



JURISPRUDENCE AND HINDU RELIGION: A COMPARATIVE STUDY

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Abstract-- Religious origins and traditions in law have been subjects of research in many countries among philosophers, jurists, and historians. This has led to a rich variety of comparative legal literature, illuminating juristic thought and providing some significant insights into the foundations of modern legal systems. Donald Davis Mr.'s *The Spirit of Hindu Law* is a close second to the classics on Ideology in examining the role of Dharma in Hindu legal and religious traditions. He has adopted an inter-disciplinary approach and comparative methodology which is both refreshing and revealing. For Davis, "law is the theology of ordinary life" and the European notion of law, as rules backed by sanctions enforced by the state, is an unnatural idea produced at a certain moment in history to serve certain colonial objectives. Among the merits he identifies in the concept is that it acknowledges and explains the gap between 'rule' and 'behavior' in everyday life and highlights the higher purpose involved whenever law is invoked.

This research paper examines the concept of religious Hindu laws as used in Indian legal discourse. This concept is used to denote religious laws of various communities that are claimed to be upheld but not modified by the secular state and also to refer to the religion related rules followed by communities outside of state regulation. This existence of various 'religious' laws are increasingly being described as legal pluralism. The ambiguous status of religious Hindu laws serves to legitimize the continued denial by the state of gender equality to women in family law matters as it creates a space for rules or laws to operate that do not conform to the Constitutional requirements and yet are enforced by the state. When legal scholars deploy this concept un-reflexively they participate in the discourse formation about religious Hindu laws as exceptional laws or as (progressive) examples of legal pluralism. In this way they assist the state in using the concept as a mode of governance. In this research paper it is argued that the legal scholars need to accept responsibility for the significant power they wield as discourse formers and acknowledge the power of naming legal practices. They are the scholars who can and should deconstruct the concept of religious Hindu laws. This is necessary for a serious engagement with the issue of what kind of family law would be truly non-oppressive.

Keywords: religious Hindu laws, legal pluralism, non-state laws, role of legal scholars in discourse formation, secular state.

INTRODUCTION

The destiny of law is a change- a constant change with the change in society. Hindu Law is undoubtedly one of the most ancient systems of law. The Hindu jurisprudence forms an integral part of the Dharma as propounded in the Vedas, Puranas, Smritis and ancient legal literature works concerning the same. As indicated in the Vedas, Hindu law was originally assigned the true 'Dharma'. What was 'Dharma' was law too and vice-versa.

Hinduism, the religion practiced by Hindus, is itself called the Sanatana Dharma because it is derived from the duties of God which are eternal. Since as human beings we share these duties upon earth, just as Gods and other beings in other worlds, to let the divine order of things to continue and since the knowledge of such duties are enshrined in our religion in the form of the Vedas, Hinduism, which is derived from the Vedas, is known as the Sanatana Dharma or Eternal Duty. Indian jurisprudence is as old as humanity itself; there is no founder of it other than the Creator Himself. Law proper has been a part and parcel of the ancient Sanatan dharma and has been nurtured by it since ages¹. Law and dharma have been often used interchangeably.

¹Dr. N. V. Paranjape, "*Studies in Jurisprudence Legal Theory*", Central Law Agency, Allahabad, Fourth edn. Reprint 2006, Pg. no. 81.



In fact, the true nature of law lies in its integral relationship with religion, though the two are different entities and have different roles to play in society. Despite several centuries of deliberate secularization, the state could not remove elements of religion from the law even in nations that are most secular, liberal, and democratic.

According to Hindu jurisprudence, it is the religion or the dharma that influences the way people live and view themselves. The very act of living is regarded as an obligatory duty and an opportunity to fulfill the aims of creation and participate in God's eternal dharma. Customs hold that religious obligations implied by dharma constitute the primary objective (Purusharthas) of human life since it is the very foundation upon which one develops the wisdom and discretion to pursue wealth (artha) and happiness (kama) without compromising the chances of attaining salvation (moksha)².

