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RETHINKING LEGAL HISTORY: INDIA'S CONTRIBUTIONS TO LEGAL POSITIVISM

Vikesh Ram Tripathi* & Gaurav Tripathi*

Abstract

This research paper explores the presence of legal positivism within the ancient Indian legal tradition. While often associated with modern Western legal thought, legal positivism's core tenets of law as a system of rules separate from morality, the importance of legal validity and authority, and the rule by law can be traced back to ancient Indian legal texts. By analyzing key texts like the *Manusmriti* and *Arthashastra*, this research demonstrates how ancient Indian thinkers articulated concepts aligned with legal positivist principles. The king's role as the ultimate lawgiver, the codification of laws, the authority of legal interpretation, legal procedures, the differentiation between law and moral are indicative of a positivist approach to law. This research paper challenges the prevailing narrative that legal positivism is solely a Western invention. By highlighting the ancient roots of legal positivism in India, it offers a new perspective on the development of legal thought and provides insights into the rich and diverse legal traditions of the past.

Keywords: *Legal Positivism, Ancient India, Codification, Legal History*

- I. Introduction
- II. Theoretical Framework
- III. Ancient Indian Legal Traditions
- IV. Legal Positivism in Ancient India
- V. Comparative Analysis
- VI. Implications and Reinterpretations
- VII. Conclusion

I. Introduction

THE STUDY of legal history often emphasizes the evolution of legal theory from its earliest forms to contemporary practices, with a particular focus on Western legal traditions. Among the many legal philosophies explored, legal positivism is frequently highlighted as a modern construct, primarily emerging in the 19th and 20th centuries through the works of figures such as Jeremy Bentham and Hans Kelsen. Legal positivism, which asserts that law is a set of rules established by a sovereign authority and separate from moral considerations, is typically viewed as a product of Western legal development. However, this perspective may overlook

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the rich and complex legal traditions that existed in other ancient cultures, particularly in India.

Ancient Indian jurisprudence, with its extensive legal texts and historical depth, offers a unique perspective that challenges this conventional view. Legal texts such as the *Manusmriti*, the *Yajnavalkya Smriti*, and various inscriptions from ancient India reflect a sophisticated understanding of law and governance that merits closer examination through the lens of legal positivism. These texts reveal that ancient Indian legal thought not only addressed the nature of law but also articulated principles that resonated with modern legal positivism. This research seeks to explore these connections, revealing that aspects of legal positivism were indeed present in ancient Indian legal traditions long before the term itself was coined.

The primary objective of this study is to reassess ancient Indian legal philosophy through the framework of legal positivism. This involves several specific goals:

1. *Identification of Legal Positivism Elements:* To identify and analyze elements within ancient Indian legal texts and practices that align with the principles of legal positivism. This includes examining codified laws, the role of legal authorities, and the separation between legal norms and moral.
2. *Reinterpretation of Ancient Texts:* To reinterpret classical Indian legal texts such as the *Manusmriti* and *Yajnavalkya Smriti* in light of legal positivism, thereby uncovering early forms of this legal theory in the context of ancient India.
3. *Comparison with Contemporary Legal Thought:* To compare ancient Indian legal positivism with its modern counterparts, highlighting similarities and differences in the application and understanding of legal principles.
4. *Contribution to Legal History:* To contribute to the broader field of legal history by proposing that the roots of legal positivism may be traced back to ancient Indian practices, thereby broadening the historical narrative of legal theory.

Significance and Scope of the Research

The significance of this research lies in its potential to reshape our understanding of both ancient Indian legal traditions and the development of legal positivism. By demonstrating that key aspects of legal positivism were present in ancient Indian jurisprudence, this study challenges the conventional view that legal positivism is exclusively a Western phenomenon. This reassessment provides a more inclusive view of legal history, acknowledging the contributions of non-Western legal traditions to the evolution of legal theory.

The scope of this research encompasses a detailed examination of ancient Indian legal texts, and relevant secondary literature. The analysis focuses on identifying elements of legal positivism within these sources and comparing them with contemporary legal theories. The study also addresses the implications of these findings for the broader field of legal history, proposing new perspectives on the evolution of legal thought.

II. Theoretical Framework

Legal positivism is a theory of law that asserts that laws are rules created by human beings and do not necessarily reflect moral or ethical considerations. According to legal positivism, the validity of law is determined by its source and adherence to prescribed procedures rather than its content. Key principles of legal positivism include:

1. *The Separation of Law and Morality*: Legal positivism maintains that law and morality are distinct domains. The validity of a legal norm is not dependent on its moral content; rather, it is determined by its creation through proper legal processes. This principle is central to the positivist rejection of natural law theories, which argue that law is intrinsically connected to moral values. For instance, H.L.A. Hart, a leading figure in legal positivism, contends that laws are rules created by social facts and must be distinguished from moral judgments.¹
2. *The Rule of Recognition*: According to Hart, this rule is one of the secondary rules, which operate on primary rules by specifying how they are identified, created, modified, or adjudicated. Primary rules regulate behaviour by imposing duties, while secondary rules (including the rule of recognition, the rule of change, and the rule of adjudication) structure the ways in which primary rules are recognised and applied.²
3. *Legal Validity*: Legal positivism asserts that the validity of a legal norm depends on its conformity to the procedures and sources recognized by the legal system, not on its moral or ethical content. This principle underscores the idea that law is a matter of social fact and institutional procedures.³

1 H.L.A. Hart, *The Concept of Law* 100 (2nd edn, Clarendon Press, Oxford, 1994)

2 *Ibid.*

3 H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 40-45 (Clarendon Press, 1982).

Historical Evolution of Legal Positivism

The roots of legal positivism can be traced back to the 18th and 19th centuries, a period marked by significant shifts in legal and political thought. The evolution of legal positivism can be divided into several key phases. The early foundations of legal positivism can be linked to the works of Jeremy Bentham, who is often credited with laying the groundwork for modern legal positivism. Bentham's utilitarian philosophy emphasized that laws should be judged by their utility and effectiveness rather than their moral content. His work "An Introduction to the Principles of Morals and Legislation" (1789) argues that laws are human creations designed to promote the greatest happiness for the greatest number of people.⁴

In the 19th century, legal positivism was further developed by figures such as John Austin, who introduced a more formalistic approach to the theory. Austin's concept of law as the command of a sovereign, backed by the threat of sanctions, reinforced the idea that law is a system of rules imposed by authority.⁵ Austin's work "The Province of Jurisprudence Determined" (1832) articulated the view that law is a set of commands from a sovereign authority, distinguishable from moral and social norms.⁶

H.L.A. Hart's contributions in the mid-20th century represent a significant reformation of legal positivism. In his seminal work "The Concept of Law" (1961), Hart introduced the idea of the rule of recognition and distinguished between primary and secondary rules. Hart's theory provided a more nuanced understanding of legal systems, incorporating the role of social practices and institutions in determining legal validity.⁷ His work addressed some of the criticisms faced by earlier positivists and offered a more sophisticated account of how legal systems function.

Relevance of Legal Positivism to Ancient Legal Systems

Understanding the relevance of legal positivism to ancient legal systems requires examining whether and how ancient legal traditions reflected the principles of legal positivism. Although legal positivism as a formal theory did not exist in ancient times, elements of positivist thought can be observed in various ancient legal systems.

4 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 1-3 (J.H. Burns and H.L.A. Hart eds, Clarendon Press, Oxford, 1970).

5 John Austin, *The Province of Jurisprudence Determined* 133 (John Murray, London, 1832).

6 *Ibid.*

7 H.L.A. Hart, *The Concept of Law* 94-99 (Clarendon Press, Oxford, 2nd edn., 1994).

Ancient legal systems, such as those in Mesopotamia, Greece, and India, often featured codified laws and systematic legal codes. For example, the Code of Hammurabi, dating back to around 1754 BCE, represents one of the earliest examples of codified legal norms. The Code established a comprehensive set of rules governing various aspects of daily life, with an emphasis on legal procedures and penalties.⁸ Similarly, ancient Indian legal texts like the *Manusmṛiti* and *Yājñavalkya Smṛiti* include detailed codes that regulate social conduct and legal procedures, reflecting an early form of systematic lawmaking.⁹

The role of legal authorities and their interpretative functions in ancient legal systems also align with aspects of legal positivism. In ancient Rome, for instance, the development of Roman law involved the interpretation and application of legal principles by jurists and magistrates. The jurisprudential writings of Roman scholars, such as Gaius and Ulpian, provided authoritative interpretations of legal norms, contributing to a structured legal system that prioritized procedural validity over moral considerations.¹⁰

While ancient legal systems were often intertwined with religious and moral norms, some legal traditions demonstrated a degree of separation between legal rules and moral or divine imperatives. For example, the Roman legal system, particularly during the classical period, distinguished between the *ius civile* (civil law) and *ius naturale* (natural law), with the former focusing on the legal norms applicable to Roman citizens and the latter addressing broader moral and ethical principles.¹¹ Similarly, ancient Indian legal texts, while rooted in religious and moral contexts, also addressed legal norms and procedures in ways that could be interpreted as aligning with positivist principles of law as a distinct system of rules.¹²

8 L.W. King (tr.), *The Code of Hammurabi* 3-5 (Yale University Press, New Haven, 1910).

9 G. Bühler (ed), *The Laws of Manu* (vol 25 of *The Sacred Books of the East*, Clarendon Press 1886); Rai Bahadur Srisa Chandra Vidyarnava (trans), *Yājñavalkya Smṛiti: With the Commentary of Vijñānevara Called the Mitākṣarā and Notes from the Gloss of Balambhatta* (Panini Office 1918).

10 Alan Watson (tr.), *The Digest of Justinian*, Vol. 1, 3-5 (University of Pennsylvania Press, Philadelphia, 1985); Barry Nicholas, *An Introduction to Roman Law* 102-108 (Clarendon Press, Oxford, 1962).

11 Barry Nicholas, *An Introduction to Roman Law* 44-48 (Clarendon Press, Oxford, 1962).

12 *Manusmṛiti*, trans. G. Bühler, Chapter 7, Verse 17, in *The Sacred Books of the East* Vol. 25, edited by F. Max Müller (Oxford University Press, 1886); *Yājñavalkya Smṛiti*, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368 in *The Sacred Book of The Hindus: The Yājñavalkya Smṛiti with the Commentary of Vijñāneśvara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918).

III. Ancient Indian Legal Traditions

Ancient Indian legal traditions are rich and multifaceted, encompassing a variety of texts and sources that provide valuable insights into the legal, ethical, and social norms of the time. The study of these texts is crucial for understanding the evolution of legal thought in ancient India, and how these early legal systems align with or diverge from the principles of legal positivism.

The primary sources of ancient Indian law include:

1. *Srutis* and *Smritis*: These are the foundational texts of Hindu law and ethics, written primarily in Sanskrit. They cover a wide range of legal and moral issues and have significantly influenced the development of legal thought in India.
2. *Dharmasutras* and *Dharmashastras*: These texts form part of a broader category that provides guidance on the duties, rights, and judicial procedures. They are crucial for understanding the formalization and codification of legal norms in ancient India.
3. Political and Administrative Treatises: Texts like the *Arthashastra* by Kautilya (Chanakya) offer insights into statecraft, law, and governance, providing a pragmatic perspective on legal and administrative practices.
4. Legal Commentaries and Scholastic Works: Commentaries by scholars such as *Vijnaneshvara* further elaborate on the legal principles outlined in the primary texts, offering detailed interpretations and applications of the laws.

Major Legal Codes

Ancient Indian legal codes are extensive and cover various aspects of law and governance. Here in this article the author will focus on 3 major legal codes *i.e.*, *Manusmriti*, *Yajnavalkya smriti*, and *Kautilya's Arthashastra*.

1. *Manusmriti (Laws of Manu)*: The *Manusmriti* is one of the oldest and most comprehensive legal texts in Hinduism. Attributed to the sage Manu, it codifies social and legal norms, including duties, rights, and punishments. The text is divided into chapters dealing with topics such as creation, law, ethics, and governance. It reflects a hierarchical view of society, prescribing different duties and rights for different classes (*varnas*) and stages of life (*ashramas*).¹³ The *Manusmriti* has been influential in shaping Hindu law and

¹³ Manusmriti, trans. G. Bühler, Chapter 7, Verse 17, in *The Sacred Books of the East* Vol. 25, edited by F. Max Müller (Oxford University Press, 1886).

has been interpreted in various ways over the centuries. Its principles on *dharma* (duty) and *karma* (action) have had a profound impact on legal and moral thinking in India.¹⁴

2. *Yajnavalkya Smriti*: The *Yajnavalkya Smriti*, attributed to the sage *Yajnavalkya*, is another key legal text that provides a systematic approach to Hindu law. It addresses issues such as property rights, family law, and judicial procedures. Unlike the *Manusmriti*, which includes extensive moral and religious content, the *Yajnavalkya Smriti* is noted for its focus on legal procedures and its systematic presentation of legal principles.¹⁵ This text emphasizes the role of the judiciary and provides guidelines for legal adjudication, reflecting a more structured approach to legal practice compared to earlier texts.¹⁶
3. *Arthashastra*: Kautilya's *Arthashastra* is a seminal text on statecraft, governance, and economic policy. Although primarily focused on political and economic strategies, it contains substantial content related to legal and administrative practices.¹⁷ The *Arthashastra* provides a pragmatic approach to governance, emphasizing efficiency and effectiveness. It includes detailed discussions on legal procedures, administration, and justice, making it a key text for understanding the practical aspects of ancient Indian law.¹⁸

Key Figures and Scholars in Ancient Indian Jurisprudence

Several key figures and scholars have made significant contributions to the development of ancient Indian jurisprudence. Their works provide valuable insights into the legal and philosophical traditions of the time. Here in this article, the author will discuss the 3 significant jurists of Ancient India who has contributed in the development of Legal Positivism in India:

1. *Manu*: Manu is traditionally considered the author of the *Manusmriti*, a foundational text in Hindu law. His work has had a profound impact on Hindu legal thought and has been a reference point for understanding

14 *Ibid.*

15 Yajnavalkya Smriti, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368 in *The Sacred Book of The Hindus: The Yajnavalkya Smriti with the Commentary of Vijnaneshwara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918).

