obeyed and the orders must be general, prescribing courses of conduct not single actions. The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was 'obliged' to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B 'had an obligation' or a 'duty' to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it. The first is often a statement about the beliefs and motives with which an action is done: B was obliged to hand over his money may simply mean, as it does in the gunman case, that he believed that some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences. In such cases the prospect of what would happen to the agent if he disobeyed has rendered something he would otherwise have preferred to have done (keep the money) less eligible.

Two further elements slightly complicate the elucidation of the notion of being obliged to do something. It seems clear that we should not think of B as obliged to hand over the money if the threatened harm was, according to common judgments, trivial in comparison with the disadvantage or serious consequences, either for B or for others, of complying with the orders, as it would be, for example, if A merely threatened

to pinch B. Nor perhaps should we say that B was obliged, if there were no reasonable grounds for thinking that A could or would probably implement his threat of relatively serious harm. Yet, though such references to common judgments of comparative harm and reasonable estimates of likelihood, are implicit in this notion, the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference. Thus not only is it the case that the facts about B's action and his beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are *not sufficient* to warrant the statement that he had an obligation to do this; it is also the case that facts of this sort, i.e. facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something. Thus the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience. Moreover, whereas the statement that he had this obligation is quite independent of the question whether or not he in fact reported for service, the statement that someone was obliged to do something, normally carries the implication that he actually did it.

Some theorists, Austin among them, seeing perhaps the general irrelevance of the person's beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of these subjective facts, but in terms of the *chance* or *likelihood* that the person having the obligation will suffer a punishment or 'evil' at the hands of others in the event of disobedience. This, in effect, treats statements of obligation not as psychological statements but as predictions or assessments of chances of incurring punishment or 'evil.' To many later theorists this has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same clear, hard, empirical terms as are used in science. It has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing 'above' or 'behind' the world of ordinary, observable facts. But there are many reasons for rejecting this interpretation of statements of obligation as predictions, and it is not, in fact, the only alternative to obscure metaphysics.

The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions. We have already drawn attention in Chapter IV to this neglect of the internal aspect of rules and we shall elaborate it later in this chapter.

There is, however, a second, simpler, objection to the predictive interpretation of obligation. If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.

It is, of course, true that in a normal legal system, where sanctions are exacted for a high proportion of offences, an offender usually runs a risk of punishment; so, usually the statement that a person has an obligation and the statement that he is likely to suffer for disobedience will both be true together. Indeed, the connection between these two statements is somewhat stronger than this: at least in a municipal system it may well be true that, unless *in general* sanctions were likely to be exacted from offenders, there would be little or no point in making particular statements about a person's obligations. In this sense, such statements may be said to presuppose belief in the continued normal operation of the system of sanctions much as the statement 'he is out' in cricket presupposes, though it does not assert, that players, umpire, and scorer will probably take the usual steps. None the less, it is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge.

It is clear that obligation is not to be found in the gunman situation, though the simpler notion of being obliged to do something may well be defined in the elements present there. To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which, unlike the gunman situation, includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behaviour a standard, is the normal, though unstated, background or proper context for such a statement; and, secondly, the distinctive function of such statement is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it. We have already seen in Chapter IV that there is involved in the existence of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard. We have also seen the main ways in which these differ from mere social habits, and how the varied normative vocabulary ('ought,' 'must,' 'should') is used to draw attention to the standard and to deviations from it, and to formulate the demands, criticisms, or acknowledgements which may be based on it. Of this class of normative words the words 'obligation' and 'duty' form an important sub-class, carrying with them certain implications not usually present in the others. Hence, though a grasp of the elements generally differentiating social rules from mere habits is certainly dispensable for understanding the notion of obligation or duty, it is not sufficient by itself.

The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation. 'He ought to have' and 'He had an obligation to' are not always interchangeable expressions, even though they are alike in carrying implicit reference to existing standards of conduct or are used in drawing conclusions in particular cases from a general rule. Rules of etiquette or correct speech are certainly rules: they are more than convergent habits or regularities of behaviour; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behaviour in the characteristic normative vocabulary. 'You ought to take your hat off,' 'It is wrong to say "you was"'. But to use in connection with rules of this kind the words 'obligation' or 'duty' would be misleading and not merely stylistically odd. It would misdescribe a social situation; for though the line separating rules of obligation from others is at points a vague one, yet the main rationale of the distinction is fairly clear.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals' respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law. We may, of course, find both these types of serious social pressure behind what is, in an obvious sense, the same rule of conduct; sometimes this may occur with no indication that one of them is peculiarly appropriate as primary and the other secondary, and then the question whether we are confronted with a rule of morality or rudimentary law may not be susceptible of an answer. But for the moment the possibility of drawing the line between law and morals need not detain us. What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So too rules which require

honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are thought of in terms of either ‘obligation’ or perhaps more often ‘duty.’ Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.

The figure of a *bond* binding the person obligated, which is buried in the word ‘obligation,’ and the similar notion of a debt latent in the word ‘duty’ are explicable in terms of these three factors, which distinguish rules of obligation or duty from other rules. In this figure, which haunts much legal thought, the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want. The other end of the chain is sometimes held by the group or their official representatives, who insist on performance or exact the penalty: sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and second those of civil law where we think of private individuals having rights correlative to the obligations.

Natural and perhaps illuminating though these figures or metaphors are, we must not allow them to trap us into a misleading conception of obligation as essentially consisting in some feeling of pressure or compulsion experienced by those who have obligations. The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure. Hence there is no contradiction in saying of some hardened swindler, and it may often be true, that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. To *feel* obliged and to have an obligation are different though frequently concomitant things. To identify them would be one way of misinterpreting, in terms of psychological feelings, the important internal aspects of rules.

Indeed, the internal aspect of rules is something to which we must again refer before we can dispose finally of the claims of the predictive theory. For an advocate of that theory may well ask why, if social pressure is so important a feature of rules of obligation, we are yet so concerned to stress the inadequacies of the predictive theory; for it gives this very feature a central place by defining obligation in terms of the likelihood that threatened punishment or hostile reaction will follow deviation from certain lines of conduct. The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person’s case falls under such a rule. In fact, however, this difference is not a slight one. Indeed, until its importance is grasped, we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society.

The following contrast again in terms of the ‘internal’ and ‘external’ aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of law but of the structure of any society. When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’ Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. But whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the

group. Such an observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment. Such knowledge may not only reveal much about the group, but might enable him to live among them without unpleasant consequences which would attend one who attempted to do so without such knowledge.

If, however, the observer really keeps austere to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign* that people will behave in certain ways, as clouds are a *sign* that rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal* for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard behaviour and an obligation. To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. Their point of view will need for its expression, 'I was obliged to do it,' 'I am likely to suffer for it if....' 'You will probably suffer for it if....,' 'They will do that to you if....' But they will not need forms of expression like 'I had an obligation' or 'You have an obligation' for these are required only by those who see their own and other persons' conduct from the internal point of view. What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.

3. The Elements of Law

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the

group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of 'custom;' but we shall not use this term, because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation. If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Such rules are in fact always found in the primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life. Secondly, though such a society may exhibit the tension, already described, between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure; for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view.

More important for our present purpose is the following consideration. It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways. In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts. They will in this respect resemble our own rules of etiquette. Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgment of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* are all that the group has. This defect in the simple social structure of primary rules we may call its *uncertainty*.

A second defect is the *static* character of the rules. The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed. There will be no means, in such a society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for, again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives. In an extreme case the rules may be static in a more drastic sense. This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case, not only would there be no way of deliberately changing the general rules, but the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual. Each individual would simply have fixed obligations or duties to do or abstain from doing certain things. It might indeed very often be the case that others would benefit from the performance of these obligations; yet if there are only primary rules of obligation they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance. For such operations of release or transfer create changes in the initial positions of individuals under the primary rules of obligation, and for these operations to be possible there must be rules of a sort different from the primary rules.

The third defect of this simple form of social life is the *inefficiency* of the diffuse social pressure by

which the rules are maintained. Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation. Lack of such final and authoritative determinations is to be distinguished from another weakness associated with it. This is the fact that punishments for violations of the rules, and other forms of social pressures involving physical effort or the use of force, are not administered by a special agency but are left to the individuals affected or to the group at large. It is obvious that the waste of time involved in the group's unorganized efforts to catch and punish offenders, and the smouldering vendettas which may result from self-help in the absence of an official monopoly of 'sanctions,' may be serious. The history of law does, however, strongly suggest that the lack of official agencies to determine authoritatively the fact of violation of the rules is a much more serious defect; for many societies have remedies for this defect long before the other.

The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system. We shall consider in turn each of these remedies and show why law may most illuminatingly be characterized as a union of primary rules of obligation with such secondary rules. Before we do this, however the following general points should be noted. Though the remedies consist in the introduction of rules which are certainly different from each other, as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. Thus they may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition.' This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. No doubt as a matter of history this step from the pre-legal to the legal may be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is very important one: what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. Moreover, where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law. Such complexity may make the rules of recognition in a modern legal system seem very different from the simple acceptance of an authoritative text: yet even in this simplest form, such a rule brings with it many elements distinctive of law. By providing an authoritative mark it introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified. Further, in the simple operation

of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.

The remedy for the *static* quality of the regime of primary rules consists in the introduction of what we shall call ‘rules of change.’ The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules. As we have already argued in Chapter IV it is in terms of such a rule, and not in terms of orders backed by threats, that the ideas of legislative enactment and repeal are to be understood. Such rules of change may be very simple or very complex: the powers conferred may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation. Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation. Usually some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment. Of course if there is a social structure so simple that the only ‘source of law’ is legislation, the rule of recognition will simply specify enactment as the unique identifying mark or criterion of validity of the rules. This will be the case for example in the imaginary kingdom of Rex I depicted in Chapter IV: there the rule of recognition would simply be that whatever Rex I enacts is law.

We have already described in some detail the rules which confer on individuals power to vary their initial positions under the primary rules. Without such private power-conferring rules society would lack some of the chief amenities which law confers upon it. For the operations which these rules make possible are the making of wills, contracts, transfers of property, and many other voluntarily created structures of rights and duties which typify life under law, though of course an elementary form of power-conferring rule also underlies the moral institution of a promise. The kinship of these rules with the rules of change involved in the notion of legislation is clear, and as recent theory such as Kelsen’s has shown, many of the features which puzzle us in the institutions of contract or property are clarified by thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals.

The third supplement to the simple regime of primary rules, intended to remedy the *inefficiency* of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them ‘rules of adjudication.’ Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed. Like the other secondary rules these are on a different level from the primary rules: though they may be reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers and a special status on judicial declarations about the breach of obligations. Again these rules, like the other secondary rules, define a group of important legal concepts: in this case the concepts of judge or court, jurisdiction and judgment. Besides these resemblances to the other secondary rules, rules of adjudication have intimate connections with them. Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a ‘source’ of law. It is true that this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect. Unlike an authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.

It need hardly be said that in few legal systems are judicial powers confined to authoritative determinations of the fact of violation of the primary rules. Most systems have, after some delay, seen the advantages of further centralization of social pressure; and have partially prohibited the use of physical punishments or violent self help by private individuals. Instead they have supplemented the primary rules of obligation by further secondary rules, specifying or at least limiting the penalties for violation, and have conferred upon judges, where they have ascertained the fact of violation, the exclusive power to direct the application of penalties by other officials. These secondary rules provide the centralized official 'sanctions' of the system.

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.

Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated. The reason why an analysis in these terms of primary and secondary rules has this explanatory power is not far to seek. Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour. This requires more detailed attention in the analysis of legal and political concepts than it has usually received. Under the simple regime of primary rules the internal point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view is required for the analysis of the basic concepts of obligation and duty. With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers private and public. There is a constant pull towards an analysis of these in terms of ordinary or 'scientific', fact- stating or predictive discourse. But this can only reproduce their external aspect: to do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules.

In the next chapter we shall show how the ideas of the validity of law and sources of law, and the truths latent among the errors of the doctrines of sovereignty may be rephrased and clarified in terms of rules of recognition. But we shall conclude this chapter with a warning: though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, this cannot by itself illuminate every problem. The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate, in ways indicated in later chapters, elements of a different character.

THE FOUNDATIONS OF A LEGAL SYSTEM*

Rule of Recognition and Legal Validity

According to the theory criticized in Chapter IV the foundations of a legal system consist of the situation in which the majority of a social group habitually obey the orders backed by threats of sovereign person or persons, who themselves habitually obey no one. This social situation is, for this theory, both a necessary and a sufficient condition of the existence of law. We have already exhibited in some detail the incapacity of this theory to account for some of the salient features of a modern municipal legal system: yet none the less, as its hold over the minds of many thinkers suggests, it does contain, though in a blurred and misleading form, certain truths about certain important aspects of law. These truths can, however, only be clearly presented, and their importance rightly assessed, in terms of the more complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of a legal system. In this chapter we shall discuss various elements of this situation which have received only partial or misleading expression in the theory of sovereignty and elsewhere.

Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases. In a very simple system like the world of Rex I depicted in Chapter IV, where only what he enacts is law and no legal limitations upon his legislative power are imposed by customary rule or Constitutional document, the sole criterion for identifying the law will be a simple reference to the fact of enactment by Rex I. The existence of this simple form of rule of recognition will be manifest in the general practice, on the part of officials or private persons, of identifying the rules by this criterion. In a modern legal system where there are a variety of ‘sources’ of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written Constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. It is in this way that in our system ‘common law’ is subordinate to ‘statute.’

It is important to distinguish this relative *subordination* of one criterion to another from *derivation*, since some spurious support for the view that all law is essentially or ‘really’ (even if only ‘tacitly’) the product of legislation, has been gained from confusion of these two ideas. In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a ‘tacit’ exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place. Again, as in the simple case, the existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria.

In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over the other sources or suggested sources of law. For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative

* H.L.A. Hart, *The Concept of Law* 100-123 (1961).

status conferred on it by other rules. In this respect, as in many others, the rule of recognition of a legal system is like the scoring rule of a game. In the course of the game the general rule defining the activities which constitute scoring (runs, goals, & c.) is seldom formulated; instead it is *used* by officials and players in identifying the particular phases which count towards winning. Here too, the declarations of officials (umpire or scorer) have a special authoritative status attributed to them by other rules. Further, in both cases there is the possibility of a conflict between these authoritative applications of the rule and the general understanding of what the rule plainly requires according to its terms. This, as we shall see later, is a complication which must be catered for in any account of what it is for a system of rules of this sort to exist.

The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that ...,' which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a given rule of the system. This, like the expression 'Out' or 'Goal', is the language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose. This attitude of shared acceptance of rules is to be contrasted with that of an observer who records *ab extra* the fact that a social group accepts such rules but does not himself accept them. The natural expression of this external point of view is not 'It is the law that...' but 'In England they recognize as law... whatever the Queen in Parliament enacts....' The first of these forms of expression we shall call an *internal statement* because it manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid. The second form of expression we shall call an *external statement* because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it.

If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished from an external statement of fact that the rule is accepted, many obscurities concerning the notion of legal 'validity' disappear. For the word 'valid' is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition. To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements; for, like the cricketers' 'Out', these statements of validity normally apply to a particular case a rule of recognition accepted by the speaker and others, rather than expressly state that the rule is satisfied.

Some of the puzzles connected with the idea of legal validity are said to concern the relation between the validity and the 'efficacy' of law. If by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connection between the validity of any particular rule and *its* efficacy, unless the rule of recognition of the system includes among its criteria, as some do, the provision (sometimes referred to as a rule of obsolescence) that no rule is to count as a rule of the system if it has long ceased to be efficacious.

From the inefficacy of a particular rule, which may or may not count against its validity, we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group. In either case, the normal context or background for making any internal statement in terms of the rules of the system is absent. In such cases it would be generally *pointless* either to assess the rights and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rules of recognition. To insist on applying a system of rules which had

either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded.

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy. It would however be wrong to say that statements of validity ‘mean’ that the system is generally efficacious. For though it is normally pointless or idle to talk of the validity of a rule of a system which has never established itself or has been discarded, none the less it is not meaningless nor is it always pointless. One vivid way of teaching Roman Law is to speak as *if* the system were efficacious still and to discuss the validity of particular rules and solve problems in their terms; and one way of nursing hopes for the restoration of an old social order destroyed by revolution, and rejecting the new, is to cling to the criteria of legal validity of the old regime. This is implicitly done by the White Russian who still claims property under some rule of descent which was a valid rule of Tsarist Russia.

A grasp of the normal contextual connection between the internal statement that a given rule of a system is valid and the external statement of fact that the system is generally efficacious, will help us see in its proper perspective the common theory that to assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken. In many ways this theory is similar to the predictive analysis of obligation which we considered and rejected in the last chapter. In both cases alike the motive for advancing this predictive theory is the conviction that only thus can metaphysical interpretations be avoided: that either a statement that a rule is valid must ascribe some mysterious property which cannot be detected by empirical means or it must be a prediction of future behaviour of officials. In both cases also the plausibility of the theory is due to the same important fact: that the truth of the external statement of fact, which an observer might record, that the system is generally efficacious and likely to continue so, is normally presupposed by anyone who accepts the rules and makes an internal statement of obligation or validity. The two are certainly very closely associated. Finally, in both cases alike the mistake of the theory is the same: it consists in neglecting the special character of the internal statement and treating it as an external statement about official action.

This mistake becomes immediately apparent when we consider how the judge’s own statement that a particular rule is valid functions in judicial decision; for, though here too, in making such a statement, the judge presupposes but does not state the general efficacy of the system, he plainly is not concerned to predict his own or others’ official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court, and constitutes not a prophecy of but part of the *reason* for his decision. There is indeed a more plausible case for saying that a statement that a rule is valid is a prediction when such a statement is made by a private person; for in the case of conflict between unofficial statements of validity or invalidity and that of a court in deciding a case, there is often good sense in saying that the former must then be withdrawn. Yet even here, as we shall see when we come in Chapter VII to investigate the significance of such conflicts between official declarations and the plain requirements of the rules, it may be dogmatic to assume that it is withdrawn as a statement now shown to be *wrong*, because it has falsely *predicted* what a court would say. For there are more reasons for withdrawing statements than the fact that they are wrong, and also more ways of being wrong than this allows.

The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an *ultimate* rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is *supreme*. These ideas of the ultimacy of the rule of recognition and the supremacy of one of its criteria merit some attention. It is important to disentangle them from the theory, which we have rejected, that somewhere in every legal system, even though it lurks behind legal forms, there must be a sovereign legislative power

which is legally unlimited.

Of these two ideas, supreme criterion and ultimate rule, the first is the easiest to define. We may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion. A similar explanation in comparative terms can be given of the notions of 'superior' and 'subordinate' criteria which we have already used. It is plain that the notions of a superior and a supreme criterion merely refer to a *relative* place on a scale and do not import any notion of legally *unlimited* legislative power. Yet 'supreme' and 'unlimited' are easy to confuse - at least in legal theory. One reason for this is that in the simpler forms of legal system the ideas of ultimate rule of recognition, supreme criterion, and legally unlimited legislature seem to converge. For where there is a legislature subject to no Constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of their status as law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity. This is, according to Constitutional theory, the position in the United Kingdom. But even systems like that of the United States in which there is no such legally unlimited legislature may perfectly well contain an ultimate rule of recognition which provides a set of criteria of validity, one of which is supreme. This will be so, where the legislative competence of the ordinary legislature is limited by a Constitution which contains no amending power, or places some clauses outside the scope of that power. Here there is no legally unlimited legislature, even in the widest interpretation of 'legislature;' but the system of course contains an ultimate rule of recognition and, in the clauses of its Constitution, a supreme criterion of validity.

The sense in which the rule of recognition is the *ultimate* rule of a system is best understood if we pursue a very familiar chain of legal reasoning. If the question is raised whether some suggested rule is legally valid, we must, in order to answer the question, use a criterion of validity provided by some other rule. Is this purported by-law of the Oxfordshire County Council valid? Yes: because it was made in exercise of the powers conferred, and in accordance with the procedure specified, by a statutory order made by the Minister of Health. At this stage the statutory order provides the criteria in terms of which the validity of the by-law is assessed. There may be no practical need to go farther; but there is a standing possibility of doing so. We may query the validity of the statutory order and assess its validity in terms of the statute empowering the minister to make such orders. Finally, when the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.

There are, indeed, many questions which we can raise about this ultimate rule. We can ask whether it is the practice of courts, legislatures, officials, or private citizens in England actually to use this rule as an ultimate rule of recognition. Or has our process of legal reasoning been an idle game with the criteria of validity of a system now discarded? We can ask whether it is satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer the same kind of question about it as those which we answered about other rules with its aid. When we move from saying that a particular enactment is valid, because it satisfies the rule that what the Queen in Parliament enacts is law, to saying that in England this last rule is used by courts, officials, and private persons as the ultimate rule of recognition, we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it. So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it one worthy of support, we have moved from a statement of legal validity to a statement of value.

Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis.' This may, however, be seriously misleading. Statements of legal validity made about particular rules in the day-to-day life of a legal system whether by judges, lawyers, or ordinary citizens do indeed carry with them certain presuppositions. They are internal statements of law expressing the point of view of those who accept the rule of recognition of the system and, as such, leave unstated much that could be stated in external statements of fact about the system. What is thus left unstated forms the normal background or context of statements of legal validity and is thus said to be 'presupposed' by them. But it is important to see precisely what these presupposed matters are, and not to obscure their character. They consist of two things. First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.

Neither of these two presuppositions are well described as 'assumptions' of a 'validity' which cannot be demonstrated. We only need the word 'validity', and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated,' is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.

A more serious objection is that talk of the 'assumption' that the ultimate rule of recognition is valid conceals the essentially factual character of the second presupposition which lies behind the lawyers' statement of validity. No doubt the practice of judges, officials, and others, in which the actual existence of a rule of recognition consists, is a complex matter. As we shall see later, there are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer. None the less is important to distinguish 'assuming the validity' from 'presupposing the existence' of such a rule; if only because failure to do this obscures what is meant by the assertion that such a rule *exists*.