This research paper examines how the concept of religious Hindu laws is used in Indian legal discourse to create a space for laws to operate that do not conform to the Constitutional requirements and yet are enforced by the state. Religious Hindu Laws are used as a mode of governance where their ambiguous status serves to legitimize the continued denial by the state of gender equality to women in family law matters, for example in succession rules. The main focus of my argument is the role of legal scholars in the discourse formation regarding religious Hindu laws as the most suitable or the least desirable vehicles of gaining gender justice in the context of family laws in India. It aims to analyze the use of the conceptual tool of legal pluralism by legal scholars in this area and argues for the legal scholars to accept responsibility for the significant power they wield as discourse formers. The argument below relies on Hindu law as the example but it could be extended to all Religious Hindu Laws.³

LITERATURE REVIEW

BOOKS

1. 'Studies in Jurisprudence Legal Theory': The book covers the whole Indian Legal Theory, and how modern Indian Law is distinguished from dharma. This particular book helped a lot during the entire research work.
2. Jurisprudence (Legal Theory): It specifically talks about the Hindu Legal Theory taking law, religion and morals into account. The whole concept of law, religion and morals and their relation has been comprehensively dealt with.
3. 'Fundamentals of Jurisprudence- The Indian Approach': It throws light upon the past and the present scenario of the Indian Legal Theory.
4. 'Jurisprudence in India- Through The Ages': This particular book gives an insight into the Hindu law and dharma in detail and goes on talking about the relevant ancient literature like the Smritis, Arthashastra and Mitakshara. It doesn't deal with intricacies of religion and law as such.
5. 'Legal and Constitutional History of India': It deals with the concept of dharma in detail and also provides valuable information on legal literature.

²Prachi Verma "RELIGION AND LAW IN LIGHT OF HINDU JURISPRUDENCE" 2013-2014

³ Agarwal, Bina. 2008. "Bargaining, Gender Equality and Legal Change: The Case of India's Inheritance Laws." In *Redefining Family Law in India*, edited by Archana Parashar and Amita Dhanda, 306–354. New Delhi: Routledge.



ARTICLES

1. “The Hindu Dharma”: It talks about the dharma as given in the Hindu ideologies.
2. “The Buddhist Conception of Dharma”: It talks about the Buddhist views of the dharma, which got popular as dhamma during those times.

RELIGION AS SOURCE OF LAW

There were times when religion influenced the primitive societies to a large extent. Religion holds the credit of offering a great deal of contribution in the development of legal systems all around the world. According to Sir Henry Maine and Sir James Frazer, the religious fear of evil was the principal instrument in securing uniformity of conduct in primitive society at a time when law did not enjoy an independent existence. Even in India, the holy treatises gave birth to The Hindu and Mohammadan law.

The essence of Dharma is seen to be there in existence in the Vedas. Sadachar aspect of dharma was regarded as law by Manu and other commentators of ancient Hindu scriptures. **According to Hindu scriptures**, Vedas are claimed to be of divine origin, their source being Brahma, the creator of the Universe. The principles and code of conduct professed and propagated by Vedas came to be incorporated in Hindu law at the later stage of development of Hindu Society. In 1850, first enacted law on religion came to be known in India which was the Freedom of Religion Act. According to the Hindu jurisprudence, law was a code of duty which is same as enshrined in the tenets of dharma. Thus, the present legislative enactments of Hindu law are basically exotic in origin. Hindu law is generally accepted, being considered as having a divine origin, that is, it is regarded as something which is in accordance to the will of the God. And therefore, Sruti, Smriti, Vedas, and Upanishads are considered as sources of law in Hindu jurisprudence.

After the Vedas and Smritis, the different Puranas which belong to a later period and were created by different agencies which were not contemporaries. In course of time dharma retained its divine character while law lost it because it is man-made. Law is something which seeks to reconcile the conflicting interests of individuals in the society. Talking of Hindu jurisprudence, dharma as a source of law, reached its climax during the Gupta period, also known as the “The Golden Age” of Hindu period in the Indian history.

Hindu law

This question becomes a relevant question in the context of a worldview that sees religion and law as separate phenomena. It has been asked primarily from the perspective of western scholars and colonial administrators. Therefore it is no surprise that invariably the answers have focused on the religious nature of Hinduism and implicated Hindu law as a kind of an exception to the modern and dominant understanding of law as separate from religion (Menski 2002).