16 *Ibid.*

17 R. Shamasastri (tr.), *Kautilya's Arthashastra* 25–30 (Mysore Printing and Publishing House, Mysore, 1915).

18 *Ibid.*

ancient Indian legal traditions. Manu's text reflects a hierarchical view of society and provides guidelines on various aspects of law and social order.¹⁹

2. *Yajnavalkya*: Yajnavalkya, attributed with the authorship of the *Yajnavalkya Smriti*, is renowned for his contributions to Hindu law. His text is noted for its systematic approach to legal principles and its focus on procedural norms. Yajnavalkya's work emphasizes the role of the judiciary and provides detailed guidelines for legal adjudication.²⁰
3. *Kautilya (Chanakya)*: Kautilya, also known as Chanakya, is the author of the *Arthashastra*, a seminal text on statecraft, governance, and economic policy. His work provides a pragmatic perspective on legal and administrative practices and offers detailed discussions on legal procedures and justice. Kautilya's contributions are significant for understanding the practical aspects of ancient Indian law and governance.²¹

Ancient Indian legal traditions are characterized by a diverse range of texts and sources that reflect a sophisticated understanding of law and governance. Major legal codes such as the *Manusmriti*, *Yajnavalkya Smriti*, and *Arthashastra* provide comprehensive accounts of legal norms, procedures, and social duties. Key figures and scholars such as *Manu*, *Yajnavalkya*, and *Kautilya* have made significant contributions to the development of ancient Indian jurisprudence. The integration of religious and legal norms, the emphasis on judicial procedures, and the hierarchical view of society are important aspects of ancient Indian legal thought that offer valuable insights for understanding the evolution of legal theory.

IV. Legal Positivism in Ancient India

Legal positivism, as a theory, emphasizes the codification of law and the separation of law from morality and divine command. To assess its presence in ancient India, it is essential to analyze the evidence of codified and systematic law found in ancient Indian texts.

Codification of Law

The *Manusmriti* is one of the most comprehensive codifications of law in ancient India. It systematically outlines various aspects of law, including social duties, legal

19 *Manusmriti*, trans. G. Bühler, Chapter 7, Verse 17, in *The Sacred Books of the East* Vol. 25, edited by F. Max Müller (Oxford University Press, 1886), *Yajnavalkya Smriti*, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368 in *The Sacred Book of The Hindus: The Yajnavalkya Smriti with the Commentary of Vijnaneshwara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918).

20 *Ibid.*

21 R. Shamasastri (tr.), *Kautilya's Arthashastra* 25–30 (Mysore Printing and Publishing House, Mysore, 1915).

procedures, and punishments. The text is organized into chapters that deal with different aspects of legal and social norms, reflecting a structured approach to law. For instance, Chapter 8 of the *Manusmriti* deals specifically with criminal law and the administration of justice, providing detailed guidelines on legal procedures and punishments for different offenses.²²

The systematic nature of the *Manusmriti* is evident in its attempt to cover a wide range of legal issues in a structured manner. It provides a comprehensive legal framework that includes rules for personal conduct, family law, and criminal justice. This codification reflects an early form of legal positivism, where laws are systematically recorded and presented in a structured manner.

The *Yajñavalkya Smṛiti* also exemplifies codification and systematic law. It is organized into three parts: the first part deals with civil and criminal law, the second part addresses the administration of justice, and the third part provides guidelines for legal procedures. The text's structured approach to legal issues highlights its emphasis on systematic legal codification.²³ The *Yajñavalkya Smṛiti* includes detailed instructions on judicial procedures, property rights, and family law. This systematic approach to law indicates a developed legal framework that aligns with the principles of legal positivism, as it seeks to create a structured and comprehensive legal system.

Kautilya's *Arthashastra* is another key text that provides evidence of codified and systematic law. The text is a treatise on statecraft, governance, and legal procedures, and it includes detailed guidelines on administrative and legal practices. The *Arthashastra* is organized into several books, each addressing different aspects of governance, law, and strategy.²⁴

The *Arthashastra* reflects a pragmatic approach to law and governance, emphasizing efficiency and effectiveness. It provides a systematic analysis of legal and administrative practices, including the role of judges, legal procedures, and the administration of justice. This systematic and pragmatic approach aligns with the principles of legal positivism, as it focuses on the codification and implementation of laws in a structured manner.

22 G. Bühler (tr.), *The Laws of Manu (Manusmriti)*, ch. 7, v. 17, in *The Sacred Books of the East*, Vol. 25, F. Max Müller (ed.) (Oxford University Press, 1886).

23 Rai Bahadur Srisa Chandra Vidyarnava (tr.), *The Yajñavalkya Smṛiti with the Commentary of Vijnaneshwara (Mitakshara)*, Vol. 21, Verse 1.368 (*The Sacred Books of the Hindus Series*) (The Panini Office, Bahadurganj, Allahabad, 1918).

24 Kautilya, *Arthashastra*, trans. R. Shamasastri, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute), 1915.

Separation of Law from Morality and Divine Command

The separation of law and morality is fundamental to legal positivism, which asserts that law functions as an objective structure distinct from personal morality. Examining ancient Indian legal traditions reveals how this separation was conceptualized and applied.

Manusmṛiti (Verse 2.10)

श्रुतिस्तु वेदो विज्ञेयो धर्मशास्त्रं तु वै स्मृतिः ।²⁵
ते सर्वोर्ध्वीमांस्ये ताभ्यां धर्मो ही निर्वेभौ ॥१०॥

Word-by-word meaning: *srutiḥ* — “that which is heard; revelation (Veda)”; *tu* — “but / indeed”; *vedaḥ* — “the Veda(s)”; *viññeḥ* — “to be known / recognised”; *dharma-śāstram* — “dharma-scripture / dharma-sāstra”; *tu* — “but / indeed”; *vai* — emphatic “indeed”; *smṛtiḥ* — “smṛti / tradition”; *te* — “those (two)”; *sarvārthesu* — “in all matters”; *amīmāṃsye* — “not to be disputed / not to be questioned”; *tābhyāṃ* — “by those two”; *dharmaḥ* — “dharma / law / duty”; *hi* — “indeed / certainly”; *nirbhau* — “shone forth / arose”.

“The authority of the law lies in the Veda and Smṛiti, which should remain beyond question as they form the foundation of Dharma.”²⁶

Interpretation: This verse emphasizes that the law is derived from sacred sources and structured as an autonomous, objective entity beyond individual morality or personal beliefs, reflecting positivism’s insistence on law’s independence from subjective morals. Just as legal positivism holds that law derives validity from established sources rather than moral judgments, this verse underscores that *Dharma* flows from *Sruti* and *Smṛiti* alone and is not subject to personal interpretation.

Thus, *Manusmṛiti* anticipates the positivist idea that law’s legitimacy arises from recognized authority rather than subjective ethical beliefs, supporting the argument that ancient Indian jurisprudence contained early roots of legal positivism.

Kautilya’s Arthashastra (Book III)

“But whenever sacred law (śāstra) is in conflict with rational law (Dharmanyāya), then reason shall be held authoritative; for there the original text is not available.”²⁷

25 Manusmṛiti with the Commentary of Medhātithi, verse 2.10, Hindi/Sanskrit text available at: <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc145583.html> (last visited June 15, 2025).

26 G. Bühler (tr.), *The Laws of Manu (Manusmṛiti)*, ch. 2, v. 10, at 11, in *The Sacred Books of the East*, Vol. 25, F. Max Müller (ed.) (Oxford University Press, 1886).

27 R. Shamasastri (tr.), *Kautilya’s Arthashastra*, 1st ed., bk. III, ch. 1, at 218 (Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

Interpretation: This verse illustrates the separation of law from morality by asserting that, in cases of conflict between sacred law (śāstra) and rational or secular law (Dharmayāya), rational law based on reason should prevail. Here, Kautilya's Arthashastra prioritizes practical, rational considerations over religious or moral doctrines, emphasizing that legal decisions should be guided by objective reason rather than moral or religious prescriptions.

This aligns closely with the principle of legal positivism, which holds that law is an independent system derived from rules and authority rather than moral values. By choosing rational law over sacred mandates when conflicts arise, Kautilya presents law as a pragmatic tool for governance, distinct from religious or ethical beliefs.

Book III

“It is power and power (*danda*) alone which, only when exercised by the king with impartiality and in proportion to guilt either over his son or his enemy, maintains both this world and the next.”²⁸

Interpretation: This verse reflects the principle of separation of law from morality by emphasizing that the king's duty to enforce punishment (*danda*) should be exercised impartially, without personal or moral bias, even when dealing with family or enemies. Here, *Arthashastra* defines *danda* (punishment) as a tool of law rooted solely in justice and reason, not influenced by personal loyalties, emotions, or ethical considerations.

In legal positivism, the validity of law comes from established rules and sovereign authority rather than from moral or personal considerations. This verse supports that view by stressing that the king's application of punishment must be objective, guided solely by the law itself and proportionate to the crime. The king's duty to apply *danda* impartially highlights a legal system grounded in authority and rationality, distinct from moral or personal motivations.

Yajñavalkya Smṛiti (Verse 1.358)

अपि भ्राता सुतोऽर्घ्यो वा श्वशुरो मातुऽलपि वा ।²⁹
नादण्डयो नाम राज्ञोऽस्ति धर्माद् विचलितः स्वकातः ॥

Word-by-word meaning: *api* — “also / even”; *bhrātā* — “brother”; *sutah* — “son”; *arghyah* — “revered one / one offered respect”; *vā* — “or”; *śvasurah* — “father-in-law”; *mātulah* — “maternal uncle”; *api* — “also / even”; *vā* — “or”; *nā-a-dandyo*

²⁸ *Ibid.*

²⁹ *Yājñavalkya Smṛiti with Mitākṣarā* (Sanskrit), ed. Patrick Olivelle, verse 1.358 (2020), available at: <https://www.wisdomlib.org/hinduism/book/yajnavalkya-smṛiti-with-mitakshara-sanskrit/d/doc1643007.html> (last visited June 20, 2025).

— “not exempt from punishment” / “not unpunishable”; *nâma* — “indeed / called”; *râjñō’si* — “is (of) the king”; *dharmât* — “from duty / from the observance of dharma”; *vicalitah* — “deviated / turned away”; *svakât* — “from one’s own duty / from one’s caste/condition.”

“A brother even, or a son, any one to whom arghya (respect) is due, a father – in – law or maternal uncle, as well, is not to go unpunished by the monarch if they fall away from their duty”³⁰

Interpretation: Here, the *Yajnavalkya Smṛiti* advocates that the monarch (or sovereign authority) should enforce laws impartially, without regard for personal relationships or familial bonds, even with individuals who are socially and morally respected, like a brother, son, father-in-law, or uncle. This verse mirrors the positivist view that the application and enforcement of law must remain detached from personal and moral considerations, emphasizing the sovereign’s duty to ensure justice and social order above individual moral relations.

Law as Command of the Sovereign

The principle of law as a command issued by a sovereign authority is central to positivism, where the sovereign’s directive forms the essence of law.

Manusmṛiti (Verse 7.17)

सा राजा पुरुषो दण्ड स नेता शासिता च सः ।
चतुर्णामाश्रमाणां च धर्मस्य प्रतिभूः स्मृतः ॥१७॥³¹

Word-by-word meaning: *sa* — “he”; *rājā* — “king”; *puruṣaḥ* — “man / person”; *dandah* — “punishment; punisher”; *sa* — “he/that”; *netā* — “leader”; *śāsitā* — “governing one / ruler”; *ca* — “and”; *saḥ* — “he”; *caturṇām* — “of the four”; *āśramānām* — “ashramas”; *ca* — “and”; *dharmasya* — “of dharma / duty / law”; *pratibhūḥ* — “manifestation / representative / embodiment”; *smṛtaḥ* — “is considered / is said.”

“Punishment embodies the king, serving as the foundation for adherence to law among all social orders.”³²

30 Rai Bahadur Srisa Chandra Vidyarnava (tr.), *The Yajnavalkya Smṛiti with the Commentary of Vijnanesvara (Mitākṣarā)*, Vol. 21, verse 1.358, at 426 (*The Sacred Books of the Hindus Series*) (The Panini Office, Bahadurganj, Allahabad, 1918).

31 Manusmṛiti with the Commentary of Medhātithi, verse 7.17, Hindi/Sanskrit text available at: <https://www.wisdomlib.org/hinduism/book/manusmṛiti-with-the-commentary-of-medhatithi/d/doc200679.html> (last visited June 25, 2025).

32 G. Bühler (tr.), *The Laws of Manu (Manusmṛiti)*, ch. 7, v. 17, at 93, in *The Sacred Books of the East*, Vol. 25, F. Max Müller (ed.) (Oxford University Press, 1886).

Interpretation: This verse equates punishment directly with the king's authority, establishing that the sovereign's command is the essence of law, a fundamental concept in Austin's view of legal positivism. By equating punishment with the king, *Manusmṛiti* suggests that the king's authority is central to enforcing and upholding *Dharma* (law) within society. In legal positivism, particularly in the view of John Austin, law derives its legitimacy as a command from the sovereign, backed by the threat of sanctions.

Here, *Manusmṛiti* asserts that punishment (*Danda*)—as embodied by the king—ensures compliance across all social orders, emphasizing the sovereign's role in maintaining order and enforcing the law. This aligns with the positivist notion that law gains its force and authority from the sovereign's ability to command and enforce adherence through punishment, thereby securing societal obedience. This verse, therefore, supports the argument that ancient Indian jurisprudence recognized law as sovereign command, a core element of legal positivism.

Kautilya's Arthashastra

"Sacred law (*Dharma*), evidence (*Vyavahāra*), history (*Charitra*), and edicts of kings (*Rājasāsana*) are the four legs of Law. Of these four in order, the latter is superior to the one previously named.."³³

Interpretation: The authority given to the king's edicts above other forms of law reflects the concept of law as sovereign command, mirroring the positivist notion of the sovereign's word as the ultimate source of law.