In the simple system of primary rules of obligation sketched in the last chapter, the assertion that a given rule existed could only be an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour was generally accepted as a standard and was accompanied by those features which, as we have seen, distinguish a social rule from mere convergent habits. It is in this way also that we should now interpret and verify the assertion that in England a rule - though not a legal one - exists that we must bare the head on entering a church. If such rules as these are found to exist in the actual practice of a social group, there is no separate question of their validity to be discussed, though of course their value or desirability is open to question. Once their existence has been established as a fact we should only confuse matters by affirming or denying that they were valid or by saying that 'we assumed' but could not show their validity. Where, on the other hand, as in a mature legal system, we have a system of rules which includes a rule of recognition so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition, this brings with it a new application of the word 'exist.' The statement that a rule exists may now no longer be what it was in the simple case of customary rules - an external statement of the *fact* that a certain mode of behaviour was generally accepted as a standard in practice. It may now be an internal assessment applying an accepted but unstated rule of recognition and meaning

(roughly) no more than ‘valid given the system’s criteria of validity.’ In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense ‘exist’ even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.

PURE THEORY OF LAW – HANS KELSEN*

LAW AND NATURE

1. The Pure Theory

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is a science of law (jurisprudence) not legal politics.

It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law. Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.

Such an approach seems a matter of course. Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.

2. The Act and its Legal Meaning

If we differentiate between natural and social sciences - and thereby between nature and society as two distinct objects of scientific cognition - the question arises whether the science of law is a natural or a social science; whether law is a natural or a social phenomenon. But the clean delimitation between nature and society is not easy, because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature. Besides, law - or what is customarily so called - seems at least partly to be rooted in nature and to have a “natural” existence. For if you analyze any body of facts interpreted as “legal” or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts - a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act; that is, the meaning conferred upon the act by Law. For example: People assemble in a large room, make speeches, some raise their hands, others do not - this is the external happening. Its meaning is that a statute is being passed, that law is created. We are faced here

* Hans Kelsen, *Pure Theory of Law* Translated by Max Knight. 1-17, 24-58 (1970)

with the distinction (familiar to jurists) between the process of legislation and its product, the statute. To give other illustrations: A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of certain content to another merchant, who, in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.

3. The Subjective and Objective Meanings of the Act: Its Self-interpretation

The legal meaning of an act, as an external fact, is not immediately perceptible by the senses - such as, for instance, that color, hardness, weight, or other physical properties of an object can be perceived. To be sure, the man acting rationally connects his act with a definite meaning that expresses itself in some way and is understood by others. This subjective meaning may, but need not necessarily, coincide with its objective meaning, that is, the meaning the act has according to the law. For example somebody makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is a testament. Objectively, however, it is not, because some legal formalities were not observed. Suppose a secret organization intending to rid the nation of subversive elements, condemns to death a man thought to be a traitor, and has a member execute what it subjectively believes to be and calls "a death penalty"; objectively and legally however, not a death penalty but a Feme murder was carried out, although the external circumstances of a Feme murder are no different from the execution of a legal death penalty.

A written or spoken act can even say something about its own legal meaning. Therein lies a peculiarity of the objects of legal cognition. A plant is unable to tell the classifying botanist anything about itself. It makes no attempt to explain itself scientifically. But an act of human conduct can indeed carry a legal self-interpretation: it can include a statement indicating its legal meaning. The men assembled in parliament can expressly declare that they are enacting a statute; a man making a disposition about his property may call it "last will and testament"; two men can declare that they are making a contract. The scientist investigating the law, sometimes finds a legal self-interpretation which anticipates his own interpretation.

4. The Norm

a) *The Norm As a Scheme of Interpretation*

The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. To put it differently: The judgment that an act of human behavior, performed in time and space, is "legal" (or "illegal") is the result of a specific, namely normative, interpretation. And even the view that this act has the character of a natural phenomenon is

only a specific interpretation, different from the normative, namely a causal interpretation. The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. The qualification of a certain act as the execution of the death penalty rather than as a murder - a qualification that cannot be perceived by the senses - results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure. That the mentioned exchange of letters between merchants constitutes legally a contract, results exclusively from the fact that such an exchange conforms with conditions defined in the civil code. That a document is objectively *as well* as subjectively a valid testament results from the fact that it conforms to conditions stipulated by this code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents of actual happenings agree with a norm accepted as valid.

b) Norm and Norm Creation

Those norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The legal order which is the object of this cognition is a normative order of human behavior - a system of norms regulating human behavior. By "norm" we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so directed, if they, according to their content, command such behavior, but also if they permit it, and - particularly - if they authorize it. "Authorize" means to confer upon someone else a certain power, specifically the power to enact norms himself. In this sense the acts whose meaning is a norm are acts of will. If an individual by his acts expresses a will directed at a certain behavior of another, that is to say, if he commands, permits, or authorizes such behavior - then the meaning of his acts cannot be described by the statement that the other individual *will* (future tense) behave in that way, but only that he *ought* to behave in that way. The individual who commands, permits, or authorizes *wills*; the man to whom the command, permission, or authorization is directed *ought to*. The word "ought" is used here in a broader than the usual sense. According to customary usage, "ought" corresponds only to a command, while "may" corresponds to a permission, and "can" to an authorization. But in the present work the word "ought" is used to express the normative meaning of an act directed toward the behavior of others; this "ought" includes "may" and "can". If a man who is commanded, permitted, or authorized to behave in a certain way asks for the reason of such command, permission, or authorization, he can only do so by saying: Why "ought" I behave in this way? Or, in customary usage: Why may I or why can I behave in this way?

"Norm" is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: then norm is an *ought*, but the act of will is an *is*. Hence the situation constituted by such an act must be described by the statement: The one individual *wills* that the other individual *ought* to behave in a certain way. The first part of this sentence refers to an *is*, the existing fact of the first individual's act of volition; the second part to an *ought*, to a norm as the

meaning of that act. Therefore it is incorrect to assert - as is often done - that the statement: "An individual ought" merely means that another individual wills something; that the *ought* can be reduced to an *is*.

The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is" - that is, the statement by which an existent fact is described - is fundamentally different from the statement: "something ought to be" - which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.

This dualism of *is* and *ought* does not mean, however, that there is no relationship between *is* and *ought*. One says: an *is* conforms to an *ought*, which means that something is as it ought to be; and one says: an *ought* is "directed" toward an *is* - in other words: something ought to be. The expression: "an *is* conforms to an *ought*" is not entirely correct, because it is not the *is* that conforms the *ought*, but the "something" that one time is and the other time ought to be - it is the "something" which figuratively can be designated as the content of the *is* or as the content of the *ought*.

Put in different words, one can also say: a certain something - specifically a certain behavior - can have the quality of *is* or of *ought*. For example: In the two statements, "the door is being closed" and "the door ought to be closed," the closing of the door in the former statement is pronounced as something that is, in the latter as something that ought to be. The behavior that is and the behavior that ought to be are not identical, but they differ only so far as the one is and the other ought to be. *Is* and *ought* are two different modi. One and the same behavior may be presented in the one or the other of the two modi. Therefore it is necessary to differentiate the behavior stipulated by a norm as a behavior that ought to be from the actual behavior that corresponds to it. We may compare the behavior stipulated by the norm (as content of the norm) with the actual behavior; and we can, therefore, judge whether the actual behavior conforms to the norm, that is, to the content of the norm.

The behavior as it actually takes place may or may not be equal to the behavior as it ought to be. But equality is not identity. The behavior that is the content of the norm (that is, the behavior that ought to be) and the actual behavior (that is, the behavior that is) are not identical, though the one may be *equal* to the other. Therefore, the usual way to describe the relation between an actual behavior and a norm to which the behavior corresponds: "the actual behavior is the behavior that - according to the norm - ought to be," is not correct. The behavior that is cannot be the behavior that ought to be. They differ with respect to the modus which is in one case the *is*, in the other the *ought*.

Acts whose meaning is a norm can be performed in various ways. For example, by a gesture: The traffic policeman, by a motion of his arms, orders the pedestrian to stop or to continue; or by a symbol: a red light constitutes a command for the driver to halt, a green light, to proceed; or by spoken or written words, either in the imperative form - be quiet!- or in the form of an indicative statement - I order you to be silent. In this way also permissions or authorizations may be formulated. They are statements about the act whose meaning is a command, a permission, an authorization. But their meaning is not that something is, but that

something ought to be. They are not - as they linguistically seem to be - statements about a fact, but a norm, that is to say, a command, a permission, an authorization.

A criminal code might contain the sentence: Theft is punished by imprisonment. The meaning of this sentence is not, as the wording seems to indicate, a statement about an actual event; instead, the meaning is a norm it is a command or an authorization, to punish theft by imprisonment. The legislative process consists of a series of acts which, in their totality, have the meaning of a norm. To say that acts, especially legislative acts, “create” or “posit” a norm, is merely a figure of speech for saying that the meaning or the significance of the act or acts that constitute the legislative process is a norm. It is, however, necessary to distinguish the subjective and the objective meaning of the act. “Ought” is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning: and only if the act of will has also the objective meaning of an “ought,” is this “ought” called a “norm.” If the “ought” is also the objective meaning of the act, the behavior at which the act is directed is regarded as something that *ought* to be not only from the point of view of the individual who has performed the act, but also from the point of view of the individual at whose behavior the act is directed, and of a third individual not involved in the relation between the two. That the “ought” is the objective meaning of the act manifests itself in the fact that it is supposed to exist (that the “ought” is valid) even if the will ceases to exist whose subjective meaning it is - if we assume that an individual ought to behave in a certain way even if he does not know of the act whose meaning is that he ought to behave in this way. Then the “ought,” as the objective meaning of an act, is a valid *norm* binding upon the addressee, that is, the individual at whom it is directed. The ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a “higher” norm.

The command of a gangster to turn over to him a certain amount of money has the same subjective meaning as the command of an income-tax official, namely that the individual at whom the command is directed ought to pay something. But only the command of the official, not that of the gangster, has the meaning of a valid norm, binding upon the addressed individual. Only the one order, not the other, is a norm-positing act, because the official’s act is authorized by a tax law, whereas the gangster’s act is not based on such an authorizing norm. The legislative act, which subjectively has the meaning of *ought*, also has the objective meaning - that is, the meaning of a valid norm - because the constitution has conferred this objective meaning upon the, legislative act. The act whose meaning is the constitution has not only the subjective but also the objective meaning of “ought,” that is to say, the character of a binding norm, if - in case it is the historically first constitution - we presuppose in our juristic thinking that we ought to behave as the Constitution prescribes.

If a man in need asks another man for help, the *subjective* meaning of this request is that the other ought to help him. But in an objective sense he ought to help (that is to say, he is morally obliged to help) only if a general norm - established, for instance, by the founder of a religion - is valid that commands, “Love your neighbor.” And this latter norm is objectively valid only if it is presupposed that one ought to behave as the religious founder has commanded. Such a presupposition, establishing the objective validity of the norms of a

moral or legal order, will here be called a *basic norm* (*Grundnorm*). Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say, from an *ought*.

Norms according to which men ought to behave in a certain way can also be created by custom. If men who socially live together behave for some time and under the same circumstances in the same way, then a tendency - that is, psychologically, a will - comes into an existence within the men to behave as the members of the group habitually do. At first the subjective meaning of the acts that constitute the custom is not an *ought*. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*. However, the subjective meaning of the acts that constitute the custom can be interpreted as an objectively valid norm only if the custom has been instituted by a higher norm as a norm-creating fact. Since custom is constituted by human acts, even norms created by custom are created by acts of human behavior, and are therefore - like the norms which are the subjective meaning of legislative acts - "posited" or "positive" norms. Custom may create moral or legal norms. Legal norms are created by custom, if the constitution of the social group institutes custom - a specially defined custom - as norm-creating fact.

Finally it is to be noted that a norm need not be only the meaning of a real act of will; it can also be the content of an act of thinking. This is the case if the norm is only presupposed in our thinking. Just as we can imagine things which do not really exist but "exist" only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking - as is the basic norm of a positive legal order.

c) *Validity and Sphere of Validity of the Norm*

By the word "validity" we designate the specific existence of a norm. When we describe the meaning or significance of a norm-creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden, or permitted, allowed, authorized. If we use the word *ought* to comprise all these meanings, as has been suggested, we can describe the validity of a norm by saying: Something ought to, or ought not to, be done. If we describe the specific existence of a norm as "validity," we express by this the special manner in which the norm - in contradistinction to a natural fact - is existent. The "existence" of a positive norm - that is to say, its "validity" - is not the same as the existence of the act of will, whose objective meaning the norm is. A norm can be valid even if the act of will whose meaning the norm is, no longer exists. Indeed, the norm does not become valid until the act of will whose meaning the norm is has been accomplished and hence has ceased to exist. The individual who has

created a legal norm by an act directed at the behavior of others, need not continue to will this conduct in order that the norm be valid. When the men who act as legislators have passed a statute regulating certain affairs and have put this statute into “force” (i.e., into validity), they turn in their decisions to the regulation of other affairs; and the statutes put into validity may be valid long after these men have died and therefore are unable to will anything. It is incorrect, therefore, to characterize norms in general, and legal norms in particular, as the “will” or the “command” of the legislator or state, if by “will” or “command” a psychological act of will is meant. The norm is the *meaning* of an act of will, not the act of will.

Since the validity of a norm is an *ought* and not an *is*, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an “is-fact” - the fact that the norm is actually applied and the fact that people actually behave according to the norm. To say that a norm is “valid,” however, means something else than that it is actually applied and obeyed; it means that it *ought* to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity. “Validity” of a legal norm presupposes, however, that it is possible to behave in a way contrary to it: a norm that were to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.

Nor do validity and effectiveness coincide in time. A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed; a law court that applies a statute immediately after promulgation - therefore before the statute had a chance to become “effective” - applies a valid legal norm. But a legal norm is no longer considered to be valid if it is permanently ineffective. Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity.

By effectiveness of a legal norm, which attaches a sanction to certain behavior and thus qualifies the behavior conditioning the sanction as illegal, that is, as “delict,” two facts may be understood: (i) that this norm is *applied* by the legal organs (particularly the law courts), which means, that the sanction in a concrete case is ordered and executed; and (2) that this norm is *obeyed* by the individuals subjected to the legal order, which means, that they behave in a way which avoids the sanction. If the stipulation of sanctions intends to prevent the commission of delicts, we are faced with the ideal case of the validity of a legal norm if this norm is never applied, because the awareness among those subjected to the legal order of the sanction to be executed in case of the commission of a delict has become the motive to refrain from committing the delict. In this situation, the effectiveness of the legal norm is confined to obedience to it. But obedience to the legal norm can be induced by other motives, if, for instance, the legal delict is at the same time a religious delict, obedience to the law may be caused not by the wish to avoid the legal sanction, but to avoid the religious sanction. In this

case the law is effective, that is, actually obeyed, because religion is effective. The relation between validity and effectiveness will be discussed later.

Let us take the statement: “The norm refers to a certain human behavior.” If by this behavior we mean the behavior that constitutes the content of the norm, then the norm can also refer to other facts than human behavior - however, only to the extent that these are *conditions* or (if existent in reality) *effects* of human behavior. For example: A legal norm can prescribe that in the event of a natural catastrophe those not immediately affected are obliged to render aid to the victims as much as possible. If a legal norm establishes the death penalty for murder, then the delict as well as the sanction do not only consist in a certain human behavior - directed toward the death of another human being - but also in a specific effect of such behavior, namely the death of a human being, which is a physiological event, not a human behavior. Since human behavior, as well as its conditions and effects, occur in space and time the legal norm must refer to space and time. The validity of norms regulating human behavior in general, and the validity of legal norms in particular, therefore, must be defined in terms of space and time, since these norms refer to spatial and temporal events in their content. That a norm is “valid” means always that it is valid for some specified space and time; it means that it relates to a behavior that can take place only somewhere and sometime (although it may perhaps not actually take place).

The relation of the norm to space and time is the spatial and temporal *sphere of validity* of the norm. This sphere of validity can be limited or unlimited. The norm can be valid either for a definite space and time (that determined by the norm itself or by a higher norm): it regulates, then, only those events that occur within a certain space and during a certain time; or the norm can be valid everywhere and always, that is, it can refer to events no matter where and when they occur. This latter alternative would be the meaning of a norm which does not contain any spatial or temporal limitations. Such a norm is not valid beyond space and time; the sphere of its validity in that case, does not lack space and time; it merely is not limited to a specific space or a specific time - its spatial and temporal sphere of validity is unlimited. The sphere of validity of a norm is an element of its content; and this content, as we shall see, can to some extent be determined by another, higher norm.

As for the temporal sphere of validity of a positive norm, it is necessary to distinguish between the time before and after the enactment of the norm. In general, norms refer only to future behavior, but they may also refer to the past. For example, a legal norm which attaches a sanction to a certain behavior may prescribe that an individual ought to be punished even for behavior that had occurred before the legal norm was enacted whereby the behavior is qualified as a delict. In this case we say that the norm is retroactive. But a legal norm may refer to the past not only with respect to the delict but also with respect to the sanction. A legal norm may stipulate not only that under certain conditions, fulfilled before its enactment, a coercive act as a sanction ought to be executed in the future, but also that under these conditions a coercive act that actually has been performed in the past without being prescribed by a norm then valid, ought to have been performed; so that the character of a sanction is conferred upon this coercive act with retroactive force. For example: In Nationalist Socialist Germany certain coercive acts which at the time of their performance were legally murder,

were subsequently retroactively legitimized as “sanctions”; and the behavior of the victim which elicited the murder was subsequently qualified as a “delict.”

A legal norm can retroactively annul the validity of an earlier norm in such a way *that* the coercive acts carried out as sanctions under the earlier norm are divested of their character as punishments or civil executions; and that the human behavior that was the condition of the sanction is divested of its character as a delict. For example: A government that has come to power by revolution can, by a retroactive statute, repeal a statute enacted by the over-thrown government, under which certain acts committed by members of the revolutionary party had been punished as political crimes. Of course, that which had been done cannot be undone; but the normative interpretation in general, and the legal qualifications in particular, of acts can be subsequently changed on the basis of norms which are enacted after the acts have been performed.

In addition to a spatial and temporal sphere of validity of a norm, a personal and material sphere of validity is to be distinguished. For the behavior that is regulated by norms is the behavior of human beings and every behavior regulated by a norm contains a personal and a material element: the *individual* who ought to behave in a certain way, and the *manner* in which he ought to behave. Both elements are inseparably linked. In this respect it must be carefully observed that the norm does not refer to the individual as such, but to a definite behavior of an individual. The personal sphere of validity refers to the personal element of the behavior determined by the norm. This sphere of validity, again, can be unlimited or limited: a moral order may claim to be valid for all individuals; that is, the norm of this order regulates the behavior of all individuals and not only of individuals specifically qualified by the order; this is usually expressed by saying that this order addresses itself to all individuals. On the other hand, the behavior determined by the norms of a national legal order is only the behavior of individuals who live within the state territory and of the state's citizens who happen to be abroad. This is expressed by saying that the national legal order regulates only the behavior of human beings determined in this way - only these human beings are subject to the national legal order; in other words: the personal sphere of validity is limited to these individuals.

We speak of the material sphere of validity when we have in mind the various provinces of human behavior that are subject to regulation such as economic, religious, political behavior. A norm that regulates the economic behavior of men is said to be regulating the economy, one that regulates religious behavior to be regulating religion, and so on. One speaks of different objects of *regulation* and means by this the different directions of the behavior regulated by norms. What the norms of an order regulate is always human behavior - only *it* can be regulated by norms. Facts other than human behavior can be made the content of norms only in connection with human conduct - only as a condition or as the effect of it. The concept of a material sphere of validity is applied, for example, when a total legal order - such as that of a federal state comprising several member states - is articulated into several partial legal orders, whose spheres of validity are determined with respect to the objects to be regulated. For example, if the legal orders of the member states are competent to regulate only those objects which are specifically enumerated by the constitution; if - in other words - the regulating of these objects falls within the competence of the member states, whereas the

regulation of all other objects is reserved for the legal order of the federation, which, in itself is also a partial legal order. The material sphere of validity of a total legal order is always unlimited, in the sense that such an order, by its very nature, can regulate the behavior of the individuals subjected to it in all directions.

d) Positive and Negative Regulations: Commanding, Authorizing, Permitting

The behavior regulated by a normative order is either a definite action or the omission (nonperformance) of such an action. Human behavior, then, is either positively or negatively regulated by the normative order. Positively, when a definite action of a definite individual or when the omission of such an action is commanded. (When the omission of an action is commanded, the action is forbidden.) To say that the behavior of an individual is commanded by an objectively valid norm amounts to the same as saying the individual is obliged to behave in this way. If the individual behaves as the norm commands he fulfills his obligation - he obeys the norm; if he behaves in the opposite way, he “violates” the norm - he violates his obligation. Human behavior is positively regulated also, when an individual is authorized by the normative order to bring about, by a certain act, certain consequences determined by the order. Particularly an individual can be authorized (if the order regulates its own creation) to create norms or to participate in that creation; or when, in case of a legal order providing for coercive acts as sanctions, an individual is authorized to perform these acts under the conditions stipulated by the legal order; or when the norm permits an individual to perform an act, otherwise forbidden - a norm which limits the sphere of validity of a general norm that forbids the act. An example for the last-mentioned alternative is self-defense: although a general norm forbids the use of force of one individual against another, a special norm permits such use of force in self-defense. When an individual acts as he is authorized by the norm or behaves as he is permitted by a norm, he “applies” the norm. The judge, authorized by a statute (that is, a general norm) to decide concrete cases, applies the statute to a concrete case by a decision which constitutes an *individual* norm. Again, authorized by a judicial decision to execute a certain punishment, the enforcement officer “applies” the individual norm of the judicial decision. In exercising self-defense, one applies the norm that permits the use of force. Further, a norm is also “applied” in rendering a judgment that an individual does, or does not, behave as he is commanded, authorized, or permitted by a norm.