However, it is also commonplace to keep repeating that law and religion have a lot in common as social institutions and religious phenomena (Lubin, Davis and Krishanan 2010, 1).

Yet analyses always proceed to test how far Hinduism offers a concept of law that is understandable to the western scholar. For example, Lubin et al. explain that the concept of



‘dharma’ and law are different but then proceed to show that just like law in the west, Hindu law also knows similar institutions (Ibid, 5).

This is a particular issue for any comparative lawyer who is trying to compare different laws. However, the comparison posits law as what exists in the west; that is, it is secular, separate inter alia from religion, and emanates from the state. Thus the first issue in studying Hindu law is to unravel its dependence on Hinduism. Lubin et al. make a distinction between the concepts ‘Hindu Law’ and ‘Hinduism and Law’ as they say that the former term is applicable to any legal order or legal tradition that has a connection to Dharmashastra as its textual canon.⁴ It is nevertheless the case that the concept of Hindu law is often used to refer to any practices that Hindus follow.⁵ It is this conceptual confusion that further plays out in analyzing the relationship between state and non-state legal systems in the form of state laws and RPLs.

The concept of RPLs

The concept of RPLs is a peculiar legacy of colonialism in many parts of the world. However, the particularities of the concept are formed in specific geographical, political and historical situations. In the Indian subcontinent the British colonists gradually moved from being traders to political rulers and imposed their laws incrementally. While it is possible to say that they left the religious laws of the populations unregulated the actual picture is much more complex. This is a widely discussed topic but for the present purposes I will only briefly narrate the broad contours of the developments because they help explain the connection between religious and customary rules in Hindu law. It is widely accepted now that there was no universal body of rules, scriptural or otherwise, that governed all Hindus and this only complicated the task for the administrators (Randeria 1999).

The colonial administrators in India ruled with a combination of mutual political agreements or treaties and conquest. The developments in provincial and Presidency towns took place differently but initially the British established the courts and provided that these courts could exercise judicial authority. It was the Warren Hastings plan of 1772 that set the stage for the development of the concept of RPLs. It is article 23 of Regulation II of the 1772 plan that ‘saved’ the right of Hindus and Muslims to be governed by their respective religious laws in the matters of inheritance, marriage, caste and other religious usages or institutions (Ilbert 1907). Other regulations, charters and legislation followed and in varying language and detail authorized the courts to use religious laws of Hindus and Muslims in determining disputes about matters that came to be defined as Hindu matters (Parashar 1992, 61–76; Parashar 2008).

It is important to remember that before the British arrived in the sub-continent, the population of Hindus and Muslims considered themselves bound by their respective religious laws. Even though the Muslim rulers had established themselves firmly as the political authority by the thirteenth

⁴ Bannerji, Himani. 2000. “The Paradox of Diversity: The Construction of a Multicultural Canada and “Women of Color”.” *Women’s Studies International Forum* 23 (5): 537–560. They explain that the term ‘Hinduism and Law’ refers to Hinduism’s relationship to legal ideas and institutions etc. as a separate or separable matter from Hindu law (Ibid, 6)

⁵ Bassel, Leah. 2010. “Intersectional politics at the boundaries of the nation state.” *Ethnicities* 10: 155–180. For example Werner Menski uses the concept of Hindu law in this manner. I will discuss this usage later (Menski 2003).



century and Shariat was the law of the land, there is academic opinion that the Hindus were generally left free to be governed by their religious laws except in matters of crime (Pearl 1979, 21; Sarkar 1959). Neither religion made a division between Hindu and other matters for the purposes of identifying the rules that regulated behavior. This idea of Hindu laws was introduced by the colonial administrators and reflected the widespread European distinction between Hindu and territorial laws. Moreover the ecclesiastical laws governed these Hindu matters and thus the British authorities easily made the link between Hindu matters and religious laws.

It is this link that needs to be emphasized when studying the successive regulations in British India that 'saved' the rights of Hindus and Muslims to be governed by their religious laws in 'Hindu' matters. It is easy to overlook the obvious point that before the arrival of the colonial rulers all aspects of laws were religious laws for both communities. It is the peculiarities of governance needs of the British that created a small island of laws that were designated as RPLs. It is also important to reiterate that the exact contours of what constituted Hindu matters (and thus Hindu laws) changed from one regulation to another.