Yajñavalkya Smṛiti (Verse 1.354)

तदवाप्य नृपो दण्डं दुर्वृतेषु निपातयेत् ।
धर्मो हि दण्डरूपेण ब्रह्मणा निर्मित पुरा ॥³⁴

Word-by-word meaning: *tat* — "that"; *avāpya* — "having obtained / having secured"; *nṛpab* — "king"; *dandam* — "punishment / rod of punishment"; *durvṛttesu* — "upon the ill-doers / wrongdoers"; *nipātayet* — "should strike down/ should inflict"; *dharmab* — "dharma / law / duty"; *hi* — "indeed / for"; *dandarūpena* — "in the form of punishment"; *brahmanā* — "by Brahman"; *nirmitab* — "was created"; *purā* — "formerly / of old."

33 R. Shamasastri (tr.), *Kautilya's Arthashastra*, 1st ed., at 217 (Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

34 Yājñavalkya Smṛiti with Mitākṣarā (Sanskrit), ed. Patrick Olivelle, Verse 1.354 (2020), available at: <https://www.wisdomlib.org/hinduism/book/yajnavalkya-smṛiti-with-mitakshara-sanskrit/doc1642999.html> (last visited June 20, 2025).

“Therefore having obtained that (kingdom) let the king hurl the Rod on evil-doers; because justice(dharma) in the shape of the rod (Punishment) was created of yore by Brahma himself.”

Interpretation: In this verse, *Yajnavalkya Smriti* emphasizes that once the king assumes authority, he must uphold justice by using the “Rod” or *Danda* (punishment) against wrongdoers. The “Rod” here symbolizes the king’s sovereign power to enforce *Dharma* (law and justice) through authoritative punishment, a concept foundational to legal positivism where law is viewed as the command of the sovereign, enforced by sanctions.

Thus, this verse embodies the principle that law is a sovereign command. The king’s authority to impose punishment on “evil-doers” as an objective duty reflects Austinian positivism, where law’s validity and enforceability stem from the sovereign’s power and command. The text conveys that law (Dharma) is not a matter of moral discretion but an obligatory standard enforced through the king’s mandate, aligning closely with the positivist view that law’s essence lies in authoritative command and sovereign enforcement.

Law and Punishment (*Danda*)

Positivism contends that law is upheld through enforceable sanctions, which deter non-compliance and ensure order.

Manusmriti (Verse 7.18)

दण्ड शास्ति प्रजाः सर्वा दण्ड एवाभिरक्षति ।
दण्डः सुप्तेषु जागर्ति दण्डं धर्मं विदुर्बुधाः ॥१८॥³⁵

Word-by-word meaning: *dandab* — “punishment / coercive power / law enforcement”; *sāsti* — “governs / disciplines”; *prajāb* — “subjects / people”; *sarvāb* — “all”; *dandab eva* — “punishment itself / indeed the punishment”; *abhiraksati* — “protects / preserves”; *dandab* — “punishment”; *suptesu* — “when all are asleep / among those inattentive”; *jāgarti* — “keeps watch / remains awake”; *dandam* — “punishment”; *dharmam* — “law / righteousness / justice”; *viduh* — “know / consider”; *budhāb* — “the wise / learned men.”

Meaning: “Punishment itself is the essence of law, vigilant over all beings at all times.”³⁶

35 Manusmrti with the Commentary of Medhātithi, verse 7.18, Hindi/Sanskrit text available at: <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc200680.html> (last visited July 2, 2025).

Interpretation: This verse aligns with the positivist principle that law is upheld through enforceable sanctions. In legal positivism, the authority of law relies on the power to impose sanctions that deter non-compliance and maintain social order. Here, *Manusmriti* equates punishment (*Danda*) with law itself, asserting that punishment is the ultimate force that governs, protects, and maintains vigilance over society.

By identifying punishment as “identical with the law,” *Manusmriti* suggests that the enforceability of law rests on the sovereign’s ability to impose sanctions effectively. This concept mirrors legal positivism, which holds that law’s strength and adherence stem from its power to sanction, thereby ensuring order. Thus, the verse supports the argument that ancient Indian jurisprudence recognized enforceable punishment as central to the authority and function of law, aligning closely with positivist principles.

Kautilya's Arthashastra

“It is power and power (*danda*) alone which, only when exercised by the king with impartiality and in proportion to guilt, maintains both this world and the next.”³⁷

Interpretation: Here, *danda* (punishment) is established as the tool for enforcing law, aligning with the positivist view that law’s efficacy depends on enforceable sanctions. This verse asserts that “power” (*danda*) is essential for maintaining social order, with its effective exercise depending on impartiality and proportionality. The legal positivism emphasizes that law is the command of the sovereign, enforced through sanctions. Kautilya’s focus on *danda* as the tool for upholding law reflects the positivist principle that laws derive their authority from the sovereign and are upheld through enforceable sanctions, rather than moral considerations.

Yajñavalkya Smṛiti (Verse 1.368)

ज्ञात्वापराधं देशं च कालं बलमाथापि वा ।
वयः कर्म च वित्तं च दण्डं दण्ड्येषु पातयेत् ॥³⁸

Word-by-word meaning: *jñātvā* — “having known/ascertained”; *aparādham* — “offence / wrongdoing”; *desam* — “place”; *ca* — “and”; *kālam* — “time”; *balam*

36 G. Bühler (tr.), *The Laws of Manu (Manusmriti)*, ch. 7, v. 18, at 93, in *The Sacred Books of the East*, Vol. 25, F. Max Müller (ed.) (Oxford University Press, 1886).

37 R. Shamasastri (tr.), *Kautilya's Arthashastra*, 1st ed., at 218 (Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

38 Yājñavalkya Smṛiti with Mitākṣarā (Sanskrit), ed. Patrick Olivelle, Verse 1.368 (2020), available at: <https://www.wisdomlib.org/hinduism/book/yajnavalkya-smṛiti-with-mitakshara-sanskrit/doc1643021.html> (last visited June. 26, 2025).

— “force / strength / power”; *atha api vā* — “or even then / or even so”; *vayab* — “age”; *karma* — “action / deed”; *ca* — “and”; *vittam* — “wealth / property”; *ca* — “and”; *dandam* — “punishment”; *dandyesu* — “upon those deserving punishment / punishable”; *pātayet* — “he (should) inflict / mete out.”

Meaning: “Ascertaining the crime, the place and the time as well as also the ability, the age, the act and the means (of the criminal, let the king) cause punishment to fall on those who deserve it.”³⁹

Interpretation: This verse reinforces the role of punishment as foundational for law’s authority, aligning with positivist thought on the necessity of sanctions in law. According to legal positivism, the enforceability of law is inseparable from the presence of sanctions or punishments, which serve to deter crime and maintain order. Here, *Yajñavalkya Smṛiti* emphasizes that punishment (*Danda*) is an essential part of justice, where the king must administer penalties only after considering the crime’s circumstances and the criminal’s characteristics. This systematic approach mirrors the positivist view that laws are not merely moral guidelines but are enforceable commands backed by sanctions. By prescribing punishment based on factors like the criminal’s age, ability, and the specific context of the offense, the verse suggests that law’s authority lies in its capacity to objectively evaluate and respond to wrongdoing.

Role of the Sovereign in Enforcing Law

Legal positivism places the sovereign as the central figure responsible for enforcing law and maintaining order.

Manusmṛiti (Verse 8.302)

परमः यतलमातिष्ठेत् स्तेनानां निग्रहे नृपः ।
स्तेनानां निग्रहादस्य यशो राष्ट्रं च वर्धते ॥३०२॥⁴⁰

Word-by-word meaning: *paramam* — “supreme / utmost”; *yatnam* — “effort / exertion”; *ātisthet* — “should exert / should apply”; *stenânām* — “of thieves”; *nigrabe* — “in suppression / restraint”; *nṛpab* — “the king”; *stenânām* — “of thieves”; *nigrabât* — “by the suppression”; *asya* — “his”; *yasha* — “fame / glory”; *râstram* — “kingdom / realm / state”; *ca* — “and”; *vardhate* — “grows / increases.”

39 Rai Bahadur Srisa Chandra Vidyarnava (tr.), *The Yājñavalkya Smṛiti with the Commentary of Vijñāneśvara (Mitākṣarā)*, Vol. 21, verse 13.368, at 439 (*The Sacred Books of the Hindus Series*) (The Panini Office, Bahadurganj, Allahabad, 1918).

40 Manusmṛiti with the Commentary of Medhātithi, verse 8.302, Hindi/Sanskrit text available at: <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc201236.html> (last visited July 1, 2025).

Meaning: “Let the king exert himself to the utmost to punish thieves; for, if he punishes thieves, his fame grows and his kingdom prospers.”⁴¹

Interpretation: The king's role in enforcing law is linked directly to his success and reputation, highlighting the importance of the sovereign in maintaining legal order, consistent with positivist principles. This reflects the sovereign's responsibility in sustaining legal order through punishment and authority. According to legal positivism, the sovereign is the primary authority responsible for maintaining law and order, and the effectiveness of law depends on the ruler's commitment to enforcing it. Here, *Manusmṛiti* emphasizes that the king must be diligent in punishing wrongdoers (such as thieves), highlighting that his active enforcement of law strengthens his authority, enhances his reputation, and contributes to the stability and prosperity of his kingdom.

By linking the king's prosperity and fame with his commitment to law enforcement, the verse conveys that the sovereign's role is central to the legitimacy and function of law. This aligns with the positivist principle that law derives its power and order from the sovereign's active role in enforcement, showing that ancient Indian jurisprudence recognized the sovereign's duty to uphold justice as essential for a flourishing society.

सर्वतो धर्मषड्भागो राज्ञो भवति रक्षतः ।

अधर्मादपि षड्भागो भवतत्यस्य ह्यरक्षतः ॥३०४॥⁴²

Word-by-word meaning: *sarvataḥ* — “on all sides / everywhere”; *dharmā-ṣaḍbhāga* — “six-fold portion/aspect of dharma”; *rājño* — “of/for the king”; *bhavati* — “becomes / is”; *rakṣataḥ* — “(in) protection / by protecting”; *adbarmāt* — “from unrighteousness”; *api* — “also / even”; *ṣaḍbhāgaḥ* — “six-fold portion”; *bhavati* — “becomes”; *asya* — “his”; *hi* — “indeed / certainly”; *arakṣataḥ* — “from non-protection / by failure to protect.”

Meaning: “A king who (duly) protects (his subjects) receives from each and all the sixth part of their spiritual merit; if he does not protect them, the sixth part of their demerit also (will fall on him).”

Interpretation - This verse highlights the king's duty to enforce law as essential to his authority and moral standing. It conveys that a king who actively protects and

41 G. Bühler (tr.), *The Laws of Manu (Manusmṛiti)*, ch. 8, v. 302, at 130, in *The Sacred Books of the East*, Vol. 25, F. Max Müller (ed.) (Oxford University Press, 1886).

42 Manusmṛiti with the Commentary of Medhātithi, verse 8.304, Hindi/Sanskrit text available at: <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc201238.html> (last visited July 1, 2025).

upholds justice gains merit, while failure to do so results in shared blame for his subjects' wrongdoings. This aligns with the positivist view that the sovereign's role in enforcing law is foundational to societal order and the ruler's legitimacy.

In legal positivism, the sovereign's primary role is to maintain law and order, with the legitimacy and stability of law directly tied to the sovereign's commitment to enforcement. This verse from *Manusmriti* suggests that the king's legitimacy and moral integrity depend on his vigilance in law enforcement, implying that societal welfare is directly linked to his active protection. The verse supports the idea that the king's role in enforcing law is not only a social duty but a fundamental aspect of his moral authority, aligning with the positivist view that the sovereign's active enforcement of law is essential for maintaining justice and order.

Kautilya's Arthashastra

"As the duty of a king consists in protecting his subjects with justice, its observance leads him to heaven."⁴³

Interpretation: This statement places the king as *Dharmaprawartaka*, or the upholder of *Dharma*, solidifying his role as the enforcer of law—a role mirrored in legal positivism where the sovereign ensures adherence to legal order. The king's primary duty is to protect his subjects and uphold justice, a responsibility that directly ties the legitimacy of his rule to the effective enforcement of law. The king's *danda* (royal sceptre, symbolizing power and punishment) is not merely a symbol of authority but a tool for maintaining order and justice. The sovereign's failure to uphold justice or to protect his people leads to a breakdown of social order, rendering his authority ineffective.

This aligns with the legal positivist principle that the sovereign's role is crucial in the enforcement of laws, as laws derive their force from the authority of the sovereign. In Kautilya's view, the sovereign must use *danda* to enforce law impartially, ensuring both justice and social stability. If the sovereign fails in this duty, his rule becomes meaningless, reinforcing the idea that the law's effectiveness hinges on its enforcement by a legitimate authority.

Yajñavalkya Smṛiti (Verse 1.368)

ज्ञात्वापराधं देशं च कालं बलं अथापि वा ।
वयः कर्म च वित्तं च दण्डं दण्ड्येषु पातयेत् ॥⁴⁴

43 R. Shamasastri (tr.), *Kautilya's Arthashastra*, 1st ed., at 217–218 (Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

44 Yājñavalkya Smṛiti with Mitākāra (Sanskrit), ed. Patrick Olivelle, Verse 1.368 (2020), available at: <https://www.wisdomlib.org/hinduism/book/yajnavalkya-smriti-with-mitakshara-sanskrit/d/doc1643021.html> (last visited June 26, 2025).

Word-by-word meaning: *jñātvā* — “having ascertained”; *aparādham* — “offence / wrongdoing”; *desam* — “place”; *ca* — “and”; *kālam* — “time”; *balam* — “force / strength”; *atha api vā* — “or even then / or even so”; *vayah* — “age”; *karma* — “act / deed”; *ca* — “and”; *vittam* — “wealth / property”; *ca* — “and”; *dandam* — “punishment”; *dandyesu* — “upon those worthy of punishment”; *pātayet* — “he should inflict / mete out.”