In the broadest sense, any human behavior determined by a normative order as condition or consequence, can be considered as being authorized by this order and in this sense as being positively regulated. Human behavior is regulated negatively by a normative order if this behavior is not forbidden by the order without being positively permitted by a norm that limits the sphere of validity of a forbidding norm, and therefore is permitted only in a negative ‘sense. This merely negative function of permitting has to be distinguished from the positive function of permitting - “positive,” because it is the function of a positive norm, the meaning of an act of will. The positive character of a permission becomes particularly apparent when the limitation of the sphere of validity of a norm that forbids a certain conduct is brought about by a norm that permits the otherwise forbidden conduct under the condition that the permission has to be given by an organ of the community authorized thereto. The negative as well as positive function of permitting is therefore fundamentally connected with

the function of commanding A definite human behavior can be permitted only within a normative order that commands different kinds of behavior.

“To permit” is also used in the sense of “to entitle” (*berechtigen*). If A is commanded to endure that B behaves in a certain way, it is - said that B is permitted (that is, entitled) to behave in this way. And if A is commanded to render a certain service to B, it is said that B is permitted (that is, entitled) to receive the service of A. In the first example, then, the sentence “B is permitted to behave in a certain way” says the same as the sentence: “A is commanded to endure that B behaves in a certain way.” And in the second example the sentence: “B is permitted to receive a certain service from A” says the same as the sentence: “A is commanded to render a service to B.” The quality of B’s behavior “to be permitted” is merely the reflex of the quality of A’s behavior “to be commanded. This kind of permitting” is not a function of the normative order different from its function of “commanding.”

5. The Social Order

Social Orders Prescribing Sanctions

The behavior of an individual can be - but need not be - in relation to other individuals: a man can behave in a certain way toward another man, but he can do so also toward animals, plants, and inanimate objects. The relation of one individual to other individuals can be direct or indirect. Murder is the behavior of a murderer toward the murdered - a direct relation between one individual and another. He who destroys a valuable object acts directly in relation to a thing but indirectly in relation to men who are interested in the object, particularly its owners. A normative order that regulates human behavior in its direct or indirect relations to other human beings, is a social order. Morals and law are such social orders.

On the other hand, logic has as its subject matter a normative order that does not have a social character. For the acts of human thought, which are regulated by the norms of this order, do not refer to other human beings; one does not think “toward” another man in the way that one acts toward another.

The behavior of one individual toward others may be useful or detrimental for them. From a psychological-sociological point of view, the function of every social order is to bring about a certain behavior of the individuals subject to this order; to motivate them to refrain from certain acts deemed detrimental “socially,” that is, to other individuals; and to perform certain acts deemed socially useful. This motivating function is rendered by the idea men have of norms, which command or forbid certain human acts.

Depending on the manner in which human acts are commanded or forbidden, different types may be distinguished - they are ideal types, not average types. The social order may command certain human behavior without attaching any consequence to the obeying or the disobeying of the command. Or the social order may command a definite human behavior and at the same time connect with that behavior the granting of an advantage, a reward; or with the opposite behavior a disadvantage, punishment in the broadest sense of the word. The principle, to react upon a certain human behavior with reward or punishment is the principle

of retribution. Reward and punishment may be called “sanctions,” but usually only punishment, not reward, is so called.

Finally a social order may - and a legal order does - command a certain behavior just attaching a disadvantage to the opposite behavior, for example the deprivation of life, health, freedom, honor, material goods, in the broadest sense the word. Therefore, one may say that a certain behavior is “commanded” by a social order and - in case of a legal order – is legally commanded, only insofar as the contrary behavior is a condition of a sanction (in the narrower sense of the word). If a social order - like the legal order ... commands a behavior by prescribing a sanction in case of the opposite behavior, this set of circumstances can be described by a sentence stating that in the event of a certain behavior a certain sanction *ought* to be executed. By this is implied that the behavior conditioning the sanction is prohibited, the opposite behavior commanded: The behavior which is “commanded” is not the behavior which “ought” to be executed. That a behavior is “commanded” means that the contrary behavior is the condition of a sanction that ought to be executed. The execution of the sanction is *commanded* (i.e., it is the content of a legal obligation if the non-execution is the condition of a sanction. If this is not the case, the sanction is only authorized, not commanded. Since this regression cannot go on indefinitely, the last sanction in this chain can only be authorized, not commanded.

It follows that within such a normative order the same behavior may be - in this sense - commanded and forbidden at the same time, and that this situation may be described without logical contradiction. This is the case if a certain conduct is the condition of a sanction and at the same time the omission of this conduct is also the condition of a sanction. The two norms: “a ought to be” and “a ought not to be” exclude each other insofar as they cannot be obeyed or applied by the same individual at the same time; only one can be valid. But the two norms: “If *a* is, *x* ought to be” and “If non-*a* is, *x* ought to be” are not mutually exclusive. These two norms can be valid at the same time. Under a legal order a situation may exist in which a certain human behavior and at the same time the opposite behavior is the condition of a sanction which ought to be executed. The two norms can be valid side by side. They can be described without logical contradiction, but they express two conflicting political tendencies, a teleological conflict. The situation is possible, but politically unsatisfactory. Therefore legal orders usually contain rules according to which one of the two norms is invalid or may be invalidated.

Insofar as the evil that functions as a sanction - the punishment in the widest sense - has to be inflicted against the will of the affected individual; and insofar as, in case of resistance, the evil has to be inflicted by force, the sanction has the character of a coercive act. A normative order, which prescribes coercive acts as sanctions (that is, as reactions against a certain human behavior), is a coercive order. But coercive acts can be prescribed - and are so prescribed in a legal order, as we shall see - not only as sanctions, but as reactions against socially undesirable facts that do not have character of human behavior and are therefore not to be regarded as prohibited.

From a sociological-psychological point of view, reward or punishment are ordered to make the desire for reward and the fear of punishment the motives for a socially desirable

behavior. But actually this behavior may be brought about by other motives. According to its inherent meaning, the order may prescribe sanctions without regard to the motives that actually, in each single case have brought about the behavior conditioning the sanctions. The meaning of the order is expressed in the statement that in the case of a certain behavior - brought about by whatever motives - a sanction (in the broader sense of the word, that is, reward or punishment) ought to be executed. Indeed, an order may attach a reward to a behavior only if it had not been motivated by the desire for reward. For example, a moral order may honor only the one who does good deeds for their own sake, not for honor's sake. Since in the foregoing pages the validity of a social order has been distinguished from its effectiveness, it should be noted that a social order prescribing rewards or punishments is effective in the literal sense of the word insofar only as the behavior conditioning the reward is caused by the desire for the reward, and the behavior avoiding the punishment is caused by the fear of punishment. However, it is usual to speak of an effective order also if the behavior of the individuals subjected to the order by and large corresponds to the order, that is to say, if the individuals by and large by their behavior fulfill the conditions of the rewards and avoid the conditions of the punishments, without regard to the motive of their behavior. Used in this way the concept of effectiveness has a normative, not a causal, meaning.

a) *Are There Social Orders without Sanctions?*

Distinctly different from a social order prescribing sanctions (in the wider sense of the word) is one that commands a certain behavior without attaching reward for it or punishment for its opposite - that is, an order in which the principle of retribution is not applied. Usually the moral order is considered to be such a social order, and is thereby distinguished from the legal order. Jesus, in his Sermon on the Mount, does not seem, at first glance to posit a moral order with sanctions, because he decidedly rejects the retribution principle of the Old Testament - evil for evil, good for good: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist one who is *evil*.... You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, Love your enemies For if you love those who love you, what reward have you? Do not even the tax collectors do the same?" Evidently Jesus refers here to the heavenly reward, and therefore even in this moral order of highest standard the principle of retribution is not entirely excluded. Heavenly (although not secular) reward is promised to the one who renounces the application of the principle of retribution in this world - who does not requite evil with evil, and not only the good with good. Also punishment in the other world is included in this moral order which does not provide for punishment in this world. It is not a moral order without sanctions, but an order with transcendental sanctions, and in that sense a religious order.

In order to judge the possibilities of a sanctionless moral order, it must be noted that: if a moral order commands a certain behavior, it commands simultaneously that the commanded behavior of the one subject is to be approved by the others opposite behavior disapproved. If somebody disapproves the commanded behavior or approves the opposite behavior, then he behaves immorally and must himself be morally disapproved. Approval and disapproval by the fellow members of the community are sensed as reward and punishment and may therefore be interpreted as sanctions. Sometimes they are more effective sanctions than other

forms of reward and punishment, because they satisfy or hurt man's desire for reputation, which is one of the most important components of the instinct for self-preservation. It is to be noted that the two moral norms - the one commanding a certain behavior and the one prescribing disapproval for the opposite behavior - are essentially connected and form a unity. It is therefore doubtful whether a distinction between social orders with and without sanctions is possible. The only relevant difference between social orders is not that some prescribe sanctions and the others do not, but that they prescribe different types of sanctions.

c) Transcendental and Socially Immanent Sanctions

The sanctions prescribed by a social order are either transcendental or socially immanent. Transcendental sanctions are those that according to the faith of the individuals subjected to the order originate from a superhuman authority. Such a faith is a specific element of a primitive mentality. Early man interprets natural events that affect his immediate interest according to the principle of retribution: favorable events as rewards for the observance, unfavorable events as punishment for disregard of the existing social order. Originally it was probably the spirits of the dead which, according to the religious ideas of early man, reward socially good behavior with success in the hunt, a rich harvest, victory in battle, health, fertility, and long life; and which punish bad behavior with disease and death. Nature, socially interpreted, appears as a normative social order connecting a definite human behavior with definite sanctions. This order has a religious character. But even within religions of the highest standards, such as the Judeo-Christian, the normative interpretation of nature plays a part that is not to be underestimated. Even modern man, when hit by misfortune, will often instinctively ask: What have I done to deserve such punishment? He will be inclined to interpret his good fortune as reward for conscientious observance of God's commands. In this respect higher developed religions are distinguished from the primitive ones only so far as they add to the sanctions to be executed in this world those that are imposed in the other world - by God rather than by the spirits of the dead. These sanctions are transcendental not only in the sense that they originate from a superhuman and therefore supersocial authority, but that they are executed outside society and even outside this world within a transcendental sphere.

Different from the transcendental sanctions are those that not only take place in this world and within society, but are executed by the members of the society and may therefore be described as 'socially immanent' sanctions. These may consist merely in the approval or disapproval expressed by the fellow members or in specific acts directed against others, that is, in acts to be performed by certain individuals designated by the social order in a procedure regulated by this order. Then one can speak of socially organized sanctions. The oldest sanction of this kind is blood revenge as practiced in primitive society. This is a sanction by which the primitive social order reacts against the fact that a member of a group constituted by blood relationship (the narrower or wider family) kills the member of another group of this kind in a natural way or by magic. It is to be executed by the members of the latter against the members of the former group. Murder within a group originally was probably sanctioned only by the revenge taken by the spirit of the murdered on the murderer. But insofar as the spirit of the dead has power only within his own group, a murder committed by a member of another group can be revenged only by acts of the victim's relatives. Only the nonfulfillment of the

obligation for revenge is subject to the transcendental sanction of revenge from the soul of the murdered. It should be noted that blood revenge, the oldest socially organized sanction, originally worked only in the relation between groups. It developed to a sanction functioning within one and the same group only when the social community comprised several groups constituted by blood relationship and hence was larger than a mere family group.

Sociologically, the religious development was characterized by centralization of the superhuman authority, increase of its power, and increase of the distance between the authority and man. The many spirits of the dead were reduced to a few gods and finally to one all-powerful God transferred to another world. How much the social idea of retribution dominated this development shows the fact that when man in his faith imagined in addition to this world another world, then this other world, in accordance with the principle of reward and punishment, split into a heaven for the good and a hell for the evil.

It is remarkable that of the two sanctions, reward and punishment, the latter plays a much more important role in social reality than the former. This is shown not only by the fact that the most important social order, the legal order, essentially makes use only of punishment, but especially clearly under a social order which still has a purely religious character, that is, a social order guaranteed only by transcendental sanctions. The morally or legally correct behavior of primitive men, especially in the observance of the numerous prohibitions - the so-called tabus - is determined primarily by the fear of misfortunes imposed by a superhuman authority - the spirits of the dead - as a reaction against the violation of the traditional order. The hope of reward, if compared with the fear that dominates the life of the primitives, plays only a subordinate role. In the religious beliefs of civilized man, too, according to which divine retribution is not (or not only) imposed in this world but in the world beyond, fear of punishment after death takes first place. The image of hell as the place of punishment is much more vivid than the usually vague idea of a life in heaven which is the reward for piety. Even when no limits are imposed on man's wish-fulfilling phantasy, it produces a transcendental order which is not fundamentally different from that of the empirical society.

6. The Legal Order

a) *The Law: An Order of Human Behavior*

A theory of law must begin by defining its object matter. To arrive at a definition of law, it is convenient to start from the usage of language, that is, to determine the meaning of the word "law" as equivalent to the German word *Recht*, French *droit*, Italian *diritto*. Our task will be to examine whether the social phenomena described by these words *have* common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements for a concept of social-scientific cognition. The result of such an investigation could conceivably be that the word "law" and its equivalents in other language designates so many different objects that they cannot be comprehended in one concept. However, this is not so. Because, when we compare the objects that have been designated by the word "law" by different peoples at different times, we see that all these objects turn out to be *orders of human behavior*. An "order" is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm - as we shall

see -from which the validity of all norms of the order are derived. A single norm is a valid legal norm, if it corresponds to the concept of “law” and is part of a legal order; and it *is* part of a legal order, if its validity is based on the basic norm of that order.

The norms of a legal order regulate human behavior. At first sight it seems as if this sentence applied only to the social orders of civilized peoples, because in primitive societies the behavior of animals, plants, and even inanimate objects is also regulated by a legal order. For example, we read in the Bible that an ox that has killed a man ought to be killed - evidently as a punishment. In ancient Athens, there was a special Court, in which a stone or spear or any other object could be tried by which a man - presumably inadvertently - had been killed. In the Middle Ages it was possible to sue an animal, for example a bull that had caused the death of a man or grasshoppers that had destroyed a harvest. The accused animal was condemned and executed in formal legal procedure, exactly like a human criminal. If the sanctions, provided by the legal order, are directed not only against men but also against animals, this means that not only human behavior, but also the behavior of animals is legally commanded. This means further: if that which is legally commanded is to be regarded as the content of a legal duty, then not only men, but also animals are regarded as being obliged to behave in a certain way. This, in our modern point of view, absurd legal content is the result of animistic ideas, according to which not only men, but also animals, and inanimate objects have a “soul” and are therefore basically not different from human beings. Consequently sanctions, and therefore norms that establish legal duties, are applicable to men as well as animals and things. Although modern legal orders regulate only the behavior of men, not of animals, plants, and things it is not excluded that these orders prescribe the behavior of man toward animals, plants, and things. For example, the killing of certain animals (in general or at specific times), the damaging of rare plants or historically valuable buildings may be prohibited. But these legal norms do not regulate the behavior of the protected animals, plants, and things, but of the men against whom the threat of punishment is directed.

This behavior may be a positive action or nonaction - a lack of action, an omission, a forbearance, a refrainment from action. The legal order, as a social order, regulates positively the behavior of individuals only so far as it refers, directly or indirectly, to other individuals. The object of regulation by a legal order is the behavior of one individual in relation to one, several, or all other individuals - the mutual behavior of individuals. The relation of the behavior of one man to others may be an individual one: for example, the norm that obliges every man to refrain from killing other men; or the norm that obliges the debtor to pay the creditor or the norm that obliges everybody to respect the property of others. But the relation may also have a collective character. For example, the behavior prescribed by the norm obliging a man to do military service, is not the behavior of an individual versus another individual, but versus the entire social community - versus all individuals subject to the legal order. The same is true where suicide attempt is punishable. And in the same way the mentioned norms protecting animals, plants, and inanimate objects may be interpreted as social norms. The legal authority commands a certain human behavior, because the authority, rightly or wrongly, regards such behavior as necessary for the human legal community. In the last analysis, it is this relation to the legal community which is decisive for the legal regulation of the behavior of one individual to another. For the legal norm obliges the debtor

not only and, perhaps, not so much in order to protect the creditor, but in order to maintain a certain economic system.

b) *The Law: A Coercive Order*

The first characteristic, then, common to all social orders designated by the word “law” is that they are orders of human behavior. A second characteristic is that they are *coercive orders*. This means that they react against certain events, regarded as undesirable because detrimental to society, especially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil - such as deprivation of life, health, liberty, or economic values - which, if necessary, is imposed upon the affected individual even against his will by the employment of physical force. By the coercive act an evil is inflicted in the sense that the affected individual ordinarily regards it as such, although it may occasionally happen that this is not so. For example, somebody who has committed a crime may regret his action so much that he actually wishes to suffer the punishment of the law and therefore does not regard it as an evil; or somebody commits a crime in order to go to jail where he can be sure of food and shelter. But these are, of course, exceptions. Since, ordinarily, the affected individual regards the coercive act as an evil, the social orders, designated as “law” are coercive orders of human behavior. They command a certain human behavior by attaching a coercive act to the opposite behavior. This coercive act is directed against the individual who behaves in this way (or against individuals who are in some social relation to him). That means: the coercive order authorizes a certain individual to direct a coercive act as a sanction against another individual. The sanctions prescribed by the legal order are socially immanent (as distinguished from transcendental) sanctions; besides, they are socially organized (as distinguished from mere approval or disapproval).

By prescribing coercive acts, a legal order may not only react against a certain human behavior, but also against other socially detrimental facts, as will be described later. In other words: Whereas the coercive act prescribed by the legal order is always the behavior of a certain individual, the condition to which the coercive act is attached need not necessarily be the behavior of an individual but may be another fact, regarded as socially detrimental. As we shall see, the coercive act prescribed by the legal order may be interpreted as an action of the community constituted by the legal order and especially as a reaction of the legal community against a socially detrimental fact. That means that the coercive act may be *attributed* to this community; which is a figurative expression of the mental operation by which we refer the coercive act prescribed by the legal order to this legal order, the unity of which we personify as an acting entity. If the socially detrimental fact against which the community reacts with a coercive act is a definite human behavior, the reaction is interpreted as a sanction. That the law is a coercive order means that the legal norms prescribe coercive acts which may be attributed to the legal community. This does not mean that the execution of the sanctions each time requires the application of physical force; this is necessary only if execution meets resistance, which ordinarily does not happen.

Modern legal orders sometimes contain norms that provide for rewards, such as titles or decorations, for certain meritorious acts. But rewards are not an element common to all social orders designated as law; they are not an essential function of these orders. Within these

coercive orders they play a subordinate role. Besides, these norms authorizing certain organs to confer titles or decorations on individuals who have distinguished themselves in some way or another have a fundamental connection with the sanction- prescribing norms: For the use of a title or the display of a decoration is either legally not prohibited, that is, negatively permitted; or - and this is the usual situation - it is positively permitted, which means it is forbidden, unless expressly permitted. The legal situation, then, can only be described as a norm-stipulated restriction of the validity of a prohibitive norm; in other words, by referring to a coercive norm.

As a coercive order, the law is distinguished from other social orders. The decisive criterion is the element of force - that means that the act prescribed by the order as a consequence of socially detrimental facts ought to be executed even against the will of the individual and, if he resists, by physical force.

The coercive acts prescribed by the legal order as sanctions

Insofar as the coercive act prescribed by the legal order has the function of a reaction against a human behavior determined by the legal order, then this coercive act has the character of a sanction. The human behavior against which the coercive act is directed is to be considered as prohibited, illegal - as a delict. It is the opposite of *that* behavior that is regarded as commanded or legal, namely the behavior that avoids the application of the sanction. That the law is characterized as a “coercive order” does not mean - as is sometimes asserted - that it “enforces” the legal, that is, the commanded, behavior. This behavior is not enforced by the coercive act, because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded, manner. It is exactly for this case that the coercive act as a sanction is prescribed. Perhaps, however, the mentioned assertion should be taken to mean that the law, by prescribing sanctions, tries to induce men to behave in conformity with its command, in that the wish to avoid the sanctions becomes the motive that brings about this behavior. However this motivation in question is only a possible, not a necessary, function of the law; the legal - that is, the commanded ... behavior may be brought about by other motives also, especially by religious and moral ones. And this happens frequently enough. The coercion that is implied in the motivation is a psychic coercion, which is a possible effect of the idea an individual has of the law, and which takes place within this individual. And this psychic coercion must not be confused with the prescription of the coercive act, which takes place within the legal order. Every effective social order exerts some kind of psychic coercion, and some orders - such as the religious order - in much higher degree than the legal order. This psychic coercion, then, is not a characteristic that distinguishes the law from other social orders. The law is not a coercive order in the sense that it exerts a psychic coercion; but in the sense that it prescribes coercive acts, namely the forcible deprivation of life, freedom, economic and other values as a consequence of certain conditions: These conditions are in the first place - but not exclusively - a definite human behavior, which precisely by being a condition of a sanction assumes the character of legally prohibited (illegal) behavior - a delict.