Further the artificiality of the construct of RPLs becomes even more evident when one examines how these rules were ascertained and in how they were applied by the judicial authorities. For example, it is widely accepted that when the religious laws of these communities were mentioned it is not evident whether the administrators meant their scriptural laws, customary usages or both. In the case of Hindu law it is well documented that the colonial rulers had to find ways of determining, what was the substantive content of Hindu law on the areas to be governed by the religious laws (Rocher 2010; Dhagamwar 1989; Agnes 1995). The early British administrators tried to get the Dharmashastras translated with the help of local experts the Hindu pandits. The courts in addition sought the help of Brahmins or pandits to tell them the substantive law in any dispute.

However, the expectations of these administrators to find fixed and invariable rules came undone frequently and over time the courts, in the true tradition of common law judges, started relying on precedents created by them. In addition the courts soon realized that the religious laws of the communities were not necessarily the scriptural rules and started giving effect to the customs of the peoples. The so-called religious rules of Hindus (and Muslims) were thus modified in various ways through their interaction with the British judicial system. As explained above the British trained judges relied on precedents they themselves had helped create. In addition, over time the judges started supplementing the rules with the application of the equity formulae of 'justice, equity and right' and 'justice and right' and thus provided direct channels for introducing English law into the 'religious' laws of Hindus (Derrett 1963). The effort to apply the customs rather than the scriptural laws introduced a certain level of artificiality into Hindu laws, as to be recognized by the courts these customs had to meet the standards set by English law. Once recognized by the courts these customs ended up becoming a part of the state legal system and, as precedents they tended to become fixed and unable to adapt to the changing conditions of society.

These judicial incursions into the religious laws were later supplemented by legislative actions by the British authorities. The legislative authority of the colonial rulers (unlike the judicial authority) was unrestricted (Jois 1984: vol. I, 265, 282).

However, initially they refrained from making laws only on 'Hindu matters' while imposing newly crafted civil and criminal laws in every other area. In this way the construct of Hindu laws as



religious laws retained currency but gradually many areas that were previously considered Hindu and thus under religious laws came to be legislated upon. A few random examples include: The Caste Disabilities Removal Act, 1850, The Hindu Widows Remarriage Act, 1856, Hindu Inheritance (Removal of Disabilities) Act, 1928, The Child Marriage Restraint Act, 1929 and the list can go on. There is considerable debate about the possible explanations for these enactments (for details see Parashar 1992, 66–76) but for the present purposes I only wish to focus on the undeniable fact that towards the end of the colonial period the so-called religious laws of Hindus stood modified in substantial ways through judicial and legislative activities of the colonial administrators.

CONCEPT OF DHARMA

In Hindu legal literature, “Dharma” has been accorded the status of law. Hinduism believes in dharma, which consists of the inherent laws which have been created by the Almighty to govern the spiritual and physical universe. The word dharma has a peculiar meaning and is full of significance. Max Muller writes: “Dharma, in the ordinary Buddhist phraseology, may be correctly rendered by law. Thus the whole teaching of Buddha is called the Good Law, Saddharma.⁶ The term dharma literally implies that ‘which sustains or maintains or upholds’. According to Hindu scriptures, dharma stands for “religious rights, fixed principles of rules of conduct and the whole body of religious duties”.⁷

In the ancient legal system of India, dharma and law meant one and the same thing. This was because law was essentially a constituent of the philosophy of dharma. Jaimini was of the viewpoint that the foundation of dharma lies on the revelation which is conducive to the welfare of the society. Ordinarily, dharma is considered to be the same thing as religion. But still the fact is that religion and law are only two facets of dharma. It is this reason for which it can be said that ‘dharma’ embodies the present concept of law.