“Ascertaining the crime, the place and the time as well as also the ability, the age, the act and the means (of the criminal, let the king) cause punishment to fall on those who deserve it.”⁴⁵

Interpretation: This verse also highlights the king's authority as the enforcer of *Dharma* (law and justice), a role that aligns closely with the positivist principle that law gains its legitimacy from sovereign command. As the sovereign, the king's power to punish wrongdoers is central to maintaining societal order. The directive that the king should “cause punishment to fall on those who deserve it” exemplifies Austin's concept of law as a command backed by coercive force, where compliance is achieved through the credible threat of sanctions. The king's discretionary authority to weigh various factors before deciding on punishment reflects a structured system of justice rooted in sovereign control, where the power to enforce law rests solely with the ruler.

The analysis of legal positivism in ancient India reveals a complex interplay between codified law, scholarly interpretation, and the integration of moral and religious principles. Ancient Indian legal traditions, including texts like the *Manusmriti*, *Yajñavalkya Smṛiti*, and *Arthashastra*, provide evidence of systematic and codified legal norms.

While ancient Indian legal traditions often integrated moral and religious teachings with legal norms, texts like the *Arthashastra* demonstrate a pragmatic approach to law that aligns with the principles of legal positivism. The focus on codification, systematic law, and practical legal practices reflects an early form of legal positivism in ancient Indian jurisprudence.

V. Comparative Analysis

Contemporary legal positivism, as articulated by theorists such as Jeremy Bentham and H.L.A. Hart, emphasizes the separation of law from morality, the importance of codified legal norms, and the role of legal institutions in interpreting and

45 Rai Bahadur Srisa Chandra Vidyarnava (tr.), *The Yājñavalkya Smṛiti with the Commentary of Vijñāneśvara (Mitākṣarā)*, Vol. 21, Verse 1.368, at 439 (The Panini Office, Bahadurganj, Allahabad, 1918).

enforcing the law.⁴⁶ Comparing ancient Indian legal traditions with these contemporary principles reveals both influences and deviations.

Ancient Indian texts such as the *Manusmriti* and *Arthashastra* exhibit elements of legal positivism through their codification and systematic presentation of laws. The emphasis on recording and organizing legal norms in these texts aligns with the positivist idea that law should be clearly defined and systematically applied. This is comparable to Bentham's advocacy for codified legal systems to ensure clarity and consistency in the law.⁴⁷ The systematic approach of texts like the *Yajñavalkya Smṛiti* and the *Arthashastra* reflects a structured understanding of law, similar to the positivist focus on organized legal frameworks. However, unlike contemporary positivism, these texts also integrate moral and religious principles, indicating a blend of legal and ethical considerations.⁴⁸

Contemporary legal positivism, as advanced by Hart, emphasizes the separation of law from morality. Hart's concept of the "separation thesis" argues that legal systems should be analyzed based on their own norms and structures, rather than their moral content.⁴⁹ Ancient Indian legal texts, such as the *Manusmriti* and *Arthashastra*, often interweave legal norms with moral and religious teachings. The *Manusmriti*, for instance, combines legal rules with moral duties and religious obligations, reflecting a more integrated approach to law and ethics.⁵⁰ The *Arthashastra*, while more pragmatic and focused on governance, still operates within a broader context of moral and philosophical considerations.⁵¹

In contrast, Roman law and Chinese Legalism exhibit a clearer separation between law and morality. Roman law, especially as codified in Justinian's *Corpus Juris Civilis*, focused on the systematic and pragmatic application of legal norms without extensive moral or religious integration.⁵² Similarly, the Legalist philosophy of ancient

46 J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche Books 2000); HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).

47 *Ibid.*

48 *Manusmriti*, trans. G. Bühler, in *The Sacred Books of the East*, Vol. 25, ed. F. Max Müller (Oxford University Press, Oxford, 1886) Ch. 8, pp. 130–132.; Kautilya, *Arthashastra*, trans. R. Shamasastri, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute, 1915).

49 H. L. A. Hart, *The Concept of Law* 268–276 (3rd edn., Oxford University Press, Oxford, 2012).

50 *Manusmriti*, trans. G. Bühler, in *The Sacred Books of the East*, Vol. 25, ed. F. Max Müller (Oxford University Press, Oxford, 1886) Ch. 8, pp. 130–132.

51 Kautilya, *The Arthashastra* 12–15 (1st edn., Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

52 A Stein, *Roman Law in European History* (Cambridge University Press 1999).

China emphasized the enforcement of codified laws with little regard for moral or religious considerations.⁵³

The role of scholars and legal experts in ancient India parallels contemporary legal positivism's emphasis on authoritative interpretation. The contributions of scholars such as *Vijnaneshvara* and *Kamandaka* demonstrate the importance of interpretation and application of codified laws. *Vijnaneshvara's* commentaries on the *Manusmriti* and *Kamandaka's* work on political ethics reflect the positivist view that legal norms require expert interpretation and application to be effectively implemented.⁵⁴

Differences and Similarities in Legal Thought

Similarities

Ancient Indian legal traditions, such as those found in the *Manusmriti* and *Arthashastra*, exhibit significant similarities with contemporary legal positivism in their emphasis on codified and systematic law. Both ancient Indian texts and modern positivist theories advocate for clear and organized legal norms. The role of scholars and legal experts in interpreting and applying laws in ancient India parallels contemporary positivist views on the importance of authoritative interpretation. Scholars like *Vijnaneshvara* and *Manu* contributed to the development and application of legal principles in a manner similar to modern legal theorists.

Differences

One of the primary differences between ancient Indian legal traditions and contemporary legal positivism is the integration of moral and religious principles with legal norms. Ancient Indian texts often blend legal rules with ethical and religious considerations, whereas contemporary positivism emphasizes the separation of law from morality and divine command. The *Arthashastra* represents a pragmatic approach to law, focusing on governance and administration, whereas other ancient Indian texts, like the *Manusmriti*, include extensive moral and religious content. This reflects a divergence from the normative focus of contemporary legal positivism, which prioritizes codified norms and systematic application over moral and religious integration.

Finding Roots of Legal Positivism in Ancient Indian Thoughts

Despite differences, the roots of legal positivism can be traced in ancient Indian legal thought. The emphasis on codification, systematic law, and the role of scholars in interpreting legal norms indicates an early form of legal positivism. While ancient

53 H Hsu, *Chinese Legalism: The Political Philosophy of Law* (Harvard University Press 2010).

54 *Vijnaneshvara* (n 28); *Kamandaka* (n 29).

Indian legal traditions often integrated moral and religious principles, the systematic approach to law and the role of authoritative interpretation reflect key elements of legal positivism.

Systematic Codification: The detailed and organized presentation of laws in texts like the *Manusmriti* and *Arthashastra* reflects an early attempt at systematic codification, a core principle of legal positivism. This emphasis on clear and organized legal norms aligns with the positivist focus on codified law.

Role of Scholars: The contributions of scholars in interpreting and applying legal principles demonstrate an early form of positivist thinking. The authoritative interpretation of codified laws by scholars such as *Vijnaneshvara* and *Kamandaka* highlights the importance of expert interpretation in ancient Indian legal traditions.

Pragmatic Approaches: The pragmatic approach of the *Arthashastra* indicates an early form of legal positivism, focusing on the practical implementation of laws and governance. This aligns with the positivist emphasis on the effective application of codified legal norms.

In conclusion, while ancient Indian legal traditions are characterized by a blend of legal, moral, and religious principles, they also exhibit significant elements of legal positivism. The emphasis on codification, systematic law, and the role of scholars in interpreting legal norms reflects the roots of positivist thinking in ancient Indian jurisprudence.

VI. Implications and Reinterpretations

The exploration of legal positivism in ancient Indian legal traditions carries profound implications for understanding the history and evolution of legal theory. By examining how ancient Indian texts and practices align with or diverge from the principles of legal positivism, scholars can gain deeper insights into the development of legal thought across different cultures and epochs.

Expansion of Legal Historical Narratives

Historically, the development of legal theory has been predominantly viewed through Western lenses, focusing on Ancient Greece, Rome, and Enlightenment Europe. The analysis of ancient Indian legal systems introduces a broader perspective, highlighting that sophisticated notions of legal codification and systematic law were present in other ancient civilizations.⁵⁵ The presence of detailed legal codes like the *Manusmriti* and *Arthashastra*, with their systematic approach to law, challenges

55 A Stein, *Roman Law in European History* (Cambridge University Press 1999).

the Eurocentric narrative of legal history and demonstrates that early forms of legal positivism were not confined to Western traditions.⁵⁶

The codification of laws and their systematic application in ancient India suggests that legal positivism, as a concept, may have emerged independently in various regions, reflecting a universal aspect of human legal development. This expansion of historical narratives emphasizes the need for a more inclusive view of legal history that acknowledges the contributions of diverse cultures and traditions.⁵⁷

Re-evaluation of Legal Theoretical Milestones

The inclusion of ancient Indian legal traditions in discussions about the history of legal positivism necessitates a re-evaluation of key milestones in legal theory. The traditional view often credits European thinkers such as Jeremy Bentham and H.L.A. Hart with the development of legal positivism, but the systematic approaches evident in texts like the *Arthashastra* and *Yajñavalkya Smṛiti* suggest that the roots of legal positivism may extend further back in history and across different cultures.⁵⁸ This re-evaluation challenges the assumption that legal positivism is a solely Western development and invites scholars to reconsider the global origins and evolution of legal thought.

Reinterpretation of Ancient Indian Legal Practices in Light of Modern Positivism

Re-evaluation of Codification and Systematic Law

The codification of laws in ancient Indian texts like the *Manusmṛiti* and *Yajñavalkya Smṛiti* can be reinterpreted through the lens of modern legal positivism. While these texts integrate moral and religious principles with legal norms, their emphasis on systematic codification and the organization of legal principles align with positivist ideals of clear and structured legal systems.⁵⁹ The systematic presentation of laws in these texts suggests that ancient Indian legal traditions were concerned with

56 Manusmṛiti, trans. G. Bühler, *The Sacred Books of the East* Vol. 25, edited by F. Max Müller (Oxford University Press, 1886); Kautilya, *Arthashastra*, trans. R. Shamasastri, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute, 1915).

57 A. L. Basham, *The Wonder That Was India* (Macmillan 1954).

58 H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).

59 Manusmṛiti, trans. G. Bühler, in *The Sacred Books of the East*, Vol. 25, ed. F. Max Müller (Oxford University Press, Oxford, 1886); Yājñavalkya Smṛiti, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368 in *The Sacred Book of the Hindus: The Yājñavalkya Smṛiti with the Commentary of Vijnāneśvara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918).

creating a coherent legal framework, similar to the goals of modern legal positivism.⁶⁰

The pragmatic approach of the *Arthashastra*, which focuses on effective governance and legal administration, can also be viewed through a positivist lens. The text's detailed guidelines on legal procedures and administration reflect a systematic approach to law, emphasizing practical implementation and effectiveness over moral or religious considerations. This pragmatic approach aligns with the positivist emphasis on the practical application of codified laws.⁶¹

Role of Scholars and Interpretation

The role of scholars and legal experts in ancient India, as exemplified by figures like, *Vijnaneshvara*, *Kamandaka*, and *Jimutvahana*, can be reinterpreted in light of modern positivist thought. The authoritative interpretation of codified laws by these scholars reflects the positivist view that legal norms require expert interpretation and application to be effectively implemented.⁶² This role of scholars in interpreting and applying legal principles highlights the continuity of certain positivist ideals in ancient Indian legal traditions.

Integration of Morality and Religion

The integration of moral and religious principles with legal norms in ancient Indian texts presents a challenge to the strict separation of law and morality proposed by modern legal positivism. However, this integration also offers a nuanced perspective on how legal systems can incorporate ethical considerations while still maintaining a focus on codified norms. The blending of legal, moral, and religious principles in texts like the *Manusmriti* and *Arthashastra* reflects a complex relationship between law and ethics that can inform contemporary discussions about the role of morality in legal systems.⁶³

60 *Kautilya, Arthashastra*, trans. R. Shamasastri, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute, 1915).

61 *Ibid.*

62 *Yājñavalkya Smṛiti*, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368 in *The Sacred Book of the Hindus: The Yājñavalkya Smṛiti with the Commentary of Vijnāneśvara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918); R. Shamasastri (tr.), *Nītiśāra of Kāmandaka* (Motilal Banarsidass, Delhi, 1989).

63 *Manusmriti*, trans. G. Bühler, in *The Sacred Books of the East*, Vol. 25, ed. F. Max Müller (Oxford University Press, Oxford, 1886); *Kautilya, Arthashastra*, trans. R. Shamasastri, 1st ed. (Sri Jayachamarajendra Oriental Research Institute, Mysore, 1915).

Contributions to the Legal History and Philosophy

Enriching Comparative Legal Studies

The study of legal positivism in ancient Indian legal traditions enriches comparative legal studies by providing a broader understanding of how legal systems evolve and function across different cultures. Comparing ancient Indian legal systems with those of Greece, Rome, and China reveals both commonalities and differences in legal thought, contributing to a more nuanced understanding of legal development. This comparative approach highlights the diverse ways in which legal systems address issues of codification, interpretation, and the relationship between law and morality.

Broadening Theoretical Perspectives

The analysis of ancient Indian legal practices contributes to broader theoretical perspectives in legal philosophy. By incorporating insights from ancient Indian legal traditions, scholars can develop more comprehensive theories of legal positivism that account for diverse historical and cultural contexts. This broader perspective challenges the notion that legal positivism is a monolithic or exclusively Western concept and encourages a more inclusive understanding of legal theory.

Informing Modern Legal Reforms

Insights from ancient Indian legal traditions can inform modern legal reforms by providing historical perspectives on issues such as codification, legal interpretation, and the role of morality in law. For instance, the pragmatic approach of the *Arthashastra* to governance and legal administration offers valuable lessons for contemporary legal systems seeking to balance efficiency with fairness.⁶⁴ Similarly, the role of scholars in interpreting and applying legal principles in ancient India highlights the importance of expert interpretation in modern legal contexts.