The monopoly of force of the legal community

Although the various legal orders largely agree about the coercive acts which may be attributed to the legal community - they always consist in the deprivation of the mentioned goods - these orders differ concerning the conditions to which the coercive acts are attached. They differ particularly concerning the human behavior whose opposite should be brought about by stipulating the sanctions, that is, concerning the socially desired status, which consists in the legal behavior prescribed by the legal order; in other words, concerning the *legal value* constituted by the legal norms. The development of the law from primitive beginnings to its present stage in the modern state displays, concerning the legal value to be realized, a tendency that is common to all legal orders. It is the tendency gradually and increasingly to prohibit the use of physical force from man to man. Use of force is prohibited by making it the condition for a sanction. But the sanction itself is a use of force. Therefore the prohibition of the use of force can only be a limited one; and one must distinguish between a permitted and a prohibited use of force. It is permitted as a reaction against a socially undesirable fact, especially against a socially detrimental human behavior, as a sanction, that is, as an authorized use of force attributable to the legal community. This distinction does not yet mean, however, that the use of force other than legally authorized as reaction against an undesirable fact, is prohibited and therefore illegal. Primitive legal orders do not prohibit all other kinds of use of force. Even the killing of men is prohibited to only a limited degree. Only the killing of free fellow countrymen is considered to be a crime in primitive societies, not the killing of aliens or slaves. The killing of the latter, insofar as it is not prohibited, is - in the negative sense - permitted. But it is not authorized as a sanction! Gradually, however, the principle is recognized that every use of physical force is prohibited unless - and this is a limitation of the principle - it is especially authorized as a reaction against a socially detrimental fact attributable to the legal community. In this case, the legal order determines exhaustively the conditions under which (and the men by whom) physical force may be used. Since the individual authorized to use force may be regarded as an organ of the legal order (or of the community constituted by the legal order), the execution of coercive acts by these individuals may be attributed to the community. Then we are confronted with a monopoly of force of the legal community. The monopoly is decentralized if the individuals authorized to use force do not have the character of special organs acting according to the principle of division of labor but if the legal order authorizes all individuals to use force who consider their interests violated by the illegal conduct of others; in other words if the principle of self-help still prevails.

Legal order and collective security

When the legal order determines the conditions under which, and the individuals by whom, physical force is to be used, it protects the individuals who live under this order against the use of force by other individuals. When this protection has reached a certain minimum we speak of collective security, because the security is guaranteed by the legal order as a social order. This minimum of protection against the use of physical force can be regarded as existing even when monopoly of force is decentralized, that is, even when self-help still prevails. It is possible to consider such a state as the lowest degree of collective

security. However, we may speak of collective security only in a narrower sense if the monopoly of force of the legal community has reached a minimum of centralization, so that self-help is excluded, at least in principle. Collective security, in this narrower sense, exists when at least the question of whether in a concrete situation the law was violated and of who is responsible for it, is not answered by the parties involved, but by a special organ, an independent court; when, therefore, the question of whether in a concrete case, the use of force is a delict or legal and an act that may be attributed to the community, particularly a sanction, can be objectively decided.

Collective security, then, can have different degrees depending on the degree of centralization of the procedure by which in concrete cases the existence of the conditions is determined to which the coercive action of a sanction is attached; and by which this coercive action is carried out. Collective security reaches its highest degree when the legal order installs law courts with compulsory jurisdiction and central executive organs whose coercive means are so effective that resistance ordinarily is hopeless. This is the situation in the modern state, which represents a highly centralized legal order.

The aim of collective security is peace, because peace is the absence of the use of physical force. By determining the conditions and the executive organs for the use of force, by establishing a monopoly of force of the legal community, the legal order pacifies this community. But the peace of law is only a relative peace. The law does not exclude the use of physical force of man versus man. The law is not a forceless order, as postulated for by utopian anarchism. The law is an order of coercion and, as a coercive order - according to its evolution - an order of security, that is, of peace. But precisely as the concept of collective security may be defined in a narrower sense and applied only where the monopoly of force of society is centralized, so we may assume that a pacification of the legal community takes place only on that level of legal development in which self-help is prohibited, at least in principle, and collective security in the narrower sense of the word prevails. Actually, we can hardly assume even a relative pacification of the legal community as long as the law is still in a primitive condition. As long as no courts exist that objectively ascertain whether a prohibited use of force has taken place; as long as every individual who considers his rights violated by another is authorized to use force as a sanction; as long as the individual against whom force was used is authorized to react against this use of force by the use of force, which he can justify as a sanction (that is, as a reaction against a wrong suffered) as long as blood revenge is a legal institution and the duel legally permitted and even regulated by law; as long as only the killing of free fellow countrymen, but not the killing of aliens and slaves is regarded as a crime; as long, finally, as war is not prohibited by international law in the relations between states: one cannot very well assert that the state of law is necessarily a state of peace and that the securing of peace is an essential function of the law. All one can say is that the development of the law runs in this direction. Therefore, even if peace is regarded as an absolute moral value or as a value common to all positive moral orders - which, as we shall see later, is not the case - the securing of peace, the pacification of the legal community, cannot be considered as an essential moral value common to all legal orders; it is not the "moral minimum" common to all law.

The prohibition of all use of force reveals the tendency to enlarge the sphere of facts that are established by the legal order as condition of coercive acts; this tendency has developed far beyond this prohibition, by the attachment of coercive acts as consequences not only to the use of force, but also to other acts, and even to omissions of acts (This constitutes a significant modification of my view on the relation between law and peace as presented in my *General Theory of Law and State*, pp. 22.) If the coercive act established by the law is a reaction against socially detrimental behavior and if the function of such an establishment is to prevent such a behavior (individual or general prevention), then this act has the character of a sanction in the specific and narrower sense of the word; and the fact that a certain behavior is made the condition for a sanction in this sense means that this behavior is legally prohibited, a delict. There is a correlation between this concept of sanction and the concept of delict. The sanction is the consequence of the delict; the delict is the condition of the sanction. In primitive legal orders the reaction of the sanction against the delict is entirely decentralized. The reaction is left to the discretion of the individuals whose interests have been violated by the delict. They are authorized to identify *in concreto* as a delict what has been so identified by the legal order only *in abstracto*; and they are authorized to execute the sanction established by the legal order. The principle of self- help prevails. In the course of evolution this reaction against the delict is increasingly centralized, in that the identification of the delict and the execution of the sanction is reserved for special organs: the courts and executive authorities. Thereby the principle of self-help is limited, but it cannot be entirely eliminated. Even in the modern state, in which centralization has reached the highest degree, a minimum of self-help remains: self-defense. Besides, there are other cases in modern, centralized legal orders - cases that have been largely ignored in legal theory—in which, to a limited extent, the use of physical force is not reserved for special organs, but left to the discretion of individuals interested in it. We speak of the right of corporal punishment that even modern legal orders concede to parents as a means of educating their children. It is limited to the extent that it must not harm the child's health; but the decision, which behavior of the child is a condition of corporal punishment, that is, which behavior is pedagogically and hence socially undesirable, is in principle left to the parents who may pass this right to professional educators.

Coercive acts other than sanctions

As the state develops from a judicial to an administrative community, the sphere of facts that are made conditions for coercive acts grows. Now not only socially undesirable actions and omissions but also other facts, not having the character of delicts, are included. Among those facts is the suspicion that a definite individual has committed a delict. Special organs, having the character of police agents, may be legally authorized to deprive the suspected individual of his liberty in order to safeguard legal proceedings against him, in which it will be decided whether he has, in fact, committed the delict of which he is suspected. The condition for the deprivation of liberty is not a definite behavior of the individual, but the suspicion of such a behavior. Similarly, the police may be authorized by the legal order to take persons in so-called protective custody, that is, to deprive them of their liberty, in order to protect them against illegal aggression that threatens them. Further, modern legal orders prescribe the forced internment in institutions of insane individuals constituting a public

danger, and in hospitals of persons with contagious diseases. Further, property may be expropriated if necessary in the public interest, domestic animals may be destroyed if infected with an epidemic illness, buildings may be torn down by force to prevent their collapsing or the spread of a conflagration. The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of these states. All these acts constitute the same forced deprivation of life, liberty, and property as the sanctions of the death penalty, imprisonment, and civil execution. But, as we have said, they differ from sanctions insofar as they are not the consequence of a legally ascertained, socially undesirable action or omission of an individual; the condition is not a legally ascertained delict committed by an individual. Delict is a definite human behavior (an action or omission) which, because socially undesirable, is prohibited by the legal order and it is prohibited insofar as the legal order attaches to it (or, more correctly formulated: to the fact that it is ascertained in a legal procedure) a coercive act, as this fact is made by the legal order the condition of a coercive act. And this coercive act is a sanction (in the sense of a reaction against a delict) and as such distinguishable from other legally established coercive acts only in that the conditioning fact of the former is a legally ascertained human behavior, whereas the coercive acts which have not the character of sanctions are conditioned by other facts. Some of the coercive acts belonging to the second category may be interpreted as sanctions, if the concept of “sanction” is not limited to reactions against a definite human behavior whose actual existence is legally ascertained, but is extended to situations in which the coercive act is provided for as reaction against a delict - but against a delict whose commission by a definite individual has not yet been legally ascertained, though the individual may be suspected of having committed it and may therefore be arrested by the police: and to situations in which the coercive act is a reaction against a delict that has not even been committed yet but is expected in the future as a possibility - as in the cases of internment of dangerous psychopaths or persons of undesired opinions, religions, and races, insofar as they are interned in concentration camps to prevent them from a socially undesired behavior of which, rightly or wrongly, in the opinion of the legal authority, they are considered capable. Apparently, this motive is the basis for the limitations of liberty to which, in a war, the citizens of the one belligerent party living on the territory of the other are subjected by the latter. If we extend the concept of “sanction” in this sense, it is no longer congruent with “of a delict.” Sanction in this wider sense of the word does not necessarily *follow* the delict.

Finally the concept of sanction may be extended to include all coercive acts established by the legal order, if the word is to express merely that the legal order reacts with this action against socially undesirable circumstances and qualifies in this way the circumstances as undesirable. This, indeed, is the common characteristic of all coercive actions commanded or authorized by legal orders. The concept of “sanction,” understood in this broadest sense, then, the force monopoly of the legal community, may be formulated by the alternative: “The use of force of man against man is either a delict or a sanction.”

The minimum of liberty

As a sanction-prescribing social order, the law regulates human behavior in two ways: in a positive sense, commanding such behavior and thereby prohibiting the opposite behavior; and, negatively, by not attaching a coercive act to a certain behavior, therefore not prohibiting this behavior and not commanding the opposite behavior. Behavior that legally is not prohibited is legally permitted in this negative sense. Since human behavior is either prohibited or not prohibited, and since, if not prohibited, is to be regarded as permitted by the legal order, any behavior of an individual subjected to a legal order may be regarded as regulated by it - positively or negatively. Insofar as the behavior of an individual is permitted by the legal order in the negative sense - and that means: not prohibited - the individual is legally free.

The freedom left to the individual by the legal order simply by not prohibiting a certain behavior must be distinguished from the freedom which is positively guaranteed to the individual by that order. The freedom of an individual which consists in permitting him a certain behavior by not prohibiting it, is guaranteed by the legal order only to the extent that the order commands the other individuals to respect this freedom; the order forbids them to interfere in this sphere of freedom, that is, the order forbids a behavior by which an individual is prevented from doing what is not prohibited and what therefore in this sense is permitted to him. Only then can the nonprohibited (in a negative sense permitted) behavior be looked upon as rightful: that is to say, as the content of a right, which is the reflex of a corresponding obligation.

However, not every behavior so permitted - in the negative sense of not being forbidden - is safeguarded by the prohibition of the opposite behavior of others; not every permitted behavior of one individual corresponds to an obligation of another individual. It is possible that a behavior is not prohibited by the legal order (and therefore, in this sense, permitted), without an opposite behavior of others being prohibited by the legal order, so that this opposite behavior is also permitted. A behavior may not be prohibited, for example, because it is not related to other individuals or at least does not hurt anybody. But not even every behavior that *does* hurt others is prohibited. For example, it may not be prohibited that the owner of a house install a ventilator into a wall situated directly at the borderline of his property. But, at the same time, it may not be prohibited that the owner of the neighboring property builds a house whose one wall directly adjoins the ventilator-equipped wall of the first house and thereby nullifies the effect of the ventilator. In this example, one party is permitted to prevent what the other party is permitted to do - namely to pipe air into one of his rooms by a ventilator.

If a behavior opposite to the not prohibited behavior of another individual is not prohibited, then a conflict is possible against which the legal order makes no provision. The legal order does not seek to prevent this conflict, like other conflicts, by prohibiting the opposite behavior. Indeed, the legal order cannot try to prevent all possible conflicts. Only one thing is prohibited practically universally by modern legal orders: to prevent another individual by force from doing what is not prohibited. For the exercise of physical force -

coercive action - is prohibited in principle, except where it is positively permitted for certain authorized individuals.

A legal order - like any normative social order - can command only specific acts or omissions of acts; therefore, no legal order can limit the freedom of an individual with respect to the totality of his external and internal behavior, that is, his acting, wishing, thinking, or feeling. The legal order can limit an individual's freedom more or less by commanding or prohibiting more or less. But a minimum of freedom, that is, a sphere of human existence not interfered by command or prohibition, always remains reserved. Even under the most totalitarian legal order there exists something like inalienable freedom; not as a right innate and natural, but as a consequence of the technically limited possibility of positively regulating human behavior. This sphere of freedom, however, can be regarded as legally guaranteed only to the extent that the legal order prohibits interference. In this respect the constitutionally guaranteed so-called civil liberties are politically particularly important. They are established by provisions of the constitution that limit the competence of the legislators to the extent that the latter are not authorized (or so authorized only under exceptional conditions to issue norms that command or forbid a certain behavior, such as the practice of a certain religion or the expression of certain opinions.

c) *The Law As a Normative Coercive Order; Legal Community and Gang of obbers*

The law as a coercive order is sometimes characterized by the statement that the law commands a certain behavior "under threat" of coercive acts, that is, of certain evils. But this formulation ignores the normative meaning with which coercive acts in general and sanctions in particular are stipulated by the legal order. The meaning of a threat is that an evil *will be* inflicted under certain conditions; the meaning of a legal order is that certain evils *ought to be* inflicted under certain conditions or - expressed more generally - that certain coercive acts ought to be executed under certain conditions. This is not only the subjective meaning of the acts by which the law is established but also their objective meaning. Only because this normative meaning is the objective meaning of these acts, do they have the character of law stipulating norm-creating, or norm-executing acts. The action of a highwayman who under threat commands somebody to surrender his money also has 'the subjective meaning of an "ought." If the situation created by such a command is described by saying that one individual expresses a will directed toward the behavior of another individual, then one merely describes the action of the first as an actually happening event. The behavior of the other individual, however, which is intended by the will of the first, cannot be described as something that actually takes place, because he does not yet behave and may not behave at all in the way that the first one had intended. It can only be described as something that according to the subjective meaning of the command ought to take place.

In this way every situation must be described in which one individual expresses a will directed toward the behavior of another individual. In this respect (namely, so far as only the subjective meaning of the acts are considered), there is no difference between describing the command of a robber and the command of a legal organ. The difference appears only when the objective meaning of the command is described, the command directed from one individual toward another. Then we attribute only to the command of the legal organ, not to

that of the robber, the objective meaning of a norm binding the addressed individual. In other words, we interpret the one command, but not the other, as an objectively valid norm; and then we interpret in the one case the connection of the nonfulfillment of the command with a coercive act merely as a “threat” (i.e., a statement that an evil *will be* inflicted), whereas in the other case, we interpret this connection to mean that an evil *ought to be* inflicted. Therefore we interpret the actual infliction of the evil in the second situation as the application or execution of an objectively valid norm, stipulating a coercive act as a sanction, but in the first situation - if we offer a normative interpretation - as a crime.

But why do we interpret the subjective meaning of the one act also as its objective meaning, but not so of the other act? Why do we suppose that of the two acts, which both have the subjective meaning of an “ought,” only one established a valid, that is, binding, norm? In other words: What is the reason for the validity of the norm that we consider to be the objective meaning of this act? This is the decisive question.

By analyzing the judgments that interpret the acts as legal (that is, as acts whose objective meaning is norms) we get the answer to the question. Such an analysis reveals the *presupposition* that makes such an interpretation possible.

Let us start from the earlier-mentioned interpretation of the killing of one individual by another as the execution of a death sentence and not as murder. Our interpretation is based on the recognition that the act of killing constitutes the execution of a court decision that has commanded the killing as a punishment. This means: We attribute to the act of the court the objective meaning of an individual norm and in this way interpret the individuals who perform the act, as a court. We do this, because we recognize the act of the court as the execution of a statute (that is, of general norms stipulating coercive acts) in which we see not only the subjective but also the objective meaning of an act that had been established by certain individuals whom we consider, for this reason as legislators. For we regard the act of legislation as the execution of the constitution, that is, of general norms that, according to their subjective meaning, authorize these individuals to establish general norms prescribing coercive acts. In this way we interpret these individuals as legislative organs. By regarding the norms authorizing the legislative organ not only as the subjective but also as the objective meaning of an act performed by definite individuals, we interpret these norms as “constitution.” For the historically first constitution such an interpretation is possible only, if we *presuppose* that one ought to behave according to the subjective meaning of the act, that one ought to perform coercive acts only under the conditions and in the manner the constitution stipulates; if, in other words, we presuppose a norm according to which (a) the act whose meaning is to be interpreted as “constitution” is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities. As will be developed later, this norm is the basic norm, of the national legal order. It is not established by a positive legal act, but is presupposed, *if* the act mentioned under (a) is interpreted as establishing a constitution and the acts based on the constitutions are interpreted as legal acts. To make manifest this presupposition is an essential function of legal science. This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order.

By making these statements we are considering, at this point, only a national legal order, that is, a legal order whose territorial sphere of validity is limited to the territory of a state. The reason for the validity of international law, whose territorial sphere of validity is not so limited, and the relationship of the international legal order to the national legal orders, are, for the present, outside our discussion. It was observed earlier that the validity of a norm (which means that one ought to behave as the norm stipulates) should not be confounded with the effectiveness of the norm (which means that one, in fact, does so behave); but that an essential relation may exist between the two concepts, namely, that a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective. That means: The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order. Only if the actual behavior of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behavior if, in other words, the subjective meaning is recognized as the objective meaning - only then are the acts interpreted as legal acts.

Now we are ready to answer the question why we do not attribute to the command of a robber, issued under threat of death, the objective meaning of a valid norm binding on the addressed victim; why we do not interpret this act as a legal act; why we *regard* the realization of the threat as a crime, and not as the execution of a sanction.

An isolated act of one individual cannot be regarded as a legal act, its meaning cannot be regarded as a legal norm, because law, as mentioned, is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system. How about a situation, however, in which an organized gang systematically jeopardizes a certain territory by forcing the people living there, under threat, to surrender their money? In this situation we will have to distinguish between the order that regulates the mutual behavior of the members of this robber gang and the external order, that is, the commands that the members of the gang direct at outsiders under the threat of inflicting evils. For it is only in relation to outsiders that the group behaves as a *robber gang*. If robbery and murder were not forbidden in the relations between the robbers, no community, no robber *gang* would exist. Nevertheless, even the internal order of the gang may be in conflict with the coercive order, considered to be a legal order, valid for the territory in which the gang is active. Why is the coercive order that constitutes the community of the robber gang and comprises the internal and external order not interpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robbers' coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity as being illegal behavior; if the members of the gang are deprived of their liberty or their lives by coercive acts that are interpreted as imprisonment and death sentences; and if thus the activity of the gang is terminated - in short, if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang.

If the validity of this coercive order is restricted to a certain territory and if it is effective within this territory in such a way that the validity of any other coercive order of this kind is excluded, then the coercive order may indeed be regarded as a legal order and the community constituted by it may be regarded as a “state” - even if its external activity is illegal according to positive international law. Thus, from the sixteenth to the beginning of nineteenth century so-called pirate states existed along the northwest coast of Africa (Algiers, Tunis, Tripolis) whose ships preyed upon navigation in the Mediterranean. These communities were “pirates” only with respect to their exercise of force on ships of other states, in defiance of international law. Yet, their internal order presumably prohibited mutual employment of force, and this prohibition was by and large obeyed, so that the minimum of collective security existed which is the condition for the existence of a relatively lasting community constituted by a normative order.

Collective security or peace - as we have said - is a function that the coercive orders designated as “law” have in various degrees when they have reached a certain level of development. This function is an objectively determinable fact. The scientific statement that a legal order is pacifying the legal community, is not a value judgment. Specifically, this statement does not mean that the realization of justice is essential to the law; this value, therefore, cannot be made an element of the concept of law and can therefore not serve as a criterion for the distinction between a legal community and a robber gang. This, however, is the distinction made by St. Augustine who says in his *Civitas Dei*: “Set justice aside then, and what are kingdoms but thievish purchases? because what are thieves’ purchases but little kingdoms?” A state, which is according to Augustine a legal community, cannot exist without justice. “Where true justice is wanting, there can be no law. For what law does, justice does, and what is done unjustly, is done unlawfully.” But what is justice? “Justice is a virtue distributing unto everyone his due. What justice is that then, that takes man from the true God and gives him unto the condemned fiends? Is this distribution according to due? Is not he that takes away thy possessions and gives them to one that has no claim to them, guilty of injustice, and is not he so likewise, that takes himself away from his Lord God, and gives himself to the service of the devil?”

According to this reasoning, the law is a just coercive order and is distinguished from the coercive order of the robbers by the justice of its content.

That justice cannot be the criterion distinguishing law from other coercive orders follows from the relative character of the value judgment according to which a social order is just. Saint Augustine recognizes as “just” only that order which gives each his due, and applies this empty formula by saying that an order is just only when it gives the true God -who, to him, is the Judeo-Christian God, not the gods of the Romans - what is his due, namely the worship that is expressed in a certain cult; therefore, according to Augustine, an order that does not conform with this postulate, cannot be law, and the community based on this order cannot be a state, but only a robber gang. With this, Roman Law is denied the character of law. If justice is assumed to be the criterion for a normative order to be designated as “law,” then the capitalistic coercive order of the West is not law from the point of view of the Communist ideal of justice, nor the Communist coercive order of the Soviet Union from the point of view of the capitalist ideal of justice. A concept of law with such consequences is unacceptable by

a positivist legal science. A legal order may be judged to be unjust from the point of view of a certain norm of justice. But the fact that the content of an effective coercive order may be judged unjust, is no reason to refuse to acknowledge this coercive order as a legal order. After the victory of the French Revolution in the eighteenth century and after the victory of the Russian Revolution in the twentieth, the other states showed the distinct inclination not to interpret the coercive orders established by the revolution as legal orders and the acts of the revolutionary governments as legal acts, because the one government had violated the monarchic principle of legitimacy and the other had abolished private property of the means of production. For the last-named reason, even American courts refused to acknowledge acts of the revolutionary Russian government as legal acts; the courts declared that these were not acts of a state, but of a robber gang. However, as soon as the revolution-born coercive orders turned out to be effective, they were recognized as legal orders, the governments as state governments, and their acts as state acts, that is, legal acts.

d) Legal Obligations without Sanctions?