In fact the ancient name of Hinduism—Sanatana Dharma (meaning the Eternal Truths), itself underscores the importance of dharma in the practice of Hinduism. Sanatana Dharma is referring to those natural principles and ways of being that are in concert with the Absolute. Being a direct reflection of God's will in this world, such principles are therefore axiomatic, or unalterable, laws of the cosmos. The term Sanatana Dharma is not referring to something that is open to alteration, speculation or human manipulation. Neither is Sanatana Dharma referring merely to some denominational faith or sectarian belief system. The principles of Dharma are transcendent and eternal laws, and thus applicable to all people for all time.⁸

Essentially living life according to dharma implies living life in a manner that is in proper compliance with the laws of the physical and spiritual worlds. Such a life is called a dharmic life. The guidelines for living provided by dharma gives one the opportunity to live a life that is most optimum for one's material, emotional and spiritual wellbeing. The

⁶Raju, P.T., “*The Buddhist Conception of Dharma*”, Annals of the Bhandarkar Oriental Research Institute, Vol. No. XXI, 1939-40, Pg. No. 192.

⁷ Supranote 1 Pg. No. 82.

⁸<http://www.dharmacentral.com/dharmainfo/introductiontodharma.php> [last accessed on: 1/10/2013]



propounders of dharma were unanimous that for the existence of an orderly society, peace and happiness of all, the desires (Kama) for material enjoyment, and pleasures (Artha) should always conform to (Dharma) and never inconsistent with it.⁹ A proper balance between Dharma, Artha and Kama (Trivarga) helps in securing peace, welfare and happiness.

Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society. The Smritis classified such of the rules of dharma which were purely Hindu in nature as 'Achara' (conduct) and those which were to be enforced and observed by the State as civil and criminal law (Vyavahara Dharma) and Constitutional law (Rajadharma), respectively. The entire Indian philosophy about law including Indian polity was based on the principles of dharma, artha (the material wealth required for enjoying life) and kama (the desire to enjoy life) call together as Trivarga, the first controlling the second and the third. The five fundamental rules of dharma for the observance by individuals were: "Ahimsa (non-violence), Satya (truthfulness), Asteya (not coveting the property of others), Shoucham (purity), and Indriyanigraha (control of senses) are, in brief, the common dharma for all the varnas."¹⁰

If values of dharma are inculcated in an individual since childhood, it remains throughout his life and acts as sextuple antigen against sinful thoughts arising in his mind on account of the influence of one or more of the six enemies inherent in everyone namely, Kama (desire), Krodha (anger), Lobha (greed), Moha (passion), Mada (infatuation), and Matsarya (jealousy) and prevents him from committing wrongs. Values of dharma so inculcated also establishes control over the 'Indriyas' (senses) and prevents them from indulging in wrongful activities.

Manusmriti written by the ancient sage Manu, prescribes ten essential rules for the observance of dharma: patience (dhriti), forgiveness (kshama), piety or self control (dama), honesty (asteya), sanctity (shauch), control of senses (indraiya-nigrah), reason (dhi), knowledge or learning (vidya), truthfulness (satya) and absence of anger (krodha). Manu further writes, "Non-violence, truth, non-coveting, purity of body and mind, control of senses are the essence of dharma". Therefore dharmic laws govern not only the individual but all in society.¹¹

The vastness of dharma and its universality and usefulness to the entire humanity has been clearly explained by Justice K. Ramaswamy, speaking for the Supreme Court in *A. S. Narayana Deekshitulu v. State of Andhra Pradesh*¹², at paragraphs 62 to 81. The conclusion at paragraph 81 reads:

Word 'Dharma' denotes, upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of mankind; whatever conduces to the fulfilment of these objects is Dharma. It is Hindu Dharma.

⁹Justice M. Rama Jois, "*Legal and Constitutional History of India*", Universal Law Publishing Co. Pvt. Ltd., New Delhi, First edn., Reprint 2008, Pg. No. 6.

¹⁰ Ibid Pg. No. 7.

¹¹ <http://hinduism.about.com/od/basics/a/dharma.htm> [last accessed on : 24/9/2013]

¹² AIR 1996 SC 1765.



Thus, dharma is a compendious term for all the righteous code of conduct in every sphere of human activity which is meant to ensure peace, harmony and happiness to the entire humanity. Moksha or spiritual freedom is the aim of all human life. It is the destiny of man to reach the summits of spirit and attain immortality. We are the children of God, Amritasya putrah. The eternal dream of the human heart, the aspiration of the soul to come to its own is the basis of the Hindu dharma.¹³

CONCEPT OF LAW

It is evident from the provisions of *Rajadharma* that ensuring the welfare of the people was the quintessence of the *Rajadharma*. But this object could only be achieved by having laws regulating the conduct of the individuals and their enforcement through the officers and servants of the State. As far as laws required were concerned, they were evolved on the basis of the fundamental principles of *Dharma* by the people from time to time and were codified in the form of *Smritis*. The ancient Hindu jurists held law to be the king of kings, far more powerful and rigid than them. Nothing could be mightier than the law, by whose aid, as by that of the highest monarch even the weak may prevail over the strong.