India's Contribution to Legal Positivism

India's contribution to the development of legal positivism can be seen in the systematic and codified approach to law evident in its ancient legal texts. The emphasis on clear and organized legal norms, as well as the role of scholars in interpreting and applying these norms, reflects key elements of legal positivism. While ancient Indian legal traditions integrate moral and religious principles with legal norms, they also exhibit significant elements of positivist thought, such as the focus on codification, systematic law, and practical implementation.

64 *Kautilya, Arthashastra*, trans. R. Shamasastry, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute, 1915).

Ancient Indian texts like the *Manusmṛiti* and *Arthashastra* demonstrate India's contribution to legal positivism through their systematic codification of laws and organized legal frameworks. These texts provide early examples of how legal norms can be codified and systematically applied, contributing to the development of legal positivism as a theoretical framework.⁶⁵ The pragmatic approach of the *Arthashastra* to governance and legal administration reflects India's contribution to the practical application of legal positivism. The text's focus on effective governance and detailed guidelines on legal procedures highlight the importance of pragmatic considerations in the development of legal systems.⁶⁶

The role of scholars such as *Vijñāneshvara* and *Kaṇḍakīya* in interpreting and applying legal principles underscores India's contribution to legal positivism. Their work reflects the positivist view that legal norms require expert interpretation and application, contributing to the broader understanding of legal positivism across different cultures and historical contexts.⁶⁷

Thus, the study of legal positivism in ancient Indian legal traditions reveals significant contributions to the development of legal theory and offers valuable insights for understanding the evolution of legal thought. By reevaluating ancient Indian legal practices in light of modern positivism and exploring India's contributions to legal positivism, scholars can develop a more inclusive and nuanced understanding of legal history and philosophy.

VII. Conclusion

The research undertaken herein establishes a robust foundation for recognizing ancient Indian legal thought—specifically as articulated in *Manusmṛiti*, *Kaṇḍakīya's Arthashastra*, and *Yājñavalkya Smṛiti*—as containing principles integral to what we now define as legal positivism. The convergence of these texts on key positivist concepts, such as the authority of sovereign command, the necessity of enforceable

65 *Manusmṛiti*, trans. G. Bühler, in *The Sacred Books of the East*, Vol. 25, ed. F. Max Müller (Oxford University Press, Oxford, 1886); *Yājñavalkya Smṛiti*, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368, in *The Sacred Book of the Hindus: The Yājñavalkya Smṛiti with the Commentary of Vijñāneshvara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918).

66 *Kaṇḍakīya, Arthashastra*, trans. R. Shamasastri, 1st ed. (Mysore: Sri Jayachamarajendra Oriental Research Institute, 1915).

67 *Yājñavalkya Smṛiti*, trans. Rai Bahadur Srisa Chandra Vidyarnava, Verse 1.368, in *The Sacred Book of the Hindus: The Yājñavalkya Smṛiti with the Commentary of Vijñāneshvara*, Vol. 21 (The Panini Office, Bahadurganj, Allahabad, 1918); R. Shamasastri (tr.), *Nītiśāra of Kāṇḍakīya* (Motilal Banarsidass, Delhi, 1989).

Note; 'All Sanskrit glosses follow IAST transliteration and mentioned with the meaning of each word below the respective footnotes of which Original Devanagari line is there in main body of the text throughout the paper.

sanctions, and the deliberate separation of law from personal morality, supports the thesis that the roots of legal positivism were indeed present in ancient India.

Throughout *Manusmriti*, we find verses that underscore the role of law as an independent system distinct from individual morality. For instance, *Manusmriti* 2.10 emphasizes that law (*Dharma*) derives its authority solely from the Vedas and Smriti, beyond personal moral interpretation, paralleling positivism's insistence on law as a rule-based system free from subjective values. Additionally, *Manusmriti* 7.17 and 7.18 further reinforce the notion of law as the sovereign's command, whereby punishment (*Danda*) serves as the embodiment of the king's authority, ensuring adherence to law across all social strata.

Kautilya's Arthashastra advances this separation of law and morality with a pragmatic, rational approach. In cases of conflict between sacred law and rational law, *Arthashastra* advocates that reason should prevail (*Arthashastra*, Book III), a clear indication of law's function as a tool for governance rather than moral guidance. This rational framework is complemented by *Arthashastra's* emphasis on *Danda* as the central mechanism of rule. In Book 3, *Arthashastra* asserts that "power alone" (embodied in punishment) sustains social and cosmic order, so long as the sovereign applies it impartially, without personal bias, thus highlighting law's objective nature as distinct from moral influence.

Similarly, *Yajnavalkya Smriti* provides critical insights into the sovereign's role in law enforcement and the structured use of punishment to maintain order. Verses such as 13.331 and 13.366 position the king as both the enforcer of *Dharma* and the impartial administrator of *Danda*, supporting the positivist framework where legal order stems from the sovereign's authority, independent of personal morality. This objective stance is further exemplified in 13.368, where the king's enforcement of law is shown to be central to his legitimacy and the stability of the kingdom.

In synthesizing these ancient texts, we see that ancient Indian jurisprudence not only prefigured but also operationalized key tenets of legal positivism. Law was seen as the command of a sovereign authority, valid by virtue of its source rather than its moral content, and supported by systematic enforcement. This convergence suggests that legal positivism, often attributed to Western legal theorists, has deeper historical roots that extend to the early jurisprudence of ancient India. By acknowledging this legacy, we gain a more nuanced understanding of the development of legal thought, one that transcends geographical and cultural boundaries, underscoring the universal pursuit of structured legal systems governed by authority, reason, and enforcement.

This study thus contributes to a growing body of research that re-evaluates legal positivism through a global lens, situating ancient Indian texts not as mere precursors but as foundational texts that shaped core principles of legal theory.

DHARMA AND LAW: EXPLORING DEVELOPMENT OF BHARATIYA JURISPRUDENCE THROUGH DHARMASHASTRA AND ARTHASHASTRA

Souvik Dhar & Sushil Dhakal**

Abstract

In this paper, the intricate relationship between *Dharma* and Law within Indian or *Bharatiya* Jurisprudence is discussed with a focus on *Dharmashastra* and *Arthashastra*. The *Dharmashastras* focused on the ethical principles and moral duties of individuals. In contrast, Kautilya's *Arthashastra* exhibited a more functional approach to governance, whereby the role of law was oriented to statecraft in balancing material prosperity with virtuous governance. The paper discusses the philosophy of law laid out in these texts, which impress upon the king the duty of maintaining *Dharma* in conducting the affairs of the state pragmatically. This paper examines the legal philosophy in the two texts and articulates an ancient, holistic Indian jurisprudence, wherein what is ethical is not pitted against what is practical but is considered an essential counterpart for societal benefit. This continues to bear relevance to modern Indian legal and political thought in that the tension remains alive in contemporary jurisprudence in its continued tug of war between secularism and religious morality. This study offers an understanding of how ancient *Bharatiya* jurisprudence balanced demands for justice with moral and spiritual guidance, from which some useful lessons are possible for the modern legal system.

Keywords: *Bharatiya Jurisprudence, Dharma, Dharmashastra, Arthashastra, Philosophy*

I. Introduction

II. *Bharatiya* Jurisprudence and *Dharma*: The Ancient Fusion of Religion, Ethics, and Law

III. *Dharmashastra* and *Arthashastra*: Ancient Indian Legal and Political Texts

IV. Conclusion

I. Introduction

FOR A long time, the relationship between religion, ethics, and law has generated controversy and debate. The general debate usually revolves around whether these three realms can be integrated into one or should be kept separate. Many ancient legal systems, including Hindu law and Canon law, combined these components

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and thus used a religious-ethical-legal amalgam to regulate their societies. For it was this overlap of territories in some philosophies that indeed built the moral and legal structure for those times. However, this superimposition of religion and ethics into law has come under attack, especially in later times, as many seek to enforce a secular legal system. Ancient *Bharatiya* jurisprudence was guided by *Dharma*, wherein legal, moral, and religious principles intertwined to maintain social order and justice. This structure has been guided by divine Shrutis and detailed Smritis. It has followed most ancient systems, such as Egyptian and Mesopotamian systems. *Dharma* has played an important role in evolution from religious dictates to procedural justice, especially relevant in the multi-religious context of India. Before exploring *Dharma* in *Bharatiya* jurisprudence and the impact of *Dharmashastra* and *Arthashastra*, it is useful to briefly consider Canon law and other religiously inspired Western legal traditions to find the relevancy of religiously-inspired laws in other legal system, and philosophical roots-which have determined the interaction of religion, ethics, and law.

Canon Law in Medieval Europe: An Insight

If the historical context of this discussion is to be integrated, an analogy has to be made with how Canon law functioned in medieval Europe. In that era, the Church commanded much power, not only in matters relating to religion but also in many aspects of civil life.¹ The Church claimed jurisdiction over a number of issues which, for our purpose, would be considered to come within the ambit of civil law.² For example, marriage issues, inheritance, and morality matters were all resolved in the ecclesiastical courts, and it was a state duty to give effect to such decisions.³

This resulted in a regime of dual authority in which the Church and the secular state each held sway over an independent sphere of life.⁴ Thus, in England, for instance, the state supported the writs of the ecclesiastical authorities, backing them up with excommunication, which brought along with it grave civil disabilities, a person so condemned could neither sue nor give testimony in a court of law.⁵ This illustrates the intimate bond among religion, ethics, and law. With the reformation and the establishment of the Church of England, that control over spiritual and temporal matters began to break down. By then the nationalization of the Church's

1 J. A. Coriden, *An Introduction to Canon Law* 10-33 (A&C Black, 2004).

2 *Ibid.*

3 *Ibid.*

4 Margaret M Acton, *The Christian World: A Global History* 88 (Edinburgh University Press, 2009).

5 Franklyn C. Setaro, "A History of English Ecclesiastical Law (Part II)" 18 *Boston University Law Review* 342 (1938).

law and the narrowness of the jurisdiction of ecclesiastical courts had come to pass.⁶ Similarly, the separation of church and state, perhaps one of the keystone principles of the modern legal regimes, had acquired new momentum.

The law of governance of the Christian Church, Canon law, binds them inextricably together with religious doctrine.⁷ What held them together was the philosophy that law manifests divine will and following the law constitutes a moral and religious duty. In the Hindu as well as in Canon law, the philosophy behind this fusion was that of believing that law, ethics, and religion are inseparable.⁸

This perspective emphasizes the idea that these three elements are fundamentally interconnected, reinforcing the notion that their integration is both natural and essential. The law was seen as a tool to propound the moral and religious virtues, which would ensure that society would follow a higher order. That philosophy still hangs in Indian thought, although the legal system has moved fundamentally toward a secular paradigm.

The Renaissance and the Rise of Secular Law

The turning point in the history of law and philosophy came with the Renaissance.⁹ It was at this point that the belief in reason took its hold, developing legal theories divorced from theology. Influenced now by the thought of the enlightenment, Protestant jurists and theologians spoke for a law which owed everything to reason and humanistic principles.¹⁰ Quite a deviation from the earlier perception that law was basically an extension of divine will.

But all this did not happen in India, where the intermixture of religion with ethics and law persisted longer on account of the early crystallization of ancient beliefs and the high volume of international commerce.¹¹ By contrast, in many Western systems morals and law were gradually separated from theology; in India, this separation was slower and more contingent.¹²

6 John Richard Humpidge Moorman, *A History of the Church in England* 3-10 (Church Publishing, Inc., 1980).

7 *Supra* note 1.

8 Purusottama Bilimoria, Joseph Prabhu and Renuka M Sharma, *I Indian Ethics: Classical Traditions and Contemporary Challenges* 57-78 (Ashgate Publishing, Ltd 2007).

9 Donald R Kelley, "The Rise of Legal History in the Renaissance" 9 *History and Theory* 174 (1970).

10 *Ibid.*

11 Arvind Sharma and Madhu Khanna, *Asian Perspectives on the World's Religions after September 11* (Bloomsbury Publishing USA 2013).

12 *Ibid.*

The Modern Perspective

One issue still openly at hand seems to be that of the relation of religion to ethics and the law. The case for the separation of domains is very strong on at least one basis—namely, that the law should be neutral and anchored in universal principles rather than in any particular doctrine of religion.¹³ This is particularly the case within more secular democracies that view such separations between church and state as integral in terms of protecting individual freedoms from a perceived tendency to impose one particular world religious view on the public.¹⁴ Another camp insists that religion and ethics have no business in the formal statement of the law.¹⁵ They view the role of the law as being an embodiment of the people's moral codes, mostly motivated by religious perceptions.¹⁶ The law is not basically, in their opinion, a system of rules but a guide whereby men can be led through a virtuous life.¹⁷

The tendency in legislative laws and order was, in fact a movement of many diversified civilizations towards centralization: divine authority concerning the role of the king and justice existed both in Egypt and Mesopotamia; in Greece, this emphasis fell on the direct citizen's involvement, whereas in Rome - a certain development towards the more complex and organized system by means of legal institutions. Of greatest importance to the evolution of the legal system in medieval England are developments in judicial centralization under the monarchy.

The ancient judicial systems almost universally shared an integration of legal and moral norms: *Dharma*, religious principles, stood at the centre of ancient Indian justice, while Egyptian and Mesopotamian justice alike were tied to religious and cosmic order. The history of legal systems has generally been characterized by a progressive shift from religious and moral dictates to procedural and institutional modes of doing justice. It has special relevance in India, which has multiple religious contexts. Though the Indian legal system works under secularism, it is highly influenced by religious norms and principles, even personal law. Therefore, laws in India form part of an ambiguous atmosphere where the distinction among religious grounds, ethics, and law itself is not really sharp.

13 Roger Trigg, *II Religious Diversity: Philosophical and Political Dimensions*, 4-23 (Cambridge University Press 2014).

14 Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* 10-50 (Open Road Media, 2014).