If the law is conceived of as a coercive order, then the formula by which the basic norm of a national legal order is expressed runs as follows: "Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution. The basic norm delegates the first constitution to prescribe the procedure by which the norms stipulating coercive acts are to be created. To be interpreted objectively as a legal norm, a norm must be the subjective meaning of an act performed in this procedure, hence in accordance with the basic norm; besides, the norm must stipulate a coercive act or must be in essential relation to such a norm. Together with the basic norm the definition of law as a coercive order is presupposed. From the definition of law as a coercive order follows that a behavior may be regarded as legally commanded (i.e., as the content of a legal obligation) only if the contrary behavior is made the condition of a coercive act directed against the individual thus behaving. It is to be noted, however, that the coercive act itself need not be commanded in this sense: its ordering and executing may be merely authorized.

Against the definition of law as a coercive order, that is, against the inclusion of the element of coercion into the concept of law, the objections have been raised (1) that legal orders actually contain norms that do not stipulate coercive acts: norms that permit or authorize a behavior, and also norms that command a behavior without attaching to the opposite behavior a coercive act; and (2) that the non-application of the norms that stipulate coercive acts are frequently not made the condition for coercive acts functioning as sanctions.

The second objection is not valid, because the definition of law as a coercive order can be maintained even if the norm that stipulates a coercive act is not itself essentially connected with a norm that attaches, in a concrete case, a sanction to the nonordering or nonexecuting of the coercive act if, therefore, the coercive act stipulated in the general norm is to be interpreted objectively not as commanded but only as authorized or positively permitted (although the subjective meaning of the act by which the general norm stipulates the coercive act is a commanding). As for the first objection, the definition of law as a *coercive* order can be maintained even with respect to norms that authorize a behavior not having the character of a coercive act; or norms that positively permit such a behavior insofar as they are

dependent norms, because they are essentially connected with norms that stipulate the coercive acts. A typical example for norms cited as arguments against the inclusion of coercion into the definition of law are the norms of constitutional law. It is argued that the norms of the constitution that regulate the procedure of legislation do not stipulate sanctions as a reaction against nonobservance. Closer analysis shows, however, that these are dependent norms establishing only one of the conditions under which coercive acts stipulated by other norms are to be ordered and executed. Constitutional norms authorize the legislator to create norms - they do not command the creation of norms; and therefore the stipulation of sanctions do not come into question at all. If the provisions of the constitution are not observed, valid legal norms do not come into existence, the norms created in this way are void or voidable. This means: the subjective meaning of the acts established unconstitutionally and therefore not according to the basic norm, is not interpreted as their objective meaning or such a temporary interpretation is annulled.

The most important case of norms which according to traditional science of law constitute legal obligations without stipulating sanctions, is the so-called natural obligation. Natural obligations are obligations whose fulfillment cannot be asserted in a court, and whose nonfulfillment is not the condition of a civil execution. Still, one speaks of a legal obligation, because that which, in fulfillment of a so-called natural obligation, has been given by one individual to another cannot be recovered as an unjustified enrichment. If this is so, however, it merely means: A general norm is valid stipulating that: (1) if the beneficiary of a performance to which the performer was legally not obligated refuses restitution, civil execution ought to be directed into the property of the beneficiary; and (2) the validity of this coercion-stipulating norm is restricted with respect to cases determined by the legal order. This situation, therefore, can be described as a restriction of the validity of a sanction-stipulating norm; it is not necessary to assume the existence of a sanctionless norm.

It is possible, of course, for a legislator to establish, in a procedure conforming with the basic norm, an act whose subjective meaning is a behavior-commanding norm, without (1) establishing an act whose subjective meaning is a norm prescribing a sanction as a reaction against the opposite behavior; and without (2) the possibility of describing the situation as “restriction of the validity of a sanction-stipulating norm.” In this case the subjective meaning of the act in question cannot be interpreted as its objective meaning; the norm, which is the act’s subjective meaning cannot be interpreted as a legal norm, but must be regarded as legally irrelevant.

And there are other reasons why the subjective meaning of an act established in conformity with the basic norm may be regarded as legally irrelevant: namely, if the subjective meaning of such an act is not a norm that commands, permits, or authorizes human behavior. A law, established strictly according to the constitution, may have a content that is not a norm, but the expression of a religious or political theory - for example, the statement that the law is given by God or that the law is just or that the law realizes the interest of the entire population. Or, to give another example in the form of a constitutionally established statute the nation’s congratulations may be conveyed to the head of time state on the occasion of an anniversary of his accession to power; this may be done in this form merely to invest the congratulations with special solemnity. After all, since constitutionally established acts are

expressed by words, the acts may have any meaning whatever, not only the meaning of norms. If law is defined as norm at all, legal science cannot dispense with the concept of legally irrelevant contents.

Since the law regulates the procedure by which it is itself created, one might distinguish this legally regulated procedure as *legal form* from the *legal content* established by the procedure, and speak of a legally irrelevant legal content. In traditional science of law this thought is expressed to some extent by the distinction between law in the formal sense and law in the material sense. This distinction acknowledges the fact that not only general behavior-regulating norms are issued in the form of laws, but also administrative decisions, such as the naturalization of a person, the approval of the state budget, or judicial decisions (when, in certain cases, the legislator acts as a judge). But it would be more correct to speak of form of law and content of law rather than of law in the formal and in the material sense. However, the words “legal form” and “legal content” are unprecise and even misleading in this respect; in order to be interpreted as a legal act it is not only required that the act be established by a certain procedure, but also that the act have a certain subjective meaning. The meaning depends on the definition of law, presupposed together with the basic norm. If the law is not defined as a coercive order, but only as an order established according to the basic norm (and if, therefore, the basic norm is formulated as: one ought to behave as the historically first constitution prescribes), then sanctionless legal norms could exist, that is, legal norms that under certain conditions command a human behavior without another norm stipulating a sanction as a reaction against nonobservance. In this case the subjective meaning of an act, established in accordance with the basic norm - if this meaning is not a norm and in no relation to a norm - would be legally irrelevant. Then, a norm established by the constitutional legislator and commanding a certain behavior without attaching a coercive act to its nonobservance, could be distinguished from a moral norm only by its origin; and a legal norm established by custom could not be distinguished from a customarily established moral norm at all.

If the constitution has established custom as a law-creating fact, then all moral norms created by custom constitute a part of the legal order. Therefore, then, a definition of law, which does not determine law as a coercive order, must be rejected (1) because only by including the element of coercion into the definition of law is the law clearly distinguished from any other social order; (2) because coercion is a factor of great importance for the cognition of social relationships and highly characteristic of the social orders called “law”; and, (3) particularly, because by defining law as a coercive order, a connection is accounted for that exists in the case most important for the cognition of the law, the law of the modern state: the connection between law and state. The modern state is essentially a coercive order - a centralized coercive order, limited in its territorial validity.

Norms that are the subjective meaning of legislative acts and that command a certain behavior without the opposite behavior being made the condition of a sanction are very rare in modern legal orders. If the social orders designated as law *did* contain significant numbers of sanctionless norms, then the definition of law as a coercive order could be questioned; and if from the existing social orders designated as law the element of coercion were to disappear - as predicted by Marx’s socialism - then these social orders would indeed fundamentally

change their character. They would - from the point of view of the offered definition of law - lose their legal character, and the social orders constituted by them would lose their character as states. In Marxian terms the state - and along with the state, the law - would wither away.

e) *Dependent Legal Norms*

It was pointed out earlier that: if one norm commands a certain behavior and a second norm stipulates a sanction as reaction against nonobservance, the two norms are tied to each other. This is particularly true if a social order - as the legal order - commands a certain behavior specifically by attaching a coercive act as sanction to the opposite behavior. Therefore a behavior according to such an order may be regarded as commanded - and in case of a legal order as legally commanded - only so far as the opposite behavior is the condition of a sanction. If a legal order, such as a statute passed by parliament, contains one norm that prescribes a certain behavior and a second norm that attaches a sanction to the nonobservance of the first, then the first norm is not an independent norm, but fundamentally tied to the second; the first norm merely designates - negatively - the condition under which the second stipulates the sanction; and if the second one positively designates the condition under which it stipulates the sanction, then the first one is superfluous from the point of view of legislative technique. For example: If a civil code contains the norm that a debtor ought to pay back the received loan to the creditor; and the second norm that a civil execution ought to be directed into the property of the debtor if the debtor does not repay the loan; then everything prescribed by the first norm is contained conditionally in the second. Modern criminal codes usually do not contain norms that prohibit, like the Ten Commandments, murder, adultery and other crimes: they limit themselves to attach penal sanctions to certain behavior. This shows clearly that a norm: 'You shall not murder' is superfluous, if a norm is valid: 'He who murders ought to be punished'; it shows, further, that the legal order indeed prohibits a certain behavior by attaching to it a sanction or that it commands a behavior by attaching a sanction to the opposite behavior.

Dependent are also those legal norms that positively permit a certain behavior. For - as shown before - they merely limit the sphere of validity of a legal norm that prohibits this behavior by attaching a sanction to the opposite. The example of self-defense has been cited earlier. Another example is found in the United Nations Charter. Article 2, paragraph 4, forbids all members to use force: the Charter attaches to the use of force the sanctions stipulated in Article 39. But the Charter permits in Article 51 the use of force as individual or collective self-defense by limiting the general prohibition of Article 2, paragraph 4. The named articles form a unit. The Charter could have combined them all in a single article forbidding all members to use force which does not have the character of individual or collective self-defense by making the thus restricted use of force the condition of a sanction. Yet another example: A norm prohibits the sale of alcoholic beverages, that is, makes it punishable; but this prohibition is restricted by another norm according to which the sale of these beverages, if a license is obtained, is not forbidden; that means that the sale is not punishable.

The second norm, restricting the sphere of *validity* of the first, is a dependent norm: it is meaningful only in connection with the first; both form a unit. Their contents may be

expressed in the single norm: “If somebody sells alcoholic beverages without a state license, he ought to be punished.” The function of the merely negative permission, consisting in the nonprohibition by the legal order of a certain behavior, need not be considered here because negative permission is not granted by a positive norm.

A legal norm may not only restrict the sphere of validity of another norm, but may entirely annul the validity. These derogating norms too are dependent norms, meaningful only in connection with other, sanction-stipulating norms. Further, legal norms authorizing a certain behavior are dependent norms likewise, if “authorizing” is understood to mean: confer upon an individual a legal power, that is, the power to create legal norms. These authorizing norms designate only one of the conditions under which - in an independent norm - the coercive act is prescribed. These are the norms that authorize the creation of general norms: (1) the norms of the constitution which regulate legislation or institute custom as a law-creating fact; and (2) the norms that regulate judicial and administrative procedures in which the general norms created by statute or custom are applied by authorized courts and administrative officials through individual norms created by these organs.

To give an example: Suppose the legal order of a state prohibits theft by attaching to it in a statute the penalty of imprisonment. The condition of the punishment is not merely the fact that a man has stolen. The theft has to be ascertained by a court authorized by the legal order in a procedure determined by the norms of the legal order; the court has to pronounce a punishment determined by statute or custom; and this punishment has to be executed by a different organ. The court is authorized to impose, in a certain procedure, a punishment upon the thief, only if in a constitutional procedure a general norm is created that attaches to theft a certain punishment. The norm of the constitution, which authorizes the creation of this general norm, determines a condition to which the sanction is attached. The rule of law that describes this situation says: “If the individuals authorized to legislate have issued a general norm according to which a thief is to be punished in a certain way; and if the court authorized by the Code of Criminal Proceedings in a procedure prescribed by this code has ascertained that an individual has committed theft; and if that court has ordered the legally determined punishment; then a certain organ ought to execute the punishment.” By thus phrasing the rule of law that describes the law, it is revealed that the norms of the constitution which authorize the creation of general norms by regulating the organization and procedure of legislation; and the norms of a Code of Criminal Procedure which authorize the creation of the individual norms of the judicial court decisions by regulating the organization and procedure of the criminal courts, are dependent norms; for they determine only conditions under which the punitive sanctions are to be executed. The execution of all coercive acts stipulated by a legal order ... including those that are ordered by an administrative procedure and those that do not have the character of sanctions - is conditioned in that manner. The constitutional creation of the general norms to be applied by courts and administrative agencies, and the creation of the individual norms by which these organs have to apply the general norms, are as much conditions of the execution of the coercive act as the ascertainment of the fact of the delict or as other circumstances which the legal norms have made the condition of coercive acts that are not sanctions. But the general norm that stipulates the coercive act under all these conditions is an independent legal norm - even if the coercive act is not commanded because

its nonexecution is not made the condition of a further coercive act. If we say that in this case the coercive act is authorized, then the word “authorized” is used in a wider sense. It then does not merely mean conferring a legal power in the sense of a power to create legal norms, but also conferring the power to perform the coercive acts stipulated by the legal norms. In a wider sense, then, this power may also be designated as a legal power.

Dependent norms are, finally, also those that further determine the meaning of other norms, by defining a concept used in a second norm or by authentically interpreting a second norm otherwise. For example, a Criminal Code might contain an article saying: “By murder is to be understood the behavior of an individual which intentionally causes the death of another individual.” This article defines murder; however, the article has normative character only in connection with another article that says: “If a man commits murder, the authorized court ought to impose the death penalty.” And this article, again, is inseparably connected with a third article that says: “The death penalty is to be carried out by hanging.”

It follows, that a legal order may be characterized as a coercive order, even though not all its norms stipulate coercive acts; because norms that do not themselves stipulate coercive acts (and hence do not command, but authorize the creation of norms or positively permit a definite behavior) are dependent norms, valid only in connection with norms, that *do* stipulate coercive acts. Again, not all norms that stipulate a coercive act but only those that stipulate the coercive act as a reaction against a certain behavior (that is, as a sanction), command a specific, namely the opposite, behavior. This, therefore, is another reason why the law does not have exclusively a commanding or imperative character. Since a legal order, in the sense just described, is a coercive order, it may be described in sentences pronouncing that under specific conditions (that is, under conditions determined by the legal order) specific coercive acts ought to be performed. All legally relevant material contained in a legal order fits in this scheme of the rule of law formulated by legal science - the *rule of law* which is to be distinguished from the *legal norm* established by the legal authority.

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SEPARATION OF LAW AND MORALITY*

Jurisprudence was enlivened in the second half of the 20th century by new debates about law and morality. Two of these involved Herbert Hart, the major figure in British legal positivism. Hart argued that the connection between law and morality was not necessary but contingent. He acknowledged that law often gives effect to morality, as it prohibits crimes and torts and demands the performance of contracts. However, he maintained that a law, however immoral, will be law if it is recognized as law according to the established rules of recognition. The sensible response to such acts, Hart argued, is not to deny that they are law but to correct their effects by other laws passed where necessary with retrospective effect.

Two American professors of law questioned this general theory and argued that law cannot be separated from morality in the sense proposed by Hart and his positivist predecessors. The first was Lon Fuller, whose theory was inspired by the German legal philosopher Gustav Radbruch. The second was Ronald Dworkin, who was a student of Fuller at Harvard Law School. Their arguments are related in some ways to the classical ideas of natural law discussed in the previous chapter, but they also introduced new dimensions to the debate about the relation between law and morality. Fuller and Dworkin approached the question from different directions, but I conclude that their theories are fundamentally similar. We cannot leave the subject of law and morality without discussing their philosophies.

Lon Fuller on the Morality of Law

Lon Louvois Fuller (1902–78) is best known for the debate with Hart on the connection between law and morality. Fuller was not a natural law theorist in the traditional sense, but in some respects his theory is more far reaching. Fuller's theory of the morality of law is best understood against the background of the post-war debate about the legality of crimes against humanity committed under positive law.

Historical roots of Fuller's Theory: The closing period of the Nazi regime in Germany

The first of the great 20th century debates on law and morality arose in the aftermath of the Second World War, which witnessed human atrocities on an unimaginable scale in Europe and Asia. The victorious Allied powers (the United States, the United Kingdom, France and the Soviet Union) established international military tribunals in Nuremberg, Germany and in Tokyo, Japan to bring to justice officials of Nazi Germany and Imperial Japan accused of war crimes and crimes against humanity. The common defence of the accused persons was that they were acting under lawful orders and hence their actions were lawful. Any retrospective punishment of these acts, they argued, would contravene the basic rule of justice that a person should only be punished for crimes against the law (*nullum crimen, nulla poena sine lege*). The debate was precipitated by the conviction of Nazi officials by the Nuremberg Tribunal.

The National Socialist (Nazi) Party came to power through democratic elections under Germany's Weimar Constitution. The Constitution, though democratic in character, had certain fatal defects, including the president's power to suspend civil liberties in case of emergencies and the legislature's power to amend the constitution by two thirds majority. These defects allowed the Nazi Party to transform the Constitution from within. In the short period that it held power, the Nazi Party under Hitler converted the liberal-democratic German state into an unrecognizable abomination of tyranny. At the height of Hitler's powers, the German political system displayed the following features:¹

* Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) pp 161-173.

¹ These facts are taken from the judgments in the Nuremberg trials, particularly from the judgment in *USA v Alstötter (The Justices Case)* 3 TWC 1 (1948); 6 LRTWC 1 (1948); 14 Ann Dig 278 (1948). They are also set out in detail in Lon Fuller's essay 'Positivism and fidelity to law: A reply to Professor Hart' (1958) 71(4) *Harvard Law Review*, 648–57.

- frequent retroactive laws punishing the guiltless or excusing atrocities
- enforcement of secret (unpublished) laws that denied citizens the guidance of the law
- uncontrolled discretions that identified the law with the momentary wishes of officials
- the fact that a verbal order by Hitler was regarded as sufficient authority to exterminate thousands of people
- frequent lawlessness, seen in the practice of extra-judicial punishment by the state acting through ‘the Party in the streets’ – a euphemism for party thuggery
- unification of legislative, executive and judicial power in the person of Adolph Hitler (the Fuehrer principle)
- total intimidation of courts, which did the bidding of party officials. Judges were required to decide cases as the Fuehrer would.

The question that Fuller raised was whether in such conditions there can be a legal system capable of producing laws in a meaningful sense.

The Radbruch Doctrine

Gustav Radbruch (1878–1949) was a professor of law at the University of Heidelberg and one of the leading German philosophers before the Second World War. A member of the Social Democratic Party, he was elected to the Reichstag (the lower house of parliament) and served as Germany’s Minister of Justice from 1921 to 1924. He returned to Heidelberg in 1926 and taught until his removal by the Nazi government in 1933. After the war he resumed his academic life at Heidelberg, where he proposed the so-called ‘Radbruch doctrine’, which became influential in the post-war jurisprudence concerning crimes against humanity.

Radbruch’s early views on the concept of law are found in *Legal Philosophy (Rechtsphilosophie)* (1932). He sought to combine elements of German legal positivism with natural law thinking, but the finished theory placed him closer to the positivists than to the natural lawyers. The idea of law, according to Radbruch, has three aspects: (1) Law serves expediency – the various purposes of human co-existence. (2) It serves justice. (3) It promotes legal certainty. (Radbruch 1950 (1932), 118) These three aspects are of equal value. He wrote that ‘the legal certainty that positive law affords may justify even the validity of unjust or inexpedient law, but argued that the demand of legal certainty has no absolute precedence over the demands of justice and expedience (1950, 118). Conflicts between these qualities are left to the resolution of individual conscience. Conscience will usually choose legal certainty over personal conviction ‘but there may be “shameful laws” which conscience refuses to obey’ (Radbruch 1950, 118). A judge’s conscience may direct them to enforce an unjust law against a person who disobeys it because of their own conscience. Radbruch stated that in relation to such a person, ‘the law may prove its power but can never demonstrate its validity’ (1950, 119). What does this mean? The power of the law is different from the validity of the law. Validity in the case of an unjust law is a matter of subjective judgment according to one’s conscience. An unjust law may be valid from a judge’s point of view, but from the viewpoint of the person who violates it the law may be effective but invalid. This suggests that officials may in good conscience enforce even the most unjust laws.

The horror of the Nazi reign of terror led to much soul searching by German legal positivists. In 1946 Radbruch published the essay ‘Statutory lawlessness and supra-statutory law’, in which he revised his pre-war theory of law. Radbruch used as his context one of the so-called ‘grudge informer’ cases. Grudge informers were persons who betrayed critics of the Nazi regime to the authorities, with knowledge that the betrayed persons faced certain execution. The common defence of grudge informers was that they did not violate any law by informing on critics. The defence of the officials who ordered the executions was that they were simply obeying the law in putting to death the betrayed critics. Radbruch argued that post-war

German courts were right to convict the informers in disregard of the Nazi law. He could not do this without revising his pre-war theory that left the resolution of conflicts between statutes and justice to the conscience of judges. Radbruch reformulated his theory in the following terms:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, 'as flawed law' must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law. (2006 (1946), 7)

Radbruch thus proposed a moral test that applies to all positive laws. His test is not a high hurdle to clear. It does not invalidate every unjust law, for what is unjust is a matter of legitimate debate. It nullifies only laws whose injustice is beyond rational doubt. The Radbruch doctrine proved influential in many post-war trials in German courts and in the Nuremberg trials.