As by and by the idea of enforceability of law evolved through the institution of kingship, ancient Indian jurists went on to define the law. Law was provided the status of a mighty instrument for the purpose of protecting the individual rights and liberties. *Sadachar* aspect of *dharma* was law according to Manu and other commentators of ancient Hindu scriptures. The word *dharma* was synonymous to duty.¹⁴ The injunction of the law was that if the desire for wealth or pleasure were contrary to law, as laid down from time to time, as flowing from the five basic rules of *dharma*, it should be eschewed. Obviously, there can be no better principle than this, for the guidance of individual, for the betterment of the society.

According to Manu, law is an order of human behaviour. This ordering of human relations is absolutely valid and just because it emanated from the will of God, and because it has regulated the behaviour of men, in a way satisfactory to all. The rights and duties of man, established by this law, are innate or inborn in him, because they are implanted by nature and not imposed from outside.¹⁵ To a Hindu jurist, law is nothing but a collection of human practices or customs based upon the principles of morality and natural justice that has been accepted by the general consensus of the society at a particular time. The law of any country is basically the product of positive morality and culture of that country.

IMPORTANCE OF CUSTOM

Customs have been the most potent force in moulding the ancient Hindu law. The variances in the laws given in several *Smritis* are regarded to be the result of the incorporation of

¹³ S. Radhakrishnan, "The Hindu Dharma", International Journal of Ethics, Vol. No. XXXIII, 1922, Pg. No. 2.

¹⁴ Supranote 1, Pg. No. 85.

¹⁵ Dr. B. N. Mani Tripathi, "Jurisprudence (Legal Theory)", Allahabad Law Agency, Faridabad, 18th edn., 2008, Pg. No. 88.



the local customs of the places where they were written. The commentators of *Smritis* exhorted for the recognition of usage. When such matters arose which were beyond the scope of *Smritis*, customs were to supplement the law. And it is the sole reasons why customs formed an important part of the law.

The contention finds support in the Privy Council decision in *Collector of Madura v. Mooto Ramalinga* wherein it was held that under the Hindu system of law, 'the clear proof of usage will outweigh the written text of the law.'¹⁶

Customs have been handed down to Hindus from the most ancient ages and they have quite evidently, not been allowed to pass into forgetfulness. It is due to the fact that man possesses a conservative nature and each member of the community looks upon them with reverential regard. And, hence, by proper observance and constant practice, the traditional practices and ideas have been given great consideration and have been transmitted from generation to generation, without in any way being warped by extraneous influences.

From ancient times, custom or *achara* has been regarded as the highest '*dharma*'. Custom generally refers to some practice or a rule which, in a particular family or particular community, class or district, has from long usage, obtained the force of law. Custom is a principal source of law and its position is next to the *Shrutis* and *Smritis* but usage of customs prevails over the *Smritis*. Hindu *Dharmashastrakars* were of the opinion that law is subject to change. It is dynamic. They were aware of the changing needs of the ever-changing societal norms and so, they also proposed the idea that law changes with time. They gave importance and recognition to sources which could introduce changes in accordance with the changing needs of the society. The *Smritikars*, thus, brought about evolution, expansion and growth of the system by adopting the ancient principles and ideals to suit the progressive conditions. Thus, it was concluded that "Custom is to society what law is to the State".

VEDIC CONCEPTION OF LAW

The concept of law and various ideas regarding it are seen to be there in existence since very early Vedic times. Many philosophical ideas regarding law were prevalent even in the early Vedic times. According to *Vedas*, law has a divine origin. *Rigveda* conceives law not merely as an ordering of human conduct and adjustment of human relations, but it is something more, i.e., ordering of things in a fixed and pre-determined manner.¹⁷

In the Vedic times, attempts were made to comprehend law and find out its nature. People in those times conceived law as *Rita*. *Rita*, the Cosmic or Eternal Law is all pervading, omnipotent, inexorable from which creation sprang and by which its life was regulated and upheld. It is the organised principle of the universe, as also the divine ordering of earthly life.¹⁸ *Rita* in the morality of the *Vedas* is just the unerring inner voice of man, the voice of conscience in each and every individual.