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

II. *Bharatiya* Jurisprudence and *Dharma*: The Ancient Fusion of Religion, Ethics, and Law

Bharatiya jurisprudence traces back to ancient Indian law and governance, which was deeply related to ethical, religious, and legal principles.¹⁸ The vortex of this framework was the proposition for the maintenance of social order, justice, and righteousness commonly known as *Dharma*.¹⁹ It is a moral-ethical duty and the order governing human beings both individually and socially, thus the basis of this system to govern personal conduct and public administration.²⁰ While *Smritis* were the source from which detailed social and legal guidelines were drawn, *Shrutis* were held to be the divine revelations that formed the basis of religious laws.²¹

The concept of *Nyaya*, or Justice, in *Bharatiya* jurisprudence has been essentially related to just order and welfare in society. Rulers were the main dispensers, though their decisions were often guided by advice of learned people.²² Panchayats, or village councils, were accorded local self-government for settling disputes with community consensus in order to maintain law and order.²³

The system tilted toward reconciliation and compensation rather than punishment. Such a system favoured restorative justice. This fell in tune with the ethical and spiritual conceptions of *Bharatiya* jurisprudence, where the legal norms had to fall in line with the higher purpose of leading one's life according to *Dharma*.²⁴ There was a flexibility within *Bharatiya* jurisprudence that allowed the same to accept newer ideas, while concomitantly sticking to its principles at root.²⁵ Such a blending of religion and ethics with law was fairly common in ancient societies. This was not an accident but a creation of the belief systems that existed both philosophically and culturally at that period of time.

For present purposes, 'Hindu' and 'Bharatiya' jurisprudence are treated as broadly overlapping, given their shared roots in Vedic, *Smriti*, and customary sources because both refer to the legal principles and rules derived from Hindu religious texts, customs, and traditions that have historically governed societal conduct in India. To illustrate, in Hindu law, its source code of laws was the sacred texts like *Vedas*

18 S. Bhavya, "Dharma under Indian Jurisprudence", 5(2) *Indian Journal of Law & Legal Research* 1 (2023).

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 S. Varadachariar, *The Hindu Judicial System* 39-64 (Lucknow University, 1946).

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

and *Dharmashastras*.²⁶ These had set standards not only for spiritual behaviour but even for social and legal conduct.²⁷

**प्रजा सुखं राज्ञः प्रजानां च हिते हितम् ।
नात्मप्रियं हितं राज्ञः प्रजानां तु हिते हितम् ॥²⁸**

Word-by-Word-Meaning - प्रजासुखे (*prajā-sukhe*) — “in the happiness of the subjects”; सुखं (*sukham*) — “happiness/well-being”; राज्ञः (*rājñā*) — “of the king”; प्रजानाम् (*prajānām*) — “of the subjects”; (ca) — “and”; हिते (*hite*) — “in the welfare/benefit”; हितम् (*hitam*) — “the good / benefit”; न (*na*) — “not”; आत्मप्रियं (*ātma-priyam*) — “what is pleasing to oneself”; हितम् (*hitam*) — “good / beneficial”; राज्ञः (*rājñā*) — “of the king”; प्रजानाम् (*prajānām*) — “of the subjects”; तु (*tu*) — “rather / indeed”; हिते (*hite*) — “in (their) welfare”; हितम् (*hitam*) — “(is) the good/the right course.”

Meaning - In the happiness of the subjects lies the happiness of the King and in what is beneficial to the subjects his own benefit. What is dear to him is not beneficial to the King, but what is dear to the subjects is beneficial to him.²⁹

Fusion of *Dharma* and Law: An analysis

Criticism on the ground of admixture of religion and ethics with law is from the modern jurisprudence perspective. One of the popular thinkers, Sir Henry Maine, a legal historian, severely criticized Hindu jurisprudence to be influenced by abstract theories in philosophy and religion.³⁰ Indeed, according to him, Hindu law failed to distinguish between religious and civil obligations treating religious delinquencies as civil wrongs and *vice versa*.³¹ According to Maine, this reflects his lack of differentiation, just as an early civilization in which the elements of legal principle and religious dogma are not differentiated.³²

What Maine’s criticism reflects is part of a general body of skepticism toward legal systems that do not clearly differentiate religious and civil spheres.³³ Modern legal thought can stress both separation of church and state and also the argument that in form and substance, law should be premised on reason and universal

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Kautilya, *Arthashastra* 1.19.34

²⁹ Dr. Sunita Devi, “Economic and Social Welfare in Kautilya’s Arthashastra” 3(12) *International Journal of Social Science and Economic Research* 7205 (2018).

³⁰ RC Majumdar (ed), *The History of Bengal: Vol. 1. Hindu Period*. 263-284 (University of Dacca, 1943).

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

principles rather than religious doctrine. This kind of attitude is one of the products of the Enlightenment: It was during this period that reason and scientific inquiry started to contest traditional religious authority seriously.

The Concept of *Dharma* in Hindu Jurisprudence

Understanding political and judicial systems in ancient Hindu society depends upon properly understanding the meaning of the term *Dharma*. This is a complex term within the Hindu worldview that unites legal, ethical, and religious dimensions together, never parallel to any one system within Western understandings of the law. However, in English, there exists a word separation in the dual meanings of the legal-evidence base and the ethical-evidential definitions; there is no single Sanskrit term that corresponds exactly to this narrow, secularised notion.³⁴ It is a relation engendered by texts such as the *Manusmṛiti*, first mistakenly viewed by Sir Henry Maine as a code of rigid law on par with the Roman legal texts. A little deeper reflection, however, and Maine soon realized that it was like Leviticus in the Bible, in that both had been meant to govern one's whole life religiously, ethically, legally. The holistic approach to law and ethics of the ancient Hindu state defined both the character of the latter itself and its legal system, where often the line separating religious morality from legal obligation was blurred.

In the Hindu sense, *Dharma* is not purely a legal concept but a guiding principle in all aspects of life. Defined in so many ways according to context, it means generally duties, rights, laws, conduct, virtues, and "the right way of living" that ensures worldly welfare and spiritual salvation.³⁵ This double orientation to worldly and spiritual well-being makes *Dharma* contrast, for instance, with the merely secular laws, which as a rule deal only with the regulation of social behaviour and protection of rights.³⁶ *Dharma* is supposed to be what secures visible and invisible goods, worldly goods and spiritual good.³⁷ It signifies the standard of conduct for individual members of the Aryan community, their castes, and stages of life. As a result, *Dharma* penetrates deep into the socio-cultural dimensions of Hindu society with a meticulous check on individual behaviour and state governance.

राज्ञः सर्वधर्मः स्वगार्यं प्रजा धर्मेण रक्षितुः ।
आरक्षितुर्वा क्षेप्तुर्वा मिथ्यादण्डम् अतोऽन्यथा ॥³⁸

34 Ingo Strauch, "The Legal Term *Dharma* and Documentary Evidence in Early Indian Law: A Closer Look into the Intertextuality of *Dharma*-and *Arthashastra*" *Studies in Indian culture and Literature (Festschrift Heidrun Brückner)* 345 (2015).

35 *Supra* note 30.

36 *Ibid.*

37 *Ibid.*

38 Kautilya, *Arthashastra* 3.1.41.

Word-by-Word-Meaning - राजः (*rājā*) — “of the king”; सर्वधर्मः (*svadharma*) — “own duty”; स्वर्गार्थः (*svargārtha*) — “for/leading to heaven”; प्रजा (*prajā, prajā*) — “the subjects, people”; धर्मेण (*dharmena*) — “by dharma/by just law”; रक्षितुः (*rakṣituh*) — “(by) protecting/of the protector”; आरक्षितुः (*araksitu*) — “(of one) not protecting/failing to protect”; वा (*vā*) — “or”; क्षेप्तुः (*kṣeptu*) — “(of one) oppressing/harassing/maltreating”; वा (*vā*) — “or”; मिथ्यादण्डम् (*mithyā-dandam*) — “unjust/false punishment”; अतः (*ata*) — “therefrom/therefore”; अन्यथा (*anyathā*) — “otherwise”.

Meaning - Carrying out his duty by the King, who protects the subjects according to law, leads to heaven; of one who does not protect or who inflicts an unjust punishment, the condition is the reverse of this.

The role of the state in upholding *Dharma*

In ancient Hindu society, the state had a very important role to play in the maintenance and enforcement of *Dharma*. The function of the state was not confined to the maintenance of law and order in the secular sense but extended to supervision over the moral and spiritual life of its subjects.³⁹ Its authority was invoked to forestall deviations from *Dharma*, including breaches of civil rights, moral delinquencies, and lapses of an ethical nature.⁴⁰

पांसुन्यासे रथ्यायामस्थाने दण्डः पन्थःसंरोधे पादः ।

राजमार्गे द्विगुणः ॥⁴¹

Word-by-Word-Meaning - पांसुन्यासे (*pāmsu-nyāse*) — “in the depositing/placing of dust, rubble, earth”; रथ्यायाम (*rathyāyām*) — “on a street/road”; स्थाने (*asthāne*) — “in an improper place/where it should not be”; दण्डः (*dandah*) — “a fine/penalty”; पन्थःसंरोधे (*panthah-samrodhe*) — “in/for obstruction of the way (public thoroughfare)”; पादः (*pādah*) — “a quarter (one-fourth)”; राजमार्गे (*rāja-mārgē*) — “on the king’s highway/royal road”; द्विगुणः (*dvigunah*) — “double (the amount).”

Meaning - For throwing dirt on the road the fine should be one-eighth of a pana, for blocking it with muddy water, one quarter. On the royal highway, the fines should be double.

The *Dharmashastras*, or the treatises laying down the principles of *Dharma*, also discussed the duties of the king and the state at some length.⁴² It underlined in clear terms that the paramount duty of the king is to see that his subjects followed their *Dharma*.⁴³ His responsibilities in this regard were not confined to the simple

³⁹ *Supra* note 18.

⁴⁰ *Ibid.*

⁴¹ Kautilya, *Arthashastra* 2.36.26, 27.

⁴² *Supra* note 18.

⁴³ *Ibid.*

administration of justice but extended to the spiritual and moral well-being of the people.⁴⁴ Even Kautilya, who otherwise is one of the most significant exponents of ancient Indian political thought, accepted that the king's duty lay only in preventing people from deviating from their *Swadharma* (i.e., own duty) and in administering justice in a manner supportive of the realisation of *Dharma* (righteousness), *Artha* (prosperity), *Kama* (pleasure) and *Moksha* (liberation).⁴⁵

***Dharma*: The intersection of law, morality, and religion**

The concept of *Dharma* thus reflects the complicated interrelation of law, morality, and religion in ancient Hindu society.⁴⁶ The state was supposed to function in harmony with the existing order of cosmos presumed to uphold the world-*Lokadharana*, i.e., sustaining the world.⁴⁷ This assumption underlined the State's duty to safeguard civil rights while implementing moral and religious norms. Although there would be a close linkage institutionally between law and religion, the Hindu state was not a theocracy.⁴⁸ The king's duty as the upholder of *Dharma* did not make him a religious leader or a priest.⁴⁹ The Brahmins, as the traditional depositaries of religious knowledge, did not take a direct part in the administration under the king, although they might serve in an advisory or even official capacity.⁵⁰ That separation of religious authority from political power marked the difference between the Hindu state and a pure theocracy.⁵¹ In pure theocracy, the clergy has immediate command over the government.

Although emanating from ancient Hindu thought, the principles of *Dharma* continue to analyze many of the modern discussions of law, ethics, and governance.⁵² In a world in which legal systems are becoming highly secular, the idea of moral and spiritual considerations being integrated should be something from which there is much to learn. *Dharma*, on the other hand, has a holistic approach, embracing the concept of well-being in both this and the next life.⁵³ As many societies worldwide grapple with issues of justice, morality, and governance, a return to this concept ushered in by *Dharma* may provide a framework through which to consider how

44 *Ibid.*

45 *Supra* note 30.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

the laws could be designed for the assurance not only of social order but also of moral and spiritual well-being. It was an ancient concept that sharply contrasts with the modernist separation of law, ethics, and religion - a bond that might actually bring about a more just and harmonious society.⁵⁴

The role of *Manusmriti* in the Indian legal system

Manusmriti has been a site of reverence as well as criticism. It is an elaborate treatise that contains minute details about the three objects of human life-law, ethics, and social duties.⁵⁵ K.P. Jayaswal asserted that the *Manusmriti* represents a new Brahminical strategy to dominate the legal sphere. K.P. Jayaswal's theory has to reckon with several difficulties.⁵⁶ First, the fact that secular legal subjects were already dealt with, if not in the same comprehensive manner, in previous *Dharmasutras* by Gautama, *Baudhayana*, and *Apastamba* - works prior to the *Manusmriti* - showed that secular and religious law had not been divided as sharply as K.P. Jayaswal proposed.⁵⁷ K.P. Jayaswal will support his contention on the premise that in the line of *Dharmashastra*, *Manusmriti* is the first systematic treatment and modification to suit the Brahminical ends of the purely worldly law hitherto left to the *Arthashastras*.⁵⁸ It was, however, this very integration that made it a specific point in history when religious authority began to have greater sway over the legal matters of Hindu jurisprudence.⁵⁹ *Manusmriti* itself is cited in texts like Kautilya's *Arthashastra*, which implies that some version of Manu's teachings dated back long before the Sunga period.⁶⁰ This fact suggests a problem with K.P. Jayaswal's assertion that the *Manusmriti* represents a new Brahminical strategy to dominate the legal sphere.⁶¹

It is supposed that the growth of law in ancient India, similar to many ancient civilizations, was gradual, intermingled with religion and ethics. Legal rules in the first instance must have been embedded in wider religious and ethical precepts constituting the dominant subject matter of the early *Dharmashastras*.⁶² With the increase in complexity within society, the need for more specialized legal codes must have grown, prompting the development of secular law found within the

54 *Ibid.*

55 MV Moorthy, "Philosophy Of Social Work In Changing India" *Social Work Profession in India: An Uncertain Future* 12 (2014).