Hart's criticism

In 1958, the *Harvard Law Review* carried articles by Professors Hart and Fuller presenting opposing views on the Radbruch doctrine and post-war trials of war criminals. In 'Positivism and the separation of law and morality' Hart defended his version of positivism and levelled two criticisms at the Radbruch doctrine. The first was that Radbruch had confused the distinction between legal duty and moral duty. According to Hart, one may be under a legal duty to obey an inhumane law but have an overriding moral duty to disobey it. (This was, in substance, Radbruch's pre-war position.) The grudge informers and Nazi officials should not have been punished, because they acted in breach of morality and not law. Hart's second criticism was that the Radbruch doctrine, by denying legal status to inhumane law, does more harm than good. He accused Radbruch of 'extraordinary naiveté' and of having 'only half-digested the spiritual message of liberalism' (Hart 1958, 617–18). Hart considered the case of a woman convicted by the post-war West German court of appeal of the offence of illegally depriving her husband of his freedom. The woman wanted to be rid of her husband and to this end reported him for criticising the Reich, knowing that he would be sentenced to death. He was sentenced but sent to the battlefield, where he survived against great odds. The woman argued that she did no wrong under the law. Hart's point was that in convicting her, the post-war German court violated a different cherished value – the fidelity to law. The case raised a moral dilemma. The woman had committed an outrageously immoral act. Hart argued that from the positivist standpoint there were two choices before the German state: to let her go free or punish her under a new retrospective statute. The latter course 'would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems' (Hart 1958, 619). This raises another question. What difference does it make if the woman is punished by the court under the Radbruch doctrine or by the legislature under retrospective law? In either case the result is the same. Hart argued that the latter course has the value of clarity. Everyone can understand the idea that 'laws may be law but too immoral to obey', whereas the contrary opinion that immoral law is not law is not widely held and 'raises a whole host of philosophical issues before it can be accepted' (1958, 620). This is a utilitarian argument. Why engage in difficult debates when a simple solution is at hand? Hart's argument, though, is not without its own problems.

First, Radbruch was not saying that all immoral laws are invalid, but only those of the most inhumane kind. Hart's confidence that the general public will regard as law even the most heinous statutes may be misplaced. Lawyers are familiar with the disbelief of clients when they are informed that some

statute or precedent bars their claim. ‘How can this be law?’ they ask, and they are not referring to genocidal laws but to laws such as those taking property without compensation. Hart’s claim that the public would have difficulty accepting the Radbruch formula is untested. In any event, the Radbruch doctrine is now implemented in substance by the *Rome Statute of the International Criminal Court*.

Second, the option of punishment by retrospective legislation is available only if the evil regime is ousted. The Allied powers and the West German state had this choice because the Nazi regime was defeated and replaced by an authority that could enact retrospective laws. If the odious regime continues in power, its inhumane laws will remain in force nationally. What happens when a foreign court is asked to apply these laws? In *Oppenheimer v Cattermole*, the House of Lords considered the effect of the 1941 Nazi decree that took away the German citizenship of Jews who left the country, and confiscated their property without compensation. Most Jews fled out of fear for their lives. Lord Cross of Chelsea declared: ‘To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all’ ([1976] AC 249, 278). Lord Salmon agreed:

The Crown did not question the shocking nature of the 1941 decree but argued quite rightly that there was no direct authority compelling our courts to refuse to recognise it. It was further argued that the authorities relating to penal or confiscatory legislation, although not directly in point, supported the view that our courts are bound by established legal principles to recognise the 1941 decree in spite of its nature. The lack of direct authority is hardly surprising. Whilst there are many examples in the books of penal or confiscatory legislation which according to our views is unjust, the barbarity of much of the Nazi legislation, of which this decree is but an example, is happily unique. I do not consider that any of the principles laid down in any of the existing authorities require our courts to recognise such a decree and I have no doubt that on the grounds of public policy they should refuse to do so. ([1976] AC 249, 281–2)

The point I make is that from time to time a court is confronted with a statute whose injustice cannot, in a practical sense, be rectified by retrospective statute. Lords Cross and Salmon held, as a matter of English law, that an English court will not recognise the heinous laws of a foreign country.

Third, the utilitarian reasoning that Hart adopted is no more conclusive than the natural law reasoning he rejected. There is reason to think that officials may be less willing to enforce evil law if they know that in the event of a regime change a court will not entertain the defence of lawful orders. The Radbruch doctrine, by utilitarian calculation, may do more good than harm, though we will never know for certain.

Fourth, Hart’s argument conflicts with his own concept of law. In his book *The Concept of Law*, Hart criticised the command theory of law on the ground, among others, that it misunderstands the idea of a rule. A rule of law has an external and an internal aspect. The external aspect is objective and factual. (Parliament has enacted the law.) The internal aspect is mental and subjective. (I ought to obey the Act of Parliament for reasons A, B and C.) It is the internal aspect that distinguishes a law from the demand of a gunman. An armed robber forces the victim to hand over their wallet. In contrast, a citizen regards the law as obligatory, even without the threat of force. In Hart’s own words, ‘Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion’ (1958, 603). This was precisely Radbruch’s argument.

Fuller’s response: Morality that makes Law possible

Radbruch, having died in 1949, was not around to answer Hart’s criticism. Harvard professor Lon Fuller, however, developed Radbruch’s central ideas into a theory of the morality of law. The editors of the *Harvard Law Review* published Fuller’s response right next to Hart’s essay. Fuller argued that Hart’s proposal to invalidate the inhumane Nazi laws by retrospective statutes (as against judicial annulment) does not advance the value of fidelity to the law. Whether the laws are set aside by court or legislature, the effect

is the same – what was once law is declared not to have been law. The only question then is ‘who should do the dirty work, the courts or the legislature’ (Fuller 1958, 649). Fuller defended the post-war decisions, arguing that the German legal system under Nazi rule had degenerated to the point that it ceased to make law ‘except in the Pickwickian sense in which a void contract can said to be one kind of contract’ (Fuller 1969, 39). ‘To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system’ (Fuller 1958, 660).

Fuller’s own substantive theory of law maintains that law and morals cannot be separated because the very concept of law carries within it certain moral qualities. Fuller’s thesis may be summarised as follows:

- Law’s authority cannot be based on law, but on the moral attitudes of the community.
- Law is an ongoing purposive enterprise. We cannot fully understand the nature of law without considering its purpose.
- The purpose of law is to allow individuals to communicate and coordinate with each other.
- The purpose of the law requires reciprocity between the ruler and the citizens. Law is not a one-way projection of authority but a system of cooperation.
- Law’s purpose cannot be achieved unless it displays certain qualities. These qualities represent the internal morality of the law.
- A legal system that wholly lacks one or more of these qualities fails to make law, except in the Pickwickian sense that a void contract is a type of contract.
- The internal morality of law involves both morality of duty and morality of aspiration. Morality of duty demands that law provides the basic rules that make social life possible. A community may aspire beyond this point to achieve the best possible laws. This is the morality of aspiration.
- The external and internal moralities of law have reciprocal influence. The decline of one leads inevitably to the decline of the other.

Moral basis of Law: External and Internal Moralities of Law

It is a ridiculous tautology to say: The law is valid because the law says it is. Law’s authority must ultimately rest on the moral attitudes of the people. The law earns fidelity by the general moral quality of its rules. Fuller called this the external morality of the law. The external morality of the law refers to the substantive content of legal rules. If this content is pervasively unjust the legal system will fail to command the respect of the community and must maintain itself by force. This is common sense. Hart agreed when he argued, in *The Concept of Law*, that a legal system must have a minimum content of natural law to be effective (1997, 193–200). Fuller argued that law also has an internal morality that arises from its very nature as a purposive human activity. The internal morality is not principally about the content of the law but concerns the qualities that enactments must possess to become law at all. Fuller’s project of demonstrating the morality of law started in his *Harvard Law Review* reply to Hart, continued in his Storrs Lectures at the Yale Law School and was completed in the two editions of his book *The Morality of Law*.

Law is a purposive, reciprocal and ongoing enterprise

Fuller regarded law as: (a) purposive, (b) reciprocal, and (c) an ongoing enterprise. This proposition goes to the heart of Fuller’s theory and marks a point of sharp difference from legal positivism. He began with the insight that law cannot be understood without considering its purpose. If we describe to a child the various parts of a computer without explaining what it does or what purposes it serves, we give them a very limited idea of what a computer is. Similarly, if we describe the law, say to a Martian, only by its formal features (that it is made by parliament, is applied by courts, etc) without saying what purpose the law serves, we give an incomplete account of it. Fuller here is not talking about the specific purposes of particular laws (to raise revenue, to provide social security, to ban narcotics, etc) but the purpose of having law at all. The

abstract purpose of law is to make it possible for individuals to communicate, to coordinate and to reach understanding with each other (Fuller 1969, 185–6). Law does this by subjecting human beings to the governance of rules (1969, 106).

Law's purpose reveals the second aspect of the enterprise – its reciprocal nature. The law cannot be conceived as whatever the ruler wills if its purpose is to facilitate human coordination. Fuller claimed that legal positivists wrongly conceive the law 'not as the product of an interplay of purposive orientations between the citizen and the government but as a one-way projection of authority, originating with government and imposing itself upon the citizen' (1969, 204). It is common knowledge that laws made by democratic legislatures do not always advance human coordination, and often impede it. Yet history shows that legal systems that consistently fail to serve law's human purpose degenerate into dictatorial command systems.

The third aspect is that law by nature is an ongoing enterprise. It is also an aspirational activity, in the sense that it aspires to an ideal of the law that can never be fully achieved. An analogy is helpful here. A motor car may be described by its structure, capacity, mechanical devices and its purpose, which is to carry passengers from one location to another. A brand new Rolls Royce may come close to a person's ideal motor car. At the other end we see a shell of what was once a car, with no wheels, seats or engine. It would be silly to call this a car. In between the Rolls Royce and the wreck, there are cars in various conditions of excellence and dilapidation. At some lower point on this spectrum it is no longer sensible to call the object a motor car. Different persons may draw the line at different points. Yet if the motor car is beyond repair and ceases to serve its purpose, most rational persons will agree that it is no longer a motor car, except in the special sense that a wrecked car is a kind of car. According to Fuller, it is the same story with legal systems: they achieve law to varying degrees, from excellence to abomination. At some point it is no longer sensible to call a law a law, for it fails law's purpose, which is facilitating social life. The question at this point is not whether the law is good or bad but whether there is a law at all. If the law, for example, is not publicised or requires the impossible, it cannot do its job – that of guiding people's conduct. Even a well-meant law can fail for these reasons. Just as a motor car needs continual maintenance, the legal system needs constant attention to what makes law possible.

Internal Morality of Law

Fuller explained the inner morality of law with the help of an allegory. Assume that a country is ruled by King Rex, who has unlimited law-making power. He is utterly selfish, uncaring and incompetent. He does not lay down any rules but from time-to-time issues commands intended to punish those who disobey him and to reward those who obey him. However, because of his incompetence he makes no attempt to find out who has been obedient and who has been disobedient. Consequently, he frequently punishes obedience and rewards disobedience. Rex will not achieve his aim, as there is no meaningful connection between his commands and his actions. He fails to produce law. At other times, Rex's commands are so confused, ambiguous and inaudible that his subjects do not know what Rex wants them to do or not do. Sometimes he commands today that something must have been done yesterday. Again, he fails to make law capable of guiding conduct. Fuller used this analogy to demonstrate how the Nazi regime debased and destroyed the legal system through ad hoc commands, retroactive laws, ad hominem laws, secret enactments, punishment without trial, indemnities for state condoned crimes, official disregard for the law and the practice of thuggery.

Fuller proceeded to identify what he termed 'eight ways to fail to make law':

1. failure to achieve rules at all, in the sense that every command of the ruler is *ad hoc* and lacks any degree of generality – if this is the case, the subjects have no guidance as to how they should behave
2. failure to publicize the rules that people are expected to observe

3. abuse of the practice of enacting retroactive laws – such laws not only fail to guide conduct but also undercut the integrity of prospective rules by placing them under constant threat of retrospective change
4. failure to make rules comprehensible
5. enactment of contradictory rules
6. enactment of rules that require conduct beyond the powers of the affected persons
7. frequently changing the rules such that the subjects cannot orient their actions by them
8. lack of congruence between the rules as announced and their actual administration.

Fuller contended that the total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all except in the Pickwickian sense described above. Fuller wrote:

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he has acted, or was unintelligible, or was contradicted by another rule of the same system, commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point, obedience becomes futile – as futile, in fact, as casting a vote that will never be counted. (1969, 39)

The eight failings are mitigated by the eight virtues of the internal morality of law. They are: (1) generality, (2) publicity, (3) prospectivity, (4) clarity, (5) consistency, (6) possibility of compliance, (7) constancy, and (8) faithful administration of law.

The Internal Morality of Law is Morality of Duty and of Aspiration

Fuller, following Kant, Adam Smith and other moral philosophers, distinguished morality of aspiration from morality of duty. If we imagine a vertical moral scale, the lower half will occupy the morality of duty and the upper half the morality of aspiration. Morality of duty relates to the fundamental and essential moral duties. These consist mainly of forbearances or negative injunctions such as ‘Do not murder’, ‘Do not steal’ and ‘Do not break your contracts’. Morality of aspiration occupies the upper part of the scale. This is the morality of striving towards the highest achievements open to human beings. At some point on the scale what is a duty becomes an aspiration. ‘Somewhere along this scale there is an invisible pointer where the pressure of duty leaves off and the challenge of excellence begins’ (Fuller 1969, 10). This is a fluctuating pointer, hard to locate but vitally important. Social attitudes about rewards and punishments are important indicators of where the pointer rests. A person is usually condemned for violating morality of duty but not praised for observing it (Fuller 1969, 30). I will be condemned if I commit theft but will not be praised because I did not steal. In contrast, a person is usually praised for displaying morality of aspiration but not condemned for the lack of it. I will be praised for plunging into the raging torrents to save my neighbor’s cat but will not be condemned if I thought better of it.

A legal system is also measurable on the moral scale. A system that fails to provide a basic framework of rules that enables peaceful social life fails the morality of duty. This is Fuller’s basic argument. We must note, though, that no legal system in history has fully met the requirements of the external and internal morality of law. No legal system ever will. Let me focus on the legal system that I know best – that of Australia. The Australian legal system is nowhere near perfect by Fuller’s yardsticks. There are arbitrary discretions that allow officials to determine the law for the particular case. Some laws have retrospective effect, such as those that impose taxes or take property without compensation.

Some laws are so complex that ordinary citizens who must observe them have no idea what they are. Some obscure rules, regulations, orders and judicial precedents lie in the crevices of the legal system, undiscovered even by the best judges and lawyers. There are contradictions within laws that remain unresolved. Yet most rational observers will place the Australian legal system at the upper end of Fuller’s

moral scale, well above the pointer that separates the moralities of duty and aspiration. The reason is that the Australian legal system by and large serves the social purpose of law. This is mainly because the constitutional features of the system make it open to self-correction. In contrast, Fuller argued that the legal system and laws of the Nazi regime fell far below the pointer.

Fuller's overall position was that law may fail by some standard of aspirational morality but will still be law. A law that fails the morality of duty is not law at all except in the Pickwickian sense.

Hart's rejoinder

The first edition of *The Morality of Law* was published in 1964, and Hart lost no time in publishing a critical review of it. A major part of the review criticised Fuller's misunderstandings of positivist positions and identified technical deficiencies in Fuller's theory. One criticism, though, went to the heart of Fuller's thesis of the internal morality of law. Hart had earlier noted that the inner morality of law is 'compatible with very great iniquity' (1961, 202). Hart's point was that a legislature may comply with all the requirements of the inner morality of law and still produce unjust law. Hence, the requirements are ethically neutral. They can be put to good or bad use. In the book review, Hart argued that the eight requirements Fuller specified are not principles of morality but principles of good legal craftsmanship. In short, he accused Fuller of confusing morality with efficiency (Hart 1965, 1286).

Hart argued that Fuller's logic would mean that principles of efficacy in any purposive activity would represent the inner morality of that activity. This would lead to the absurd conclusion that even despicable activities have an internal morality. Hart took the example of a person who wishes to poison to death another person. Common sense tells the poisoner to choose a poison that is hard to detect and administer the poison without being observed. 'But to call the principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned' (Hart 1965, 1286). This is a grotesque misreading of Fuller's theory.

Fuller's counter

In the first edition of *The Morality of Law*, Fuller had already offered a defence against the charge that his internal morality is in fact ethically neutral. The demand that rules be known, general and observed in practice seems at first sight ethically neutral, but Fuller argued that without these qualities one cannot judge the morality of the law at all because one only sees pattern less *ad hoc* commands. He said that an unlimited power expressing itself solely in unpredictable and pattern less interventions could be said to be unjust only in the sense that it does not act by a known rule. It is hard to call it unjust in any more specific sense until one has discovered what hidden principle, if any, guided its interventions (Fuller 1969, 157–8). Generality also has ethical merit in mitigating discriminatory laws, such as those used in apartheid and segregation (Fuller 1969, 160).

Fuller's most important argument was that internal morality arises from a particular view of human beings as responsible agents. Every departure from the principles of inner morality, he argued, is an affront to people's dignity as responsible agents. To judge a person's actions by unpublished or retroactive law, or to order a person to do an act that is impossible, is to convey to them your indifference to their powers of self-determination (Fuller 1969, 162).

In the revised edition of *The Morality of Law*, Fuller directly addressed Hart's claim that his internal morality was in fact efficiency. He compared two different types of social ordering: managerial direction and law. Five of the principles of internal morality are applicable to managerial activity. Managers who wish to ensure that subordinates work according to plan will announce their directions as clearly as possible and without contradictions. They would be silly to give impossible directions, and good managers will not change their instructions frequently. However, the qualities of generality, prospectivity and congruence of rules and actions have a special place in law that they do not have in management. Generality of directions

is only a matter of convenience in management. Subordinates have no cause to complain if the manager directs them on occasions to depart from the general orders. There is also no compelling reason for a manager not to depart from announced rules. As for the principle of prospectivity, Fuller stated that the issue does not arise: no manager with a semblance of sanity would direct a subordinate today to do something yesterday (1969, 208–9).

Fuller argued that the inapplicability of these three requirements brings out the essential difference between managerial direction and law. Management represents a one-way projection of authority, and hence only requires principles of efficiency. On the contrary, a relatively stable reciprocity of expectations between the law giver and the subject is part of the very idea of a functioning legal order. Law, unlike management, is not simply about directing persons to perform tasks set by a superior but is a matter of providing citizens with a sound and stable framework for their interactions with one another, the role of government being that of a guardian of the integrity of this framework. Fuller claimed that his positivist critics confused his principles of inner morality with requirements of efficacy because they regarded law essentially as a one-way projection of authority.

The connection of Internal and External Moralities

The external morality of law concerns the moral content of the rules. A law that authorises torture is bad and a law that bans torture is good. Internal morality is about the qualities that make the law serve the general social purpose of human coordination. It provides stable rules for the game. Fuller conceded that a law that complies with internal morality may yet be unjust. The law in the People's Republic of China that prohibits parents from having more than one child is general, prospective, promulgated clearly, and so forth. Yet it has been widely condemned as unjust. Inner morality is logically consistent with external injustice. This does not mean that the inner morality is not true morality.

Imagine two bad regimes, A and B. Regime A operates by clearly declared prospective and general rules that are consistently and scrupulously enforced, while regime B operates through ad hoc commands, retrospective laws, secret laws and extra-judicial punishment without charges or trial. Is there any moral difference between the regimes? Clearly there is. Regime A provides a degree of order that allows citizens to avoid official retribution and go about their lives even within the confines of harsh laws. In regime B nothing is certain and people are in constant jeopardy. History also demonstrates repeatedly that the internal and external moralities of law are symbiotic. One does not live long without the other. This is why the internal morality of law, under its other name, 'the rule of law', is widely regarded as a moral imperative.

HISTORICAL SCHOOL*

The historical outlook will be dealt with in this chapter. It comprises, on the one hand, inquiries into the past and evolution generally with the object of elucidating the position today. The question to be answered is to what extent the 'oughts' of contemporary laws have been fashioned by the past. This is what some of the jurists, who belong to what is known as the Historical School, have purported to do. On the other hand, there are inquiries into the past, especially into primitive and undeveloped communities, which are conducted for their own sake in order to discover what 'law' might appropriately be taken to mean in them. Such inquiries are distinguishable as the Anthropological approach and will be touched on at the end of the chapter.

The Historical School arose more or less contemporaneously with Analytical positivism at the beginning of the nineteenth century, and should be regarded as another manifestation of the reaction against natural law theories. It did not emerge as something novel in European thought, for it had been germinating long before then. The reaction against natural law theories provided a rich bed in which the seeds of historical scholarship took root and spread.

The prelude to the historical approach to law is the story of the study and reception of Roman law in Europe. The gradual disappearance and decay of Roman law in the ages which followed the dissolution of the Roman Empire were arrested by a revival of academic interest in that system in the eleventh century in France and Italy and principally at the law school in Bologna. This new interest took the form of adding to the texts explanatory glosses and commentaries. The Glossators accepted Justinian's boast that conflicts had been eliminated from his codification, and they devoted their ingenuity to reconciling and explaining away the many conflicts that did undoubtedly exist. There was another more significant side to their work, which was that they endeavoured to fit the problems of their feudal society into Roman terminology and thus paved the way for the later reception of Roman law into Europe. The work of the Glossators culminated in the *Glossa Ordinaria* of Accursius in the early twelfth century, which superseded all previous glosses and came to be accepted as the final resolution of the conflicting opinions of individual Glossators. The scholars who followed them were known as the Post-Glossators or Commentators. The most interesting feature of their work is the way in which they attempted to relate the Roman law to contemporary problems, but they used for this purpose, not the original texts, but the *Glossa*. So it was that when Roman law was eventually received into Europe in the fifteenth and sixteenth centuries it was a diluted version adapted from the *Glossa* that was received.