¹⁶ Ibid Pg. No. 186.

¹⁷ Supranote 1, Pg. No. 85.

¹⁸ Supranote 12, Pg. No. 85.



According to the *Upanishads*, the function of law was to make sure that the men and existing social institutions were socially secure and this was done by avoiding conflicts and confrontations between the individuals in the society. The law was an instrument to keep a check on the limitations of the individuals with regard to their relations with other members of the society. The tenets of *Dharma* are to be found in the *Vedas* – the sacred treatises consisting of four parts, namely, *Rig*, *Sama*, *Yajur* and *Atharva*, all of which were written in the form of hymns (or *shlokas*) in Sanskrit.

Smritikars were the persons who were supposed to interpret the *Vedas* and taking their true essence and reason into consideration, they were expected to give new definitions to 'law'. In this context, Manu acquires the supreme position since Manu Smriti is considered to embody the essence of the *Vedas*. Thus, the person who was well versed in *Vedas* and had proper knowledge and understanding of the reason of the *Vedas* was considered to be fit enough to develop the law in accordance with that.

INDIA'S INDIGENOUS VALUES AND THE MODERN AGE

As Sadguru Swami Ramdas rightly says, "*Dharma* means that which upholds and elevates.... *Dharma* therefore signifies the knowledge of the great truth which upholds all things.... From the light of this knowledge alone can the life of a human being be harmoniously adjusted in all its various aspects." Therefore a right understanding and knowledge of *dharmic* laws in nature and its earnest and effective application in our day to day life is the need of the hour. It is the inability of this so-called modern civilization to enable man to adjust harmoniously with the various aspects of life, -- that has posed a great threat to existence of beings on our planet. *Dharma* is the central core of spirituality and being universal in message, it won't antagonize any religion. *Dharma* is inherent in all religions. 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 these modern solutions have to be found- of course, fundamental principles should not be entirely ignored.¹⁹ Unlike the modern law which is confined to rights, duties and legal obligations without much concern for morals, the ancient law laid great stress on *sadachar* or moral-law which is broad-based, liberal, and humane.

But at the same time, it should never be forgot how India has always supported oneness and consensus and maintained a balance between the old and new ideals, values and needs. The times are changing and it has to be realised that the present-day India cannot be governed alone with the help of the principles laid down by the ancient law-givers Manu, Kautilya or Sukra and also it cannot merely survive on the British colonial laws and legal ideas adopted from foreign places which are baseless and alien in quality as well as content.

¹⁹Dr. S. N. Dhyani, "*Fundamentals of Jurisprudence- The Indian Approach*", Central Law Agency, Allahabad, 2004, Page No. 66.



It must be kept in mind that blind following of western legal concepts will never remove the discord and dissensions that are invading our national life. Our indigenous values and principles should never stand dissolved. Their essence should always prevail amidst the upcoming legal theories to tackle the problems that are arising with the changing times.

K. M. Panikkar the profound scholar of Indian history describes 'the meeting of East and West' in India in terms of assimilation – tolerance – synthesis trilogy.

'...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 molded 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 not 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.'²⁰

RELIGION, MORALS AND LAW DISTINGUISHED

On the face, religion, morals and law look interlinked. Taking the ancient Indian legal system into consideration, one can easily infer that the ideas of religion, morals and law overlapped each other. This was because *dharma* constituted the religion in Hindus which was based on the principles of morality and proposed a code of conduct that had to be followed by the individuals of the society and as such, formed a part of the law. The secular character of religion was inexplicably connected with the morality and rules.

The modern law does not take morality or religion into consideration. But *dharma* - which had been accorded the status of law in the ancient times in the Hindu jurisprudence - took morality and religion also under its purview. The *Smritikars*, while talking about *dharma* or law, essentially meant the totality of rules governing the social order. It referred to the whole social order which enclosed the all legal, social as well as moral rules. But it cannot at all be inferred from this that the *Smritikars* were not aware of the difference between legal and moral rules. The fact is that they knew the distinction between the two and as and when required they made the same thing clear.