56 *Ibid.*

57 *Ibid.*

58 *Supra* note 30.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 Sunil Sondhi, "The Dharmasastra and Modern Law Letter and Spirit of Law in Indian Tradition" *SSRN Electronic Journal* 1-25 (2024).

Arthashastras.⁶³ It could be a part of evolution when these laws were integrated into *Manusmriti*.

Rather than considering *Manusmriti* to have been a conscious Brahminical invasion of secular law, it was better to consider it an effort in the direction of providing a unified and more comprehensive legal system that is reflective of the social and religious realities in those times.⁶⁴ In putting elements of secular law into a *Dharmashastra*, the *Manusmriti* was arguably trying to make certain that the legal and moral codes were on the same page to provide a more cohesive framework in which society could operate.⁶⁵ But the exact form and range of its influence on the secular law is a matter of dispute.⁶⁶ Scholars remain divided on the very chronology of *Manusmriti* and argue whether it is really representative of the Sunga period or that of an earlier age.⁶⁷ The various versions of the text, together with the unavailability of any previous version, make it difficult to determine exactly how much the *Manusmriti* altered or expanded the existing legal code at the time.⁶⁸

III. *Dharmashastra* and *Arthashastra*: Ancient Indian Legal and Political Texts

The two major works in ancient Indian literature are the *Dharmashastra* and *Arthashastra*, which give valuable pieces of information on ancient India's legal, social, and political thought. The word *Dharmashastra*, generally translated as "science of righteousness," denotes a body of Sanskrit texts that give guidelines with regard to religious duties, social responsibilities, and legal conduct based on the concept of *Dharma* - the moral and ethical code that governs human behaviour.⁶⁹ These are texts that have been written over many centuries and include texts such as the *Manusmriti*, the *Yajnavalkya Smriti*, and the *Narada Smriti*.⁷⁰ *Arthashastra*, attributed to Kautilya, also known as Chanakya, and is a treatise on statecraft, political economy, and military strategy.⁷¹ If *Dharmashastra* is mainly concerned with the moral and ethical dimensions of life, the main concern of *Arthashastra* is with the practical

63 Werner Menski, *Hindu Law: Beyond Tradition and Modernity* 3-36 (Oxford University Press 2009).

64 *Supra* note 30.

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 Ashok Bachhar, and Alope Bachhar, "Kautilya's Political and Economic Thought." in Dr. Amit Kumar Mandal, et. al. (eds), *India And The World*, 834-840 (Authorspress, 2023).

71 *Ibid.*

aspects of governance and the acquisition of power.⁷² Together, these texts offer something of a complete picture of ancient *Bharatiya* jurisprudence, where the moral does intermingle with the practical.

The *Dharmashastras* and *Arthashastras* were two archetypal writings on moral, ethical, religious, and functional governance in ancient Hindu society. Whereas the former remained principally concerned with moral, ethical, and religious duties, the latter was more concerned with statecraft, politics, and pragmatic administration.⁷³ Such an interrelationship between these two works depicts an involved relationship whereby religion, ethics, and the law intertwined and at certain points clashed.⁷⁴

In fact, Dr. Johann Georg Bühler and K.P. Jayaswal, scholars of ancient Indian law and polity, have debated the origins and development of secular law within these texts.⁷⁵ K.P. Jayaswal, following upon a suggestion of Dr. Bühler, advanced the theory that secular law originally developed in the schools of politicians and statesmen-in short, in the *Arthashastras* - rather than in the *Dharmashastras*.⁷⁶ As this hypothesis goes, the *Manusmriti*, a mainstream *Dharmashastra*, marked a serious digression where religious law started to impinge on the sphere of secular law. According to K.P. Jayaswal, in so doing, it was partially motivated by the growth of Brahminical ascendancy, especially under the *Sunga* dynasty, to amalgamate religious tenets within the state legal system.⁷⁷

Dharmashastra: The moral and ethical foundations of Bharatiya Jurisprudence

Dharmashastra is the bedrock on which *Bharatiya* jurisprudence rests and provides a moral and ethical framework of an individual and society.⁷⁸ The idea of *Dharma*, though central to these texts, is more than religious duty; in fact, it represents the whole range of moral, social, and legal requirements. *Dharma* is regarded as eternal law, dictating the practice of individuals and the dispensation of justice. Among other aspects of *Dharma*, the *Manusmriti* was one of the most important *Dharmashastra* texts dealing with various details about varna, or different social classes; ashrama, meaning stages of life; and principles of justice.⁷⁹ It calls for the

⁷² *Ibid.*

⁷³ Preeti Singh, "Analyzing the Role of Dharma in Shaping Ancient Indian Political Thought" 1(7) *International Journal of Law, Management & Humanities*, 222 (2024).

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 30.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Supra* note 18.

⁷⁹ Raj Kumar Garg and Akshita Manhas, "An Analysis of Dharma from the Perspective of Indian Society" 2 *Indian Journal of Integrated Research in Law* 1 (2022).

king to protect *Dharma* and ensure that laws are in step with moral principles. Legal procedures, property rights, marriage, and inheritance are treated in great detail within the text, reflecting the importance of *Dharma* to every aspect of life. *Dharmashastra* will continue through to shape Hindu law and its legal practices for centuries and social norms within society with its moral authority.

The concept of *Dharma* in *Bharatiya* jurisprudence plays the central role in the administration of law and justice. *Dharma* is considered the ultimate law, transcending human-made laws, wherein all legal and social norms are governed by the principles of *Dharma*. A king being the upholder of *Dharma* has to ensure that the administration of justice is done in a manner which is considered morally and ethically right.⁸⁰ This is reflected in the due process of law involved in the *Dharmashastra* texts, which insist on fairness, equity, and righteousness in the application of justice.⁸¹ For example, *Manusmriti* uses different punishments for the same crime as a function of the offender's status.⁸² This shows that *Dharma* does not apply as a single norm or rule but has to be put into practice according to the intricacies of social hierarchy or even individual cases. *Dharma*, in this respect, fits into the legal system in such a way that the justice is to be done not on merely legal forms but also on higher moral conceptions. It has been the most dynamic influence in Hindu law and continues to draw principles from *Dharma* in interpreting and applying laws.

***Arthashastra*: The guide to governance under *Bharatiya* Jurisprudence**

While *Dharmashastra* focuses on the ethical dimensions of life, *Arthashastra* presents a more pragmatic and strategic approach to governance.⁸³ Common conception is that, Kautilya, the chief advisor to Emperor Chandragupta Maurya, wrote this; hence, it is often referred to as a manual for kings and rulers.⁸⁴ It deals with the pursuit of *artha*, referring to material success, wealth, and power. The *Arthashastra* consists of fifteen books that range over a wide variety of subjects, including statecraft, diplomacy, military strategy, and economic policy.⁸⁵ Whereas *Dharmashastra* puts tremendous emphasis on moral values, *Arthashastra* postulates that any means are justified in achieving and retaining power: lying, espionage, and even military

80 *Supra* note 18.

81 *Ibid.*

82 K. Jaishankar and Debarati Halder, "Criminal Justice Tenets in Manusmriti: A Critical Appraisal of the Ancient Indian Hindu Code" in K. Jaishankar (ed.) *Routledge Handbook of South Asian Criminology* 97-109 (Routledge 2019).

83 *Supra* note 30.

84 *Ibid.*

85 *Ibid.*

action.⁸⁶ While much of Kautilya's approach was ruthless and pragmatic, perhaps best described by the political view that the ends justify the means, it also recognized good governance, efficient administration, and welfare of the people as milestones, realizing very well that a stable and prosperous state alone guarantees the success of the ruler.⁸⁷

The procedure and details of administering justice in ancient India are documented in full detail in Kautilya's *Arthashastra*.⁸⁸ The text outlines the roles of different officers in the setup, including the judges themselves, placing huge stress on the king's role in maintaining order. In his work, Kautilya emphasized due process, the role of evidence, and fair adjudication. This sophisticated understanding of judicial power embodies the aspects of both procedure and substance of law in the *Arthashastra*. The *Arthashastra* is preoccupied with the practical aspect of governance-law, economics, and military strategy.⁸⁹ Such texts reflect the pragmatic style of statecraft, in which so often the need for flexibility and pragmatism is emphasized in legal and administrative affairs.

Kautilya's *Arthashastra*, for example, discusses many legal questions, such as how to penalize false witnesses, and very often takes more moderate positions compared to the severe penalties recommended in some *Dharmashastras*.⁹⁰ K.P. Jayaswal seems to extend this effort of the *Manusmṛiti* as an attempt to subordinate the *Arthashastras* to the *Dharmashastras* - an effort reflective of the larger religious-secular tension in ancient India. Yet, this is not an unproblematic argument. Take the case of the Mahabharata, that epic which is also a text dealing with law and polity: it does not subordinate the *Arthashastra* to the *Dharmashastra*. It often assumes both as authoritative, depending on the context.

Through this, *Arthashastra* has had a deep influence on political thought and governance in ancient India.⁹¹ It shaped the way rulers in ancient India approached the problems of statecraft and administration. Most serious has been the inspiration of pragmatism, strategy, and the pursuit of *artha* buoyed by Kautilya against the purely moral and ethical inspirations of *Dharmashastra*.⁹² Most influential, perhaps, were *Arthashastra*'s lessons on diplomacy, espionage, and military strategy, which gave rulers the wherewithal to navigate ancient India's complex and often

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

inhospitable political topography. Kautilya's ideas on the role of the state, the importance of economic prosperity, and the need for efficient administration have continued to resonate in Indian political thought, influencing the way modern Indian leaders approach governance and statecraft. The legacy of *Arthashastra* is replicated in the modern Indian practice of the primacy of politics, where every realistic consideration often precedes ideological or moral contemplation.⁹³

That the *Arthashastra* ever enjoyed equal or greater authority than the *Dharmashastra* negates any thesis of an overarching Brahminical hegemony over the legal tradition.⁹⁴ It indicates that, at least during the existence of such works, secular and religious laws had considerable independence from each other.⁹⁵ The *Arthashastra* commanded respect perhaps for the worldly wisdom that underlay their principles and policies, while the *Dharmashastra* commanded authority because they supplied the moral and spiritual guidance.⁹⁶

The relationship between *Dharma* and *Artha* in ancient Indian thought

The interaction between *Dharma* and *Artha*, between *Dharmashastra* and *Arthashastra*, respectively, indicates the concern of both moral precept and pragmatic realism inherent in ancient Indian thought.⁹⁷ Whereas *Dharmashastra* proselytizes adherence to ethical principles and maintenance of social order, *Arthashastra* presumes material success and power as necessary for stability and prosperity of the state.⁹⁸ In this context, *Dharma* and *Artha* are not oppositional, competing entities but complementary forces that need to balance each other for the benefit of society. In the process, the king has the onus of protecting *Dharma*; yet, he has to be pragmatic and tactical in his moves concerning the security and well-being of his kingdom.⁹⁹ This is further evidenced by the concept of '*Rajadharma*,' or the duty of the king, in which ethical laws of *Dharmashastra* are combined with strategic measures from *Arthashastra*.¹⁰⁰ The relation between *Dharma* and *Artha* underlines the holistic nature of ancient Indian jurisprudence, where moral and practical considerations go hand in hand in the governance of society.¹⁰¹

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Supra* note 18.

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 *Ibid.*

A. Judicial process in the *Arthashastra*: An Insight

Arthashastra is the most comprehensive treatise on political economy and statecraft and is attributed to Kautilya, or Chanakya. For all practical purposes, it gave a systematically worked-out approach to governance in the administration of justice.

- **The Role of the King:** In the main role, according to *Arthashastra*, the king personifies the power of the state.¹⁰² His responsibilities include such tasks as protection for his subjects and administration of justice, either by conducting cases in person or entrusting his appointed officials with such duties.
- **Delegation of Judicial Powers:** Though the king is considered the supreme authority, still *Arthashastra* significantly established the principle of delegation.¹⁰³ The king delegates a judge, known as *pradhivaka*, among other officials responsible for attending to legal matters.¹⁰⁴
- The officials holding such key positions have to be well acquainted with and conversant in the laws and their judgment, which is to be given in a fair and non-arbitrary manner.
- **Legal Procedure:** The *Arthashastra* contains elaborate procedures on the conduct of trials, examination of evidence and witnesses, and in extreme cases, torture was to be used to extract the truth.¹⁰⁵ Essentially, this would involve a fair trial for the purpose of maintaining order in society.
- **Law as a Tool of Governance:** In the text, law is viewed pragmatically as a tool of governance to maintain the king's authority and ensure social stability. The dispensation of justice is directly related to the ruler's duty of sustaining *Dharma*, or moral law, and order.¹⁰⁶

B. Judicial Process in the *Dharmashastra* : An Insight

Dharmashastras are ancient texts laying down the laws governing personal and social behaviour based essentially on the concept of *Dharma* or righteousness.

- **Role of the King:** *Dharmashastras* regard the king as the protector of *Dharma*. However, the latter places greater emphasis on the king's duty to enforce moral and religious laws than the more practical and

¹⁰² *Supra* note 30.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

administrative aspect developed by the *Arthashastra*. The judicial role of the king was considered divine wherein his judgments were guided by *Dharma*.¹⁰⁷

- **Society and Justice:** The *Dharmashastras* bring to the forefront that in the administration of justice, local communities, guilds, and assemblies also played an important role.¹⁰⁸ Such bodies could exercise their own jurisdiction to settle disputes internally, with the king's court being a place of appeal or intervention in serious matters.¹⁰⁹
- **Legal Procedures:** *Dharmashastras* prescribe procedures for the administration of justice. Much stress has been laid on ritual purity, character of witnesses, and on moral consequences of judicial decisions. He is advised to consult learned Brahmins and other respectable figures of the society before reaching a decision.¹¹⁰

व्यवहारान् दिदृक्षुस्तु ब्राह्मणैः सह पार्थिव ।

मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत् सभाम् ॥¹¹¹

Word-by-Word-Meaning - व्यवहारान् (*vyavahārān*) — legal proceedings/disputes; दिदृक्षु (*didrksu*) — desiring to see/inspect; तु (*tu*) — then/indeed; ब्राह्मणैः (*brāhmaṇaiḥ*) — with Brāhmaṇas as; सह (*saha*) — together/along with; पार्थिव (*pārthivah*) — the king; मन्त्रज्ञैः (*mantrajñaiḥ*) — with counsellors/”knowers of counsel”; मन्त्रिभिः (*mantribhiḥ*) — with ministers; च (*ca*) — and; एव (*eva*) — indeed/just; विनीतः (*vinītaḥ*) — humble/disciplined/modest; प्रविशेत् (*praviset*) — should enter; सभाम् (*sabhām*) — the assembly/court

Meaning - Desirous of investigating cases, the king shall enter the court, with a dignified demeanour, along with Brāhmaṇas as and councillors, versed in counsel.