The Renaissance kindled fresh interest in the teachings of the Romans themselves. The outstanding name in this connection is that of Cujas, a Frenchman, who resorted to the Roman originals underneath the accumulated silt of commentary and gloss. He did more: he was the first scholar to understand Justinian's *Corpus Juris* in historical perspective. It is difficult to appreciate nowadays how lacking in historical sense people were in those days. The tendency was to regard the *Corpus Juris* more or less as a simultaneous product, rather than a collection of materials which had been changing and developing over centuries. More than one hundred years spanned the jurists of the Classical period, whose writings comprise the Digest, while between them and Justinian another three centuries elapsed. This lack of historical sense led to elaborate and fanciful explanations of differences which were easily explicable on historical grounds. The admirable work of Cujas, however, was confined to the academic sphere and failed to penetrate through to practice. For this there was good reason. As long as Roman law remained 'the law' in the countries of Europe, inconsistencies had to be reconciled and historical explanations of their origin were of no avail. The living law could not be self-contradictory. Accordingly, there developed a gulf between the academic jurist and the practitioner, which also explains why the historical approach remained for so long in the background.

* R.W.M. Dias, *Jurisprudence* 375-393 (5th ed., 1985).

The position of Germany at the start of the nineteenth century deserves special mention, since this was the cradle of the Historical School. Roman law functioned as the common law subject to canon law, imperial enactments and customary law, so far as this was still extant. The Roman law was assumed to have been accepted as a whole, not in fragments, in the form of Justinian's codification as found in the works of the Glossators and Commentators. The practical problems which lawyers had to solve had altered with the ages, but the methods of applying the law differed little from that of the Italian courts in the time of the Glossators. Moreover, the panorama of the law as a whole was confusing, for local variations were innumerable. In these circumstances a proposal was made by Thibaut, of Heidelberg, in 1814 for a code on the lines of the Code Napoleon [For review of the events of 1814 leading to Savigny's publication, see Stammeler 'Fundamental Tendencies in Modern Jurisprudence' (1923) 21 Mich L.R. 623]. This was immediately answered by von Savigny (1779-1861) in an essay entitled *On the Vocation of our Age for Legislation and Jurisprudence* [Savigny *Vom Bneruf unseer Zet fur Gesetzgebung und Rechtsuivenschaft*, hereafter referred to as '*On the Vocation*'], with which, in the words of Ihering, a new jurisprudence was born. So powerful was his influence that the move towards codification was effectively halted and it was not until 1900, after many years of sustained agitation, that Germany ultimately acquired her code, the *Bürgerliches Gesetzbuch*.

Although Thibaut's proposals were the immediate stimulus for the rise of the Historical School, other factors had combined to prepare the way. The first of these has already been mentioned, namely, the reaction against the unhistorical assumptions of the natural law theorists. As these were exposed as hollow and false, so the need was felt for a realistic investigation into historical truths. Secondly, the attempt to found legal systems based on reason without reference to past or existing circumstances had proved to be revolutionary, culminating in the French Revolution, with all its brutalities. A reaction set in against the rationalism that promoted such barbarity. This was a factor which weighed heavily with Savigny, a conservative nobleman, who acquired a deep and lasting hatred for the revolution. Thirdly, the French conquests under Napoleon aroused the nationalism of Europe. Fourthly, the French had spread the idea of codified law, and the reaction against anything French carried with it hostility to codification. Finally, the influence of certain early pioneers in the new way of thinking should not be ignored. Montesquieu had maintained that law was shaped by social, geographical and historical considerations; Burke in England had voiced the same sentiment by pointing to the importance of tradition as a guide to social change. These factors, boosted by the genius of Savigny, started European thought along a new road.

Savigny was born in Frankfurt in 1779, and was nurtured in the natural law discipline. His interest in historical studies was kindled at the universities, first of Marburg and then of Göttingen, and was greatly encouraged when he became acquainted with Niebuhr at the University of Berlin. He also acquired a lasting veneration for Roman law. In 1803 appeared his first major work, *Das Recht des Bestizes (The Law of Possession)*. He traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. Savigny next set himself the task of laying the foundation for future historical labours by producing a basic history of the development of Roman law in medieval Europe. It was his thesis that Roman law had been received into Germany so long ago that her legal soul had become a mixture of Roman and local laws. In this great work, *The History of Roman Law in the Middle Ages*, which appeared in six volumes between 1815 and 1831, he analysed the Roman element to its roots, and in his other great work, *The System of Modern Roman Law*, he analysed Roman and local laws. These two together form an imperishable monument to his learning and industry. He was also supremely conscious of his mission, which was *not* opposed to reform; it was to preach the warning that reforms, which went against the stream of a nation's continuity, were doomed [Savigny was Prussian Minister of Legislation]. He emphasised that the muddled and outmoded nature of a legal system was usually due to a failure to comprehend its history and evolution. The essential pre-requisite to the reform of German law was, for him, a deep knowledge of its history. Historical research was therefore the indispensable means to the understanding and reform of the present, and he said, somewhat belatedly it is true, but nonetheless clearly:

The existing matter will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it a vivid creative energy – obtain the mastery over it by a thorough grounding in history and thus appropriate to ourselves the whole intellectual wealth of preceding generations [Savigny Introduction to *The System of Modern Roman Law*].

His warning, then, was that legislators should look before they leap into reform, but he spoilt this advice by over-generalisation. The core of Savigny's thesis is to be found in his essay *On the Vocation*. The nature of any particular system of law, he said, was a reflection of the spirit of the people, who evolved it. This was later characterised as the *Volksgeist* by Puchta, Savigny's most devoted disciple. All law, according to him, is the manifestation of this common consciousness. He wrote,

Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality [Puchta, *Outlines of the Science of Jurisprudence* (trans. Hastie)].

A nation, to him, meant only a community of people linked together by historical, geographical and cultural ties. The boundaries of some nations may be clearly defined, but not of other nations, and this is reflected in the unity or variety of their respective laws. Even where the unity of a people is clear, there may lie within it 'inner circles' of variations, such as cities and guilds. He then went on to elaborate the theory of the *Volksgeist* by contending that it is the broad principles of the system that are to be found in the spirit of the people and which become manifest in customary rules. From this premise it followed that law is a matter of unconscious growth. Any law-making should therefore follow the course of historical development. Custom not only precedes legislation, but is superior to it, and legislation should always conform to the popular consciousness. Law is thus not of universal application; it varies with peoples and ages. The *Volksgeist* cannot be criticised for being what it is. It is the standard by which laws, which are the conscious product of the will as distinct from popular conviction, are to be judged. An individual jurist may misapprehend the popular conviction, but that is another matter. In place of the moral authority, which the natural lawyers of the preceding age had sought to posit behind law, the Historical School substituted social pressure, which provided the bridge between the work of the Historical School and that of the Sociological School.

This view of the nature of law dovetailed with Savigny's historical method of work, for if law is a reflection of people's spirit, then it can only be understood by tracing their history. It is clear, all the same, that in his revolt against the lack of historical sense, which characterised natural law theory, he swung the pendulum of legal thought too much the other way. To point out Savigny's exaggerations, however, is not to detract from the importance of his contribution.

On the idea of *Volksgeist* several comments should be made.

(1) There is an element of truth in it, for there is a stream of continuity and tradition; the difficulty lies in fixing it with precision. Savigny, however, made too much of it. As with most pioneers, he drew too sweeping an inference from modest premises. The idea of the *Volksgeist* certainly suited the mood of the German peoples. It was a time of the growing sense of nationhood, a desire for unification, an interest in the dramatic marking the appearance of the Romantic movement. German thinking, also, seems prone to personify the abstract, and to attribute a mystical coherence to ideals. Gierke's personification of corporate existence, was an example: Savigny's *Volksgeist* is another. The idea of a *Volksgeist* is acceptable in a limited way. Thus, the psychological associations built up around the law-making institutions in a particular state could be regarded as a manifestation of the *Geist* of that community. Savigny, however, extrapolated his *Volksgeist* into a sweeping universal. He treated it as a discoverable thing; but it is common experience that even in a small group (*a fortiori* in a nation) people hold different views on different issues. 'The' spirit does not exist. So Savigny's thesis is probably best treated as the juristic contribution to Romanticism. In this it would appear that his historical sense deserted him, for it amounts, in effect, to the adoption of an *a priori* preconception. It will be remembered that in dealing with possession he did much the same thing,

namely, to draw an inference from limited data, and then to use it as an *a priori* talisman.

(2) The transplanting of Roman law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of a *Volksgeist*. It postulates, if anything, some quality in law other than popular consciousness. His endeavour to establish that the reception of Roman law had taken place so long ago as to make the Germanic *Volksgeist* an expression of it was unconvincing. Apart from this, a survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the French Code in Egypt without any apparent violence to popular susceptibilities. The French Code was also introduced into Holland during the Napoleonic era, displacing the Roman-Dutch common law, and it is significant that after the overthrow of Napoleon the Dutch never went back. They had, however, taken Roman-Dutch law to their colonies in the Cape of Good Hope and Ceylon (now Sri Lanka) with the odd result that it flourishes today in two such dissimilar national climates as southern Africa and Sri Lanka, although it has long since disappeared in its homeland. The reception of English law in so many parts of the world is also evidence of supra-national adaptability and resilience. Indeed, the protest in South Africa today is that far too much English law has been allowed to overlay the 'national' Roman-Dutch law.

(3) The *Volksgeist* theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. Every man is a product of his time, but occasionally there are men who by their genius are able to give legal development new directions. The Classical jurists of Rome, Littleton, Coke, may be cited as examples. This is especially the case in modern times when new doctrines are deliberately introduced by a handful of policy-makers. Ehrlich pointed out that customs are norms of conduct, juristic laws are norms for decision. They are always the creation of jurists.

(4) The last two points lead to the further objection that the influence of the *Volksgeist* is at most only a limited one. The national character of law seems to manifest itself more strongly in some branches than in others, for example, in family law rather than in commercial or criminal law. Thus, the general reception of Roman law in Europe did not include Roman family law. Even more significant is the fact that the successful introduction of alien systems into India and Turkey affected the indigenous family laws least of all. The inference appears to be that very few branches of law, perhaps only family law and succession to some extent, are really 'personal' to a nation. A further distinction may have to be drawn between the creative influence of the *Volksgeist* and its adaptative and abrogative influence. It is undoubtedly the case that doctrines have been, and are constantly being, introduced by individuals. The most that indigenous tradition can do is to bring about practical modifications of these gradually and by degrees. Turkey provides an example, where new marriage laws, which were contrary to the existing traditional laws, were introduced as a matter of deliberate policy. The result from a juristic point of view was a fascinating process of action and reaction between the old and the new law. It might be thought that this bears out Savigny's contention that legislation should conform to existing traditional law, or it is doomed. In a sense so it does, but an example such as this also reveals something else. It shows that in modern times the function of the *Volksgeist* is that of modifying and adapting rather than creating, and that, in any case, even this function manifests itself only in the very 'personal' branches of the law. There is less evidence today of its creative force and none of its influence over the whole body of the law. If one thinks in the time-frame of the moment, the *Volksgeist* is of little or no relevance, for many existing laws have come from 'outside'. Savigny's theory only makes sense to a limited extent in a continuum. Even so, the *Volksgeist* is discernible only in retrospect, but he sought to make it a test of validity, i.e. to use it in the present time frame where it is irrelevant. This confusion in his frames of reference left his theory open to attack.

(5) Law is sometimes used deliberately to change existing ideas; and it may also be used to further inter-state co-operation in many spheres. Even in Germany one may instance Bismarck's shrewd and successful attempt to cut the ground from under the feet of the socialist movement by introducing the Railway and Factories Accident Law 1871, well before social conditions were ripe.

(6) Many institutions have originated, not in a *Volksgeist*, but in the convenience of a ruling

oligarchy, e.g. slavery.

(7) Many customs owe their origin to the force of imitation rather than to any innate conviction of their righteousness.

(8) Some rules of customary law may not reflect the spirit of the whole population, e.g. local customs. Savigny, it will be remembered, did allow for these by recognising the existence of ‘inner circles’ within a society. The question remains: if law is the product of a *Volksgeist*, how is it that only some people and not all have evolved a special rule? On the other hand, some customs, e.g. the Law Merchant, were cosmopolitan in origin: they were not the creatures of any particular *nation* or *race*. In short, it is not at all clear who the *Volk* are whose *Geist* determines the law.

(9) Important rules of law sometimes develop as the result of conscious and violent struggle between conflicting interests within the nation, and not as a result of imperceptible growth, e.g. the law relating to trade unions and industry. Evolution does not follow an inexorably determined path.

(10) A different objection to the *Volksgeist* came from Savigny’s opponents. They pointed out that, taken literally, his thesis would thwart the unification of Germany permanently by emphasising the individuality of each separate state and by fostering a parochial sense of nationalism.

(11) An inconsistency in Savigny’s work was that, while he was the protagonist of the *Volksgeist* doctrine, he worked at the same time for the acceptance of a purified Roman law as the law of Germany. There was in Germany in his day a vigorous school of jurists who strongly advocated the resuscitation of ancient Germanic laws and customs as the foundation of a modernised German system. The leader of this school, Eichorn, was a fellow professor with Savigny at the University of Berlin. Savigny never opposed the work of Eichorn, but he opposed the expulsion of Roman law. The obvious objection to Savigny is that his endeavour to preserve Roman law as the law of Germany was inconsistent with his idea of the *Volksgeist* of the German nation. One explanation lies in his personal devotion to Roman law. Another is that in his earliest work on possession he had been able to expose the misinterpretations of Roman law by later commentators, and this possibly implanted in his mind the idea that the Romans were better craftsmen than incompetent moderns. Even so the point apparently overlooked by Savigny was that, whatever may have been the case with possession, in other branches of the law these post-Roman interpretations were ‘adaptations,’ rather than ‘perversions,’ to meet contemporary needs. It might even be argued that the so-called ‘misinterpretations’ were indeed expressions of the *Volksgeist* of each different country. Another and better reason for the preservation of Roman law might have been that, in view of its long established reception, to dispense with it would have unsettled three centuries of development. In order to account for the original reception of an alien system Savigny argued that at that date the Germanic law was incapable of expressing the *Volksgeist*. This questionable proposition fails to show how an alien system was better able to express it than the indigenous law. Far from the law being a reflection of the *Volksgeist*, it would seem that the *Volksgeist* had been shaped by the law.

Such are the objections to Savigny’s idea of the *Volksgeist*. Other aspects of his work also need mention. His veneration for Roman law led him to advance certain dubious propositions. For instance, there was in Roman law a strict adherence to the doctrine of privity of contract with few exceptions, i.e. no one other than parties to a contract can be entitled or obliged under it. The law of negotiable instruments, of course, is a contradiction of this. Savigny accordingly condemned negotiable instruments as ‘logically impossible.’ This reveals one of the more unfortunate results of devotion to a postulate as well as the limitations of the *Volksgeist* idea. It could hardly be supposed that the populace had any feeling in the matter one way or the other, while the feelings of the commercially minded were strongly in favour of negotiable instruments. Indeed, the crucial weakness of Savigny’s approach was that he venerated past institutions without regard to their suitability to the present.

The *Volksgeist*, according to Savigny, only formulates the rudimentary principles of a legal system. He

saw clearly enough that it could not provide all the detail that is necessary. He accordingly maintained that as society, and consequently law, becomes more complex, a special body of persons is called into being whose business is to give technical, detailed expression to the *Volksgeist* in the various matters with which the law has to deal. These are the lawyers, whose task is to reflect accurately the prevailing *Geist*. This is nothing but a fictitious assumption, in no way related to reality, to cover up an obvious weakness in his principal contention. As Sir Carleton Allen said, it is not possible to pretend that the rule in *Shelley's* case, for instance, is rooted in the instincts of the British. Savigny's thesis, however, contained another and even more awkward implication. The only persons who talked of the *Volksgeist* were academic jurists, unversed in the practical problems of legal administration. Therefore, the *Volksgeist* resolved itself into what these theorists imagined it to be. On the other hand, it is possible that there is a limited sense in which Savigny's contention is acceptable. It has already been pointed out that the *Volksgeist* manifests itself, if at all, only in a few branches of the law and, even in these, by way of modifying and adapting any innovations that may be introduced. So, Savigny's proposition might be taken to mean simply that in these spheres of the law it would be helpful if legislators took account of tradition when framing new laws.

Consistently with this theory, Savigny further maintained that legislation was subordinate to custom. It should at all times conform to the *Volksgeist*. It has been pointed out that he did not oppose legislation or reform by way of codification at some appropriate time in the future, but his attitude was generally one of pessimism. He certainly opposed the project of immediate codification on several grounds. In the first place, he pointed to the defects of contemporary codes which, to his mind, preserved adventitious, subsidiary and often unsuitable rules of Roman law, even while they rejected its main principles. Secondly, in matters on which there is no *Volksgeist*, a code, in his opinion, might introduce new and unadaptable provisions and so add to the prevailing difficulties. Such an argument would appear to have been disposed of by the subsequent experience of many countries. Thirdly, he argued that codification could never cater exhaustively for all problems that are likely to arise in the future and hence was not a suitable instrument for the development of law. Fourthly, he suggested that an imperfect code would create the worst possible difficulties by perpetuating the follies underlying it. On the other hand, when lawyers were in a position to create a perfect code, no code would then be necessary since the lawyers could adequately cope with the problems that arise. Fifthly, he argued, even more oddly, that codification would highlight the loopholes and weaknesses of the law and so encourage evasion. The short answer to the last two contentions is that they leave out of account the possibility of amendment and alteration. Codification, in Savigny's view, should be preceded by 'an organic, progressive, scientific study of the laws,' by which he meant of course historical study. Reform should await the results of the historians' work. It is true that reformers should not plunge into legislation without paying some heed to the past as well as to the present. Savigny was over-cautious in this respect, for as Allen observed, his doctrines had the unfortunate tendency 'to hang traditions like fetters upon the hands of reformative enterprises.' So little in fact did the historians contribute in the years that followed that drastic legislative action became imperative; which it did in 1900.

Savigny's work, on the whole, was a salutary corrective to the methods of the natural lawyers. He did grasp a valuable truth about the nature of law, but ruined it by overemphasis.

Another writer of whom some mention should be made is Gierke (1841-1921) [*Natural Law and the Theory of Society 1500-1800* (trans. Barker) and Barker's introduction], who was profoundly interested in the 'associations,' which has always exercised a peculiar fascination for German thinkers. Associations have significance in law, and are sometimes treated as persons. Gierke denied that the recognition of an association as a person depended on the state. The reality of social control lies in the way in which autonomous groups within society organise themselves. He then proceeded to trace the progress of social and legal development in the form of a history of the law and practice of associations and propounded a classification of associations on the following lines: firstly, he contrasted groups organised on a territorial basis, such as the state, with those organised on a family or extraterritorial basis; then he contrasted associations founded on the idea of fraternal collaboration (*Genossenschaften*) with those founded on the idea of domination (*Herrschaften*). In his view legal and social history is most accurately portrayed as a

perpetual struggle between the *Genossenschaft* and the *Herrschaft*. Thus, in feudal society men were organised in tight hierarchical groups based on the holding of property; this system was opposed in the Middle Ages by the emergence of collaborative groups such as the guild and the city. These degenerated in turn, and with the Renaissance and Reformation the state appeared as the significant factor in social organisation. In his own day Gierke felt that the collaborative principle had prevailed and that the state encouraged the growth of independent collaborative organisations within its own framework. The pivot of social control, then, lay not in state organisation but rather in these collective bodies within the state.

Gierke represented a collectivist, rather than an individualist, approach. To this extent his work touched on that of the sociologists, but his interpretation of this development on historical lines entitles him to be ranked among the historians. His doctrines of mass psychology, though largely fanciful, anticipated modern inquiries. He also never quite succeeded in reconciling the independence of autonomous bodies with the supreme power of the state. He devised a pyramidal structure, which made society consist of a hierarchy of corporate bodies culminating in the state. He wished at the same time to defend the independent existence of the lesser corporate bodies and to limit absolute state power by arguing that the state was the expression of reason and the sense of right. This, of course, was easily brushed aside by those who wished to use Gierke's doctrines as a justification for absolute totalitarian power.

Anthropological Approach

Anthropological investigations into the nature of primitive and undeveloped systems of law are of modern origin and might be regarded as a product of the Historical School. Pride of place will here be accorded to Sir Henry Maine (1822-1888), who was the first and still remains the greatest representative of the historical movement in England. It is not easy to place Maine's contributions to the theory of law. He began his work with a mass of material already published on the history and development of Roman law by the German Historical School, and he was able to build upon that and also to bring to bear a more balanced view of history than is found in Savigny. Maine, however, went further. He was learned in English, Roman and Hindu laws and also had knowledge of Celtic systems. In this respect he parted company with the German historians. Instead of stressing the uniqueness of national institutions, he brought to bear a scientific urge to unify, classify and generalise the evolution of different legal orders. Thus he inaugurated both the comparative and anthropological approaches to the study of law, and history in particular, which was destined to bear abundant fruit in the years to come.

Maine set out to discover whether a pattern of legal development could be extracted from a comparative examination of different systems, especially between Roman law and the common law. What he sought were laws of historical development. He was led to distinguish between what he called 'static' and 'progressive' societies. The early development of both types is roughly the same and falls, in his thesis, into four stages. The first stage is that of law-making by personal command, believed to be of divine inspiration, e.g. Themistes of ancient Greece, and the dooms of the Anglo-Saxon kings. The second stage occurs when those commands crystallise into customs. In the third stage the ruler is superseded by a minority who obtain control over the law, e.g. the pontiffs in ancient Rome. The fourth stage is the revolt of the majority against this oligarchic monopoly, and the publication of the law in the form of a code, e.g. the XII Tables in Rome.

Static societies, according to Maine, do not progress beyond this point. The characteristic feature of 'progressive' societies is that they proceed to develop the law by three methods - fiction, equity and legislation. Ample examples of the use of fiction are to be found in Roman and early English law. The operation of equity and legislation has been considered in the earlier chapters of this book.