Dharma or law included morality as well as religion. In this regard, two things are noticeable. Firstly, the *sadachar* emphasizes more on morality than on law, and secondly, religion as a part of *dharma* implied what was approved by the conscience of virtuous men who are free from hatred and worldly temptations. The law in present times emanates from legislative enactments. The idea is that they are man-made and do not have a divine origin. Today, the law is mainly concerned with actions or omissions but does not bother itself about the motives. But the religious part of *dharma* always focused on the motive behind the act. Thus, religion was meant to protect the universe including human society and *dharma* stood for "religious rights, fixed principles of rules of conduct and whole

²⁰ Ibid Pg. No. 67.



body of religious duties”. In the ancient Indian legal system, the philosophy of *dharma* was based on the belief that man possesses outer and inner existence. While his outer existence was controlled and governed by legal rules and morals, his inner self was regulated by the religious precepts. Thus, *dharma* embodied the rules of religion, law and morality.

FINDINGS

Dharma constituted the religion in Hindus which was based on the principles of morality and proposed a code of conduct that had to be followed by the individuals of the society and as such, formed a part of the law. The secular character of religion was inexplicably connected with the morality and rules. Our indigenous values and principles should never stand dissolved. Religion essentially houses within itself ancient values as well as ideologies that formed an integral part of the society and it was thus, entwined with the concept of law and order. The same holds importance today. Even in the present scenario, it has to be realized that blind following of western legal concepts will never remove the discord and dissensions that are invading our national life. Thus, the hypothesis proves to be true, that is, the solution to the sundry problems of discord, tensions and dissensions seeping into our national life lies in an amalgam of the essence of ancient legal ideologies and the will to adapt new ideas and ideals in accordance with the changing times.

CONTRIBUTION

There is a lot of work to be done if the judicial system has to rediscover its glory that has lost quite a bit of sheen. The task is uphill but as there is a saying, “Where there is a will, there is a way”. As a solution to this problem, after the research was done, it was found that it is quite surprising how an ancient solution of *Manu* might as well help a great deal in tackling the prevailing problems in our present legal system. The idea is to propose a way out from the problem and thereby, contributing in improving the legal scenario in India. The need of the hour is to go by morality, weave ancient ideologies and principles into the fresh fabric of laws and come up with unique solutions to the emerging intricacies within the legal system. The main essence should never get dissolved.

CONCLUSION AND SUGGESTIONS

The logical acumen of Hindu legal philosophers, their analytical skill and comprehensiveness of approach deserve all admiration. Sen writes: “No one can complain that our law givers were lacking in logical consistency. The Hindu mind has ever been eminently logical; subtlety of discrimination, analytical skill, and logical accuracy in defining legal conceptions have always been its delight and it has never enunciated without perceiving what it really involves and the deductions which logically follow from it.”

After studying the whole concept of religion and law in light of Hindu jurisprudence, it could be easily inferred that the times are changing and in modern times, India cannot be governed alone with the help of the principles laid down by the ancient law-givers *Manu*, *Kautilya* or *Sukra* and also it cannot merely survive on the British colonial laws



and legal ideas adopted from foreign places which are baseless and alien in quality as well as content.

What the time and situation demands is the correct blend of the ancient tested ideologies with the new principles that fit in the changing times. We need to adapt to the new ideas and ideals as and when the need for doing so arises. The principal essence of the ancient ideals and values must not get diluted though in doing so. Therefore a right understanding and knowledge of *dharmic* laws in nature and its earnest and effective application in our day - to - day life is the need of the hour. The true nature of law lies in its integral relationship with religion, though the two are different entities and have different roles to play in society. Despite several centuries of deliberate secularization, the state could not remove elements of religion from the law even in nations that are most secular, liberal, and democratic.

Conclusively, it can be said that to eradicate the problems that are facing our current legal system, we need to embrace new ideals and philosophies while at the same time keeping ourselves rooted to what our religion taught and has been handed over to us since ages by our forefathers.

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