- **Justice and Dharma:** In the *Dharmashastras*, justice was inseparable from *Dharma*-an idea that defined both legal norms and moral duties.¹¹² The very administration of justice is thus a preservation of the cosmic, not only social, order.

C. *Arthashastra* and *Dharmashastra*: Comparative insights

While both *Arthashastra* and *Dharmashastra* recognized the significant role of the king in administering justice, there are certain differences. *Arthashastra* is more realistic

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

111 *Manusmṛti* 8.1.

112 *Ibid.*

and related to the state's power and efficiency, whereas *Dharmashastra* has more moral and religious orientation. While the *Arthashastra* reflects more as a centralized system of justice, where the king and his officials were directly involved with the adjudication of cases, the *Dharmashastra* integrates a more decentralized approach involving local bodies and the king playing a final arbiter.¹¹³

While in the *Arthashastra*, law is a means to the ends of governance, in the *Dharmashastra*, it is an expression of *Dharma*, and the king's judicial power is above all expressive of his moral authority. In general, these texts detail an interesting representation of the judicial conception of power as it was thought of and employed within ancient India-the *Arthashastra* being more practical regarding the operation of governance and the *Dharmashastra* concerning itself more with the ethical and religious dimensions of law.

IV. Conclusion

It has been a dynamic process wherein the growth of judicial power reflects the transformations in political structures, social values, and legal concepts. From the divine kings of ancient Egypt, the citizen juries of Athens, the centralized royal courts of medieval England, to the sophisticated legal theories of ancient India, the emergence of judicial power reflects an interaction between authority, legality, and morality in all its complexity. Knowing this history serves to contextualize the nature of justice and how it works in a legal system, historically and within different cultures. Religion, ethics, and law are normally one big admixture in most of the old legal systems of every country. The basis for this integration had been that law was essentially an expression of godly will, and adhering to the law implied carrying out one's religious and moral duties. This integration, however, has come under a fair share of criticism, more so in the modern day, with increasing calls for secular legal systems anchored on reason and universal principles.

Whereas separation of religion, ethics, and the law in contemporary life would suggest the reception of progress, it should also be put into its historical and philosophical perspective within which religion, ethics, and law had been united. Thus, the debate over what place, if any, that religion and ethics play in the law remains a debated controversy and reflects the tension between tradition and modernity, between moral values and legal principles. As societies evolve, the relationship between these domains is likely to continue to be a point of debate and reflection that will shape the future of legal and moral thought.

In this situation, the *Bharatiya* jurisprudence reflect the diverse dimensions of an integrated perspective on governance and social order in ancient India. The

¹¹³ *Ibid.*

positioning of the *Dharmashastras* in relation to the *Arthashastras* tells something about the more general interrelation between religion, law, and politics in ancient Hindu society. The *Dharmashastras* and *Arthashastras* neither should be viewed in isolation nor as clearly antagonistic agencies. The role of *Manusmriti* in this regard becomes very important. Whether seen as an attempt to consciously mould secular law to serve the Brahminical interests or unconsciously acting as a mirror to a changing legal and social environment, the *Manusmriti* remains one of the most essential texts to those who wish to understand the growth of Hindu law. Such assimilation of the secular and religious elements provides an explanation for the recognition of the need towards an all-inclusive legal system which would cater to the material and spiritual requirements of society.

The legacy of *Dharmashastras* and *Arthashastras*, was to hold their own in the wake of constantly changing social conditions yet not be severed entirely from their roots on grounds laid by moral and ethical tenets that had underpinned Hindu society. The teachings of *Dharmashastra* and *Arthashastra* stand to this day, guiding modern expositions on the interpretation of law and ethos, offering lessons in how legal systems maintain a balance between the demands of justice with moral and spiritual direction. It reflects the perpetual tension between the secular and the religious that persists to this date on issues regarding the role of law in society. The complex interplay in the way morality and pragmatism interact with governance finds special mention in the continuing relevance *Dharmashastra* and *Arthashastra* have to *Bharatiya* jurisprudence. The insistence of *Dharmashastra* on *Dharma* as the basis of law and justice produced the moral and ethical dimensions of Hindu law, while *Arthashastra* has contributed to practical statecraft and governance.

This, in sum, provides a comprehensive view of ancient *Bharatiya* jurisprudence, wherein the morality of principles and the practicality of measures both become necessary for the benefit of society. This means *Dharma* has been integrated into the laws so that justice would not only be conducted through following due process of law but also through higher moral principles. On the other hand, teachings of *Arthashastra* will provide the ruler with all the necessary measures required to negotiate the complexities of governance. Thus, the traditions of *Dharmashastra* and *Arthashastra* continue to inform Indian legal and political thinking, holding together normative commitments to *Dharma* with pragmatic concerns of governance.

INDIAN KNOWLEDGE SYSTEM AND CONTEMPORARY LEGAL ETHICS

Dinesh Pathak J.* & Abhijay Sukul*

Abstract

This paper explores the connection between the Indian Knowledge System (IKS) and contemporary legal ethics. Ancient Indian texts like the *Vedas*, *Upanishads*, *Dharmashastras*, and the *Arthashastra* contain rich legal and ethical wisdom that emphasized truth (*Satya*), non-violence (*Ahimsa*), justice (*Nyaya*), and duty (*Dharma*). These principles guided personal and legal conduct and aimed to ensure societal welfare and moral governance. The paper argues that while colonial rule introduced Western legal practices and sidelined traditional systems, the ancient Indian approach to law, rooted in ethics and morality, remains highly relevant today. Contemporary legal challenges, such as corruption, inequality, and moral conflicts, demand solutions grounded in both law and ethics. The IKS can provide timeless guidance for dealing with these modern issues. Important schools like *Nyaya* and *Mimamsa* contributed rules of logic and interpretation that are still useful in understanding legal texts. Traditional stories of kings like *Harishchandra* and *Shibi Rana* illustrate how moral duty and justice were valued in ancient times. The paper also connects traditional values with current practices like Public Interest Litigation (PIL) and Corporate Social Responsibility (CSR), showing how ancient wisdom continues to shape modern legal systems. The study encourages legal professionals and educators to integrate traditional principles with current legal education and practice. However, it also acknowledges that ancient systems had limitations, especially around gender and caste. A careful and balanced approach is needed to apply these principles today.

Keywords: *Dharma, Legal ethics, Indian Knowledge System, Justice, PIL, CSR*

- I. Introduction
- II. Historical Context
- III. Integration of Ethics and Law
- IV. Contemporary Legal Ethics
- V. Ancient Systems: Strengths and Limitations
- VI. Conclusion

I. Introduction

THE INDIAN knowledge system (*hereinafter* referred as 'IKS') has an important and extensive heritage, and stands as a testament to the rich history of the Indian subcontinent. Over the millennia, this system encompasses a vast array of disciplines,

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including philosophy, science, medicine, arts, and, notably, law and ethics. The legal philosophies that are within ancient Indian texts such as the *Vedas*, *Upanishads*, *Dharmashastras*, and the *Arthashastra*, reveal intricate and sophisticated understanding of justice, morality, and governance that continues to influence contemporary thought.¹

In recent years, there has been more of an interest in revisiting these traditional knowledge systems, particularly within legal ethics. This resurgence is due to a desire to reconnect with the philosophical foundations that used to guide societal conduct and to explore their relevance in addressing modern ethical dilemmas. Contemporary legal ethics guides the conduct of legal professionals and institutions, often facing challenges that transcend mere legal formalities, encompassing broader ethical and moral considerations. In this way, the principles derived from the IKS give good insight that can enrich the current understanding and practice of legal ethics.

Ancient Indian legal traditions were characterized by a holistic approach, integrating ethical principles with legal norms to ensure justice and societal welfare. The concept of *Dharma*, central to these traditions, pressed on the duty to uphold righteousness and moral order. The epic *Ramayana*, enshrines the tenets of *Dharma* (righteousness). The protagonist *Rama*, an avatar of Lord *Vishnu*, lived his life as *Maryada Purushottam* (Ideal person with a supreme personality) and he always followed the rules of *dharma*. That is the reason Indians consider him heroic. The *Ramayana* emphasises on *dharma* and righteousness.²

आहु स्सत्यं हि परमं धर्मं धर्मविदो जनाः ।

सत्यमाश्रित्य हि मया त्वं च धर्मं प्रबोधितः ॥³

Word-by-Word-Meaning - आहु (*āhuḥ*) — “(they) say/declare”; सत्यं (*satyam*) — “truth”; हि (*hi*) — “indeed/certainly”; परमं (*paramam*) — “supreme/highest”; धर्मं (*dharmam*) — “dharma; righteousness/duty/law”; धर्मविदः (*dharmavidah*) — “knowers of dharma, jurists/wise”; (janāḥ) — “people/persons”; सत्य-माश्रित्य (*satyam āśritya*) — “having resorted to truth; relying on truth”; हि (*hi*) — “indeed”; मया (*mayā*) — “by me”; त्वम् (*tvam*) — “you”; च (*ca*) — “and”; धर्मं प्रबोधितः (*dharmā-prabodhitah*) — “instructed/awakened in dharma; taught the principles of dharma.”

1 Pandurang Vaman Kane, *History of the Dharma Sastra* 28-36 (Bhandarkar Oriental Research Institute, Pune, Vol II Part 1, 1941).

2 Valmiki Ramayana, Ayodhya Kanda, Sarga 14, Shloka 3 *Translation*, available at: https://www.valmiki.iitk.ac.in/content?field_kanda_tid=2&language=dv&field_sarga_value=14&field_sloka_value=3 (last visited on November 12, 2025).

3 Ayodhyakanda, Sarga-14, Shloka-3.

Meaning - Those conversant with *Dharma* (righteousness) say that truth is a great virtue. By following the truth, I have enlightened you about your *Dharma* (duty).

Similarly, principles such as *Nyaya* (justice), *Ahimsa* (non-violence), and *Satya* (truthfulness) were not only abstract ideals but practical guides for legal and ethical conduct. These principles were carefully documented and practised. This reflected a deep commitment to ethical jurisprudence. The advent of British colonial rule in the 19th century introduced major changes to the Indian legal landscape. The imposition of English common law and the subsequent hybridization of legal systems often marginalized old legal traditions. This colonial legacy has left a complicated and sometimes contentious legal framework that is still evolving. Currently, there is a compelling need to critically examine and integrate traditional Indian ethical principles with contemporary legal practices in order to create a more inclusive as well as a morally grounded legal system.⁴

This paper aims to delve into the rich intersection between the IKS and contemporary legal ethics. This way the historical context of ancient Indian legal philosophies; their ethical foundations; and their potential applications in current legal practices, make this paper seek to offer a nuanced perspective on how traditional wisdom can inform and enhance contemporary legal ethics. The study will also address the challenges and criticisms of integrating these systems, providing a balanced view that acknowledges both the strengths and limitations of traditional and modern frameworks.

It will be not merely academic but also a practical endeavour to bridge the gap between ancient wisdom and modern exigencies. As the legal profession deals with ethical issues in an increasingly complex and globalized world, the timeless principles of the IKS can offer a valuable compass. By looking back on the ethical and moral insights of the past, contemporary legal practitioners can manage the challenges of today with greater integrity as well as foresight.

II. Historical Context

Overview of Traditional Indian Knowledge

Ancient Indian knowledge is found in a variety of texts, including the *Vedas*, *Upanishads*, *Dharmashastras*, and *Arthashastra*. These texts provide good insights into various aspects of life, including law, ethics, politics, and philosophy. The key texts in IKS have significant relevance for understanding and integrating traditional principles with contemporary legal ethics. The *Vedas*, being the oldest and

⁴ Mitra Sharaifi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947*, 68 (Cambridge University Press, 2014).

authoritative scriptures, form the foundation of Hindu law and ethics, providing a good framework for moral and legal conduct. The *Upanishads* delve into the reality and ethics of human actions, offering particular insights into the nature of duty and righteousness. The *Dharmashastras* are treatises and they lay down laws for legal and ethical practices across various areas of life, guiding individuals and society to maintain order and justice. Additionally, the *Arthashastra*, written by *Kautilya* (Chanakya), is a seminal text on economic policy, statecraft, and military strategy, reflecting the sophisticated understanding of governance and ethical statecraft in ancient India.

प्रजासुखे सुखं राज्ञः प्रजानां च हिते हितम् ।
नात्मप्रियम् हितम् राज्ञः प्रजानां तु प्रियम् हितम् ॥⁵

Word-by-Word-Meaning - प्रजासुखे (*prajā-sukhe*) — “in the happiness of the subjects”; सुखं (*sukham*) — “happiness/well-being”; राज्ञः (*rājñah*) — “of the king”; प्रजानाम् (*prajānām*) — “of the subjects”; च (*ca*) — “and”; हिते (*hite*) — “in the welfare/benefit”; हितम् (*hitam*) — “the good / benefit”; न (*na*) — “not”; आत्मप्रियं (*ātma-priyam*) — “what is pleasing to oneself”; हितम् (*hitam*) — “good / beneficial”; राज्ञः (*rājñah*) — “of the king”; प्रजानाम् (*prajānām*) — “of the subjects”; तु (*tu*) — “rather / indeed”; हिते (*hite*) — “in (their) welfare”; हितम् (*hitam*) — “(is) the good/ the right course.”

Meaning - In the happiness of his subjects lies the king's happiness