As a general inference Maine believed that no human institution was permanent, and that change was not necessarily for the better. Unlike Savigny, he favoured legislation and codification. He recognised that the advance of civilisation demanded an increasing use of legislation, and he often contended that the confused state of English law was due to its preeminently judge-made character. Codification is an advanced form of legislative development and represents the stage at which all the preceding phases of

development are woven into a coherent whole. He also did not share Savigny's mystique of the *Volkgeist*.

Side by side with these doctrines Maine developed another thesis. In early societies, both 'static' and 'progressive', the legal condition of the individual is determined by status, i.e. his claims, duties, liberties etc. are determined by law. The march of 'progressive' societies witnesses the disintegration of status and the determination of the legal condition of the individual by free negotiation on his part. This was expressed in one of Maine's most famous generalisations:

The movement of progressive societies has hitherto been a movement from *Status to Contract*.

An evaluation of Maine's work must take into account the pioneer character of his comparative investigations. Since his day the study of anthropology has developed into a separate branch of learning. Modern research over a wider field and with better equipment has corrected Maine's work at many points, and departed from it at others. One should be charitable about his errors and marvel at his genius in accomplishing so much. Some comment should, however, be made about the development from status to contract. There was much to support it. In Roman law there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage, and the acquisition of a limited contractual capacity by children and slaves. In English law the bonds of serfdom were relaxed and eventually abolished. Employment came to be based on a contractual basis between master and servant. Maine's own age was one in which legislation was removing the disabilities of Catholics, Jews, Dissenters and married women. He witnessed the triumph in the American Civil War of the North, a community based on contract, over the feudal and status-regulated South. In the modern age, however, a return to status has been detected. In public affairs, and in industry in particular, the individual is no longer able to negotiate his own terms. This is the age of the standardised contract, and of collective bargaining. Such developments, however, should not be held against Maine. He was not purporting to prophesy and, indeed, he expressly qualified his proposition by saying that the development had 'hitherto' been a movement towards contract.

Modern anthropologists have had the advantage of following the trails blazed by Maine and by others after him with the added advantage of being able to profit from the researches of fellow-workers in many directions. It is not surprising, therefore, to find that Maine's conclusions about primitive law have now been discredited or modified. The idea that early development passed through the successive stages of personal judgments, oligarchic monopoly and code has been abandoned as drawing too simple a picture. Primitive societies are seen to have been more complex than had been supposed. There have been several forms of such societies, so there is an initial problem of determining what sorts of societies should be classified as 'primitive'. It is now thought that there were seven grades of them, the First and Second Hunters, the First, Second and Third Agricultural Grades, and the First and Second Pastoral Grades. The agricultural and pastoral grades are to some extent parallel. The degree of development of social institutions does bear some correspondence with the degree of economic development. From all this it will be gathered that primitive societies exhibit a wide range of institutions; there is nothing like a single pattern as Maine had supposed.

There has also been modification of the sequence, as stated by Maine, of later development, namely by means of fiction, equity and legislation. Deliberate legislation is now seen to have been an early method of law-making with fiction and equity coming in at a later stage. The codes, which one finds at the culmination of the primitive period, were chiefly collections of earlier legislation.

Primitive law was by no means as rigid as Maine had supposed, nor were people inflexibly bound by it. Field-work among 'contemporary primitives' has revealed that considerable latitude is inherent in the content of their customary practices. For instance, Malinowski's first-hand experience of life among certain Pacific islanders enabled him to demonstrate how, eg their practices made allowance for good and bad harvests, or take due account of an excess of generosity on the part of individuals. Observations by Gluckman of the Barotse in Northern Rhodesia have shown that the very indeterminate character of their

standards permits a desirable flexibility in application. Rigidity develops at a much later period. Above all, it is generally agreed that even in primitive societies people do control their destinies, that they are by no means blindly subservient to custom. The conscious purpose of achieving some and precedes the adaptation of human behaviour, and the adaptation of behaviour is followed by adaptation of the structure of social organisation.

It used to be accepted that law and religion were indistinguishable in primitive societies. This view has given way to an increased recognition of the secular character of primitive law. The exact extent to which law and religion were associated, seems, however, to be in some doubt. Diamond, for example, criticises Maine most strongly for his assertion that they were indistinguishable; the association of the two, in his view, is a comparatively late development. Hoebel, on the other hand, defends Maine on this point. Hocart believed that the dualism between religion and the secular authority (the state) originated in a division of function of between a 'sky-king', who was the supreme regulator and as such responsible for law, and an 'earth-king', who was charged with the task of dealing with evil and wrongdoing; the former was reflective and unimpassioned, the latter quick in decision and violent in action. The role of the 'sky-king' would seem to have combined religion and law. further, if Hocart is right there seems to be implicit in this the distinction between the primitive, prescriptive patterns of conduct and the secondary machinery of sanction; which leads on to the next point.

It is likewise agreed among anthropologists that there is, at any rate as far as contemporary primitive societies are concerned, a phenomenon that can be isolated from religious and other social observances and for which the term 'law' would be convenient. Bohannan has suggested that law comes into being when customary reciprocal obligations become further institutionalised in a way that society continues to function on the basis of rules. These concern mainly the relations of individuals *inter se* and groups, i.e. primary patterns of conduct importing an 'ought'. Gluckman has shown that among the Barotse the laws consist mainly of positive injunctions, 'you ought', rather than negative, 'you ought not'. These 'oughts' of primitive law are distinguishable from others by the nature of the obligation to obey them. It was a cardinal point of Malinowski's thesis, supported by Hogbin, that obedience to customs rests on the reciprocity of services. People do unto others what the law bids them do because they depend on some service in return as part of their mutual co-existence. It is spontaneous and incessant goodwill that promotes and preserves social existence. It is possible that Malinowski underestimated the part played by sanction. It might also be that the ceremonial with which these services are usually rendered underlines their obligatory character, but this is of minor significance. Moreover, it is obedience, not disobedience, that is contemplated by law, the primary rule, not sanction. Yet some mechanism there has to be for dealing with cases of conflict and breach. As long as obedience prevails there is no call for this machinery. Examples of its working are also of interest. For instance, the records kept by Gluckman of the judicial processes among the Barotse show that the main task is reconciliation rather than the ordering of sanctions, which implies that even at the secondary stage an attempt is made to ensure conformity with the primary pattern of conduct. Sanctions apply only when reconciliation has failed or is not possible. One form which these take is to abandon the wrongdoer to the avenger, who has the moral support of the community behind him. In other cases, compensation may be payable to the victim, and it is a matter of dispute whether vengeance preceded compensation or whether they existed side by side. This is why it is difficult to distinguish between civil and criminal wrongdoing in early societies. The question depended on whether the action was thought to affect the society or only individual. In the result, the conclusion which most anthropologists have reached is that what is called 'law' should be described in terms of its function and the attitude of the people towards it rather than in terms of form or enforcement. It would appear to be something compulsory observed and certainly far from what is commanded or backed by sanction.

Lastly, another point, which has emerged from modern investigations, is the disposal of the belief in communism as the primitive form of society. This may be seen in many ways, particularly in the prevalence of jealously protected private ownership of socially productive weapons and institutions, such as spells, incantations and, above all, ritual.

So far not much has been said, save indirectly, of the organisation of government. In this connection the outstanding contribution of Hocart deserves mention, especially as his name is insufficiently known among jurists. On the evidence collected from a large number of widely separated tribes in many parts of the world, Hocart came to the conclusion that the functions of modern government were gradually fitted into the framework of a machinery that was previously fulfilling other functions. In other words, the framework of government was there before there was any governing to be done. Man does not consciously seek government; he seeks life, and with that end in view he does one thing after another, evolving and adapting special procedures and techniques, till he finds himself governed. The means by which primitive societies sought life was ritual. The lives and well-being of individuals depended on the life and well-being of society. Ritual was therefore a social affair and society had to organise itself for it. The structure of ritual was such that different rules were assigned to different individuals and groups. In all this one may detect the origin of caste; the various castes that one finds, the fisher, the farmer, the launderer, the potter, etc., may not have derived from the trades that the people actually pursued, but from the roles they fulfilled in the ritual. There probably was some connection between trade and a role, for no doubt it was usual to assign to a person the role which he was fitted to fulfil whenever this was possible.

It was the organisation, founded on ritual, that was adapted for purposes of government. Since the king could not play every role simultaneously, he assigned to each chieftain a particular role which had a particular objective. The aim of the ritual was the control of nature so as to render it bounteous and abundant. The particular form which the ritual assumed in any given case depended on the aspect of nature which was to be controlled, whether sunshine or rain or harvest or game etc. To the group that was identified with some aspect of nature was entrusted the ritual concerning it. It follows from this, first, that only the group that exclusively owned a particular ritual was competent to perform it; secondly, every ritual had its leader; thirdly, the performers did not merely imitate nature as it happened to be at the moment, but as they wanted it to behave, e.g. to shed rain at a time of drought - an 'ought' not an 'is'; fourthly, in order to control nature the performers had to become one with nature and identify themselves with it; and fifthly, such equivalence was accompanied by the 'words,' which thus acquired special significance.

There was always a tendency for rituals to coalesce in one person or group of persons. The greatest cumulator was the king, and this process of cumulation is centralisation. Even after the king had begun to fulfil several roles, his chiefs had to stand ready to lend their assistance if called on to do so. In the role of the sun the king became the supreme regulator of the world, and this regulative function assumed greater and greater importance and eventually became the mark of the king. The aim of the ritual, as has been remarked, was to make nature bounteous. It followed that nature should itself be amply provided before a generous return could be expected of it. The king being identified with nature, the prosperity of the people could only be achieved by making the king prosperous. Revenue and tribute were the means of making him so.

In these and various other ways Hocart discerned the outlines of government, the organs of which were fitted into the existing framework of ritual. It is not possible in this short space to pursue his demonstration further, nor to consider his parallel investigations into the meaning of ceremonial statements, doctrines and courtesies relating to monarchy even today. One thing which his analysis has endorsed is the prescriptive nature and function of primitive law.

SOCIOLOGICAL SCHOOL

ROSCOE POUND*

Nowhere has the study of laws in society been taken up with such industry and enthusiasm as in America. Here, the law school and the jurist enjoy a status akin to that of jurists on the Continent and superior to that of their counterparts in Great Britain. These factors have combined to produce an American movement in sociological jurisprudence of great importance which draws its exponents both from the faculty and the bench. Outstanding among these was Pound (1870-1964), of the Harvard Law School. As with Bentham, his theme was a constant one, maintained in his extensive writings throughout a long period.

Sociological jurisprudence, according to Pound, should ensure that the making, interpretation and application of laws take account of social facts. Towards achieving this end there should be (a) a factual study of the social effects of legal administration, (b) social investigations as preliminaries to legislation, (c) a constant study of the means for making laws more effective, which involves, (d) the study, both psychological and philosophical, of the judicial method, (e) a sociological study of legal history, (f) allowance for the possibility of a just and reasonable solution of individual cases, (g) a ministry of justice in English-speaking countries, and (h) the achievement of the purposes of the various laws. This comprehensive programme covers, as is evident, every aspect of the social study of laws. It is not possible to follow Pound's elaboration of each of these aspects, and all that can be done here is to outline his thought.

The common law, he said, still bears the impress of individual rights. So, in order to achieve the purposes of the legal order there has to be (a) a recognition of certain interests, individual, public and social, (b) a definition of the limits within which such interests will be legally recognised and given effect to, and (c) the securing of those interests within the limits as defined. When determining the scope and subject-matter of the system the following five things require to be done: (i) preparation of an inventory of interests, classifying them; (ii) selection of the interests which should be legally recognised; (iii) demarcation of the limits of securing the interests so selected; (iv) consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited; and (v) evolution of the principles of valuation of the interests.

Pound likened the task of the lawyer to engineering an analogy which he used repeatedly. The aim of social engineering is to build as efficient a structure of society as possible, which requires satisfaction of the maximum of wants with the minimum of friction and waste. It involves the balancing of competing interests. For this purpose, interests were defined as 'claims or wants or desires (or, I would like to say, expressions) which men assert *de facto*, about which the law must do something if organised societies are to endure. It is the task of the jurist to assist the courts by classifying and expatiating on the interests protected by law. Pound's arrangement of these, elaborated in detail, was as follows:

- A. **Individual Interests:** These are claims or demands or desires involved in and looked at from the standpoint of individual life. They concern: -
- (1) **Personality.** This includes interests in (a) the physical person, (b) freedom of will, (c) honour and reputation, (d) privacy, and (e) belief and opinion.
 - (2) **Domestic relations.** It is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of (a) parents, (b) children, (c) husbands, and (d) wives.
 - (3) **Interest of substance.** This includes interests of (a) property, (b) freedom of industry and contract, (c) promised advantages, (d) advantageous relations with others, (e) freedom of

* R.W.M. Dias, *Jurisprudence*, 431-35 (1985).

association, and (f) continuity of employment.

B. Public Interests: These are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life.

‘The claims asserted in title of a politically organised society; as one might say for convenience, the claims of the state, the political organization of society.’

There are two of them:

(1) ***Interests of the state as a juristic person.*** These, as pointed out earlier, are not applicable in this country where the position of the Crown has obviated the need for the personification of the state. They include (a) the integrity, freedom of action and honour of the state’s personality, and (b) claims of the politically organised society as a corporation to property acquired and held for corporate purposes.

(2) ***Interests of the state as guardian of social interests.*** This seems to overlap with the next major category.

C. Social Interests. These are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalised as claims of the social group. This is much the most important category, since most, if not all, the interests in category A would be statable here from a social, rather than an individual, point of view. Social interests are said to include:

1. Social Interest in General Security

‘The claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence.’

This embraces those branches of the law which relate to (a) general safety, (b) general health, (c) peace and order, (d) security of acquisitions, and (e) security of transactions.

2. Social Interest in the security of social institutions

‘The claim or want or demand involved in life in civilised society that its fundamental institutions be secure from those forms of action and courses of conduct which threaten their existence or impair their efficient functioning.’

This comprises (a) domestic institutions, (b) religious institutions, (c) political institutions, and (d) economic institutions. Divorce legislation might be adduced as an example of the conflict between the social interest in the security of the institution of marriage and the individual interests of the unhappy spouses. Pound pointed out that the law has at times attached disabilities to the children of illegitimate and adulterous unions with the object of preserving the sanctity of marriage. The example is not altogether fortunate, since the extent to which such vicarious suffering has deterred would-be offenders is minimal. Then again, there is tension between the individual interest in religious freedom and the social interest, at any rate in some countries, in preserving the dominance of an established church.

3. Social interest in general morals

‘The claim or want or demand involved in social life in civilised society to be secured against acts or courses of conduct offensive to the moral sentiments of the general body of individuals therein for the time being.’

This conveys a variety of laws, for example, those dealing with prostitution, drunkenness and gambling.

4. *Social interest in the conservation of social resources*

‘The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter may be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.’

Thus, this social interest clashes to some extent with the individual interest in dealing with one’s own property as one pleases. It covers (a) conservation of natural resources, and (b) protection and training of dependants and defectives, i.e. conservation of human resources.

5. *Social interest in general progress*

‘The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.’

This has three aspects, (a) Economic progress, which covers (i) freedom of use and sale of property, (ii) free trade, (iii) free industry, and (iv) encouragement of invention by the grant of patents. Now, (i) and (ii) are less marked today than they used to be. Indeed, it might even be said that progress has been achieved by a reversal of them. The policy of free trade, which has as its corollary the disapproval of monopolies, might appear to have been indorsed by legislation against restrictive practices. While this is true of private monopolies, it should be noted that there is an ever-growing demand for monopolies in the state or state-controlled institutions. The encouragement of invention by the grant of patents, too, is somewhat suspect, for it opens the possibility of acquiring patents in order to suppress inventions. On the whole, therefore, item (a) is the least happy.

The interest in general progress also includes (b) political progress, which covers (i) free speech, and (ii) free associations; and (c) cultural progress, which covers (i) free science, (ii) free letters, (iii) free arts, (iv) promotion of education and learning, and (v) aesthetics.

6. *Social interest in individual life.*

‘The claim or want or demand involved in social life in civilised society that each individual be able to live a human life therein according to the standards of society.’

It involves (a) self-assertion, (b) opportunity, and (c) conditions of life.

Having listed the interests recognised by law, Pound considered the means by which they are secured. These consist of the device of legal person and the attribution of claims, duties, liberties, powers and immunities. There is also the remedial machinery behind them, which aims sometimes at punishment, sometimes at redress and sometimes at prevention. He also addressed himself to the question of how in any given case the interests involved are to be balanced or weighed. Interests, he insisted, should be weighed ‘on the same plane’, as it were. One cannot balance an individual interest against a social interest, since that very way of stating them may reflect a decision already made. One should transfer the interests involved on to the same ‘plane,’ preferably in most cases to that of the social plane, which is the most general. Thus, freedom of the person might be regarded as an individual interest, but it is translatable as an interest of the society that its members should be free. But, assuming that a choice has been made, the extent to which it can be given effect in any given case depends on the texture of the legal institutions that are involved. Some are more flexible than others and permit freer play for the balancing process. Elsewhere Pound classified the institutions of the law as follows. There are, first, rules, which are precepts attaching definite

consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in cases not covered by rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles and conceptions with regard to particular situations or types of cases in logically independent schemes so that reasoning may proceed on the basis of the scheme and its logical implications. Finally, there are standards prescribing the limits of permissible conduct, which are to be applied according to the circumstances of each case.

Such, then, is the substance of Pound's theory. That his contribution is considerable goes without saying. He more than anyone helped to bring home the vital connection between laws, their administration and the life of society. His work also set the seal on prior demonstrations of the responsible and creative task of lawyers, especially the judges. In so far as his theory laid such heavy emphasis on the existence of varied and competing interests and the need for adjustment between them, it will have enduring value. There are, however, some other respects in which his views are less happy.

In the first place, Pound's engineering analogy is apt to mislead. What, for instance, is the 'waste and friction' in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product, and the stresses and strains to be allowed to each part are worked out with a view to producing the best bridge of that kind in that place. With laws there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing, and the pressures behind interests are changing too. Therefore, the value or importance to be allotted to each interest cannot be predetermined.

Pound assumed that *de facto* claims pre-exist laws, which are required to 'do something' about them. Some claims, however, are consequent on law, e.g. those that have resulted from welfare legislation. Besides, what does 'do something' about them mean? It is not enough to say that law has to select those that are to be recognised. 'Recognition' has many gradations, which makes it necessary to specify in what sense an interest is recognised as such. Thus, the cult of Scientology is not outlawed, but it has been officially condemned, which makes it difficult to say in what sense the law recognises or does not recognise it.

It is not interests as such, but the yardsticks with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself, in which case it is not the interest as an interest, but as an ideal that will determine the relative importance between it and other interests. Thus, whether the proprietary right of a slave-owner is to be upheld or not depends upon whether sanctity of property or sanctity of the person is adopted as the ideal. The choice of an ideal, or even a choice between competing ideals, is a matter of decision, not of balancing; and it is with the choice made by judges and the ideals which they adopt that lawyers are concerned.

The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some 'scale' or 'yardstick' with reference to which they are measured. One does not weigh interests against one another, even 'on the same plane.' Only with reference to some ideals is it possible to say that the upholding of one interest is more consonant with, or more likely to achieve it than another, which means that with reference to that given ideal the one interest is entitled to preference over the other. This leads to another consideration. The 'weight' to be attached to an interest will vary according to the ideal that is used. For example, with reference to the ideal of freedom of the individual all interests pertaining to individual self-assertion will carry more weight and social interests; but with reference to the ideal of the welfare of society the reverse might be true. The point is that the whole idea of balancing is subordinate to the ideal that is in view. The march of society is gauged by changes in its ideals and standards for measuring interests.

In any case, all questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. An interest is not presented to a judge preclassified as part

of an overall scheme, but in relation to one or more other interests in a given situation. Each situation has a pattern of its own, and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are to be measured. Therefore, the listing of interests is not as important as the views which particular judges take of given activities and the criteria by which they evaluate them.

How does one know when interests exist, how are they made articulate? The answer is: when presented in litigation. Lists of interests can be drawn up, not in advance of, but after the various interests have been contended for in successive cases.

The recognition of a new interest is a matter of policy. The mere presence of a list of interests is, therefore, of limited assistance in helping to decide a given dispute. What this and the last paragraph suggest is that interests need only be considered as and when they arise in disputes; the matter that is of importance is the way in which they are viewed and evaluated by the particular judge.

In any case, lists of interests are only the products of personal opinion. Different writers have presented them differently. With reference to Pound's own elaborate scheme, it is to be observed that his distinction between categories B and C, Public and Social interests, is doubtful. Even the distinction between A and C, Individual and Social interests, is of minor significance. As Pound himself says, in most cases it is preferable to transfer individual interests on to the plane of social interests when considering them. On the suggestion previously made, it is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed. None of these remarks is intended to detract from the value of Pound's analysis of the interests themselves. All that is urged is that as a guide to the administration of laws the listing of interests is unhelpful.

It is difficult to see how the balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority. How does one 'balance' such interests? Whichever interest is favoured, the decision will be resented by those espousing the other, a compromise will most likely be resented by both. There is a different problem where a substantial proportion of the populace is parochially minded and have little or no sense of nationhood. The prime task in such countries is the creation of interests and the emphasis is, once more, on the need for ideals. Pound's theory cannot be accepted too generally.

It is worthwhile repeating that the criticism here is not that Pound ignored ideals of guidance, but that he seems to have devoted too little attention to them. His awareness of them is evident, for example, in his own distinction between 'natural law' and 'positive natural law'. The former, according to him, is 'a rationally conceived picture of justice as an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order effective for its ideal end'. The latter is 'a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies of universal problems and so taken to give legal precepts of universal validity. It is submitted with respect that it would have been preferable had he enlarged on the criteria of evaluating interests instead of developing particular interests. It is possible that his work has not had the practical impact that it ought to have had because of this somewhat sterile preoccupation with interests and too little attention to the criteria of evaluation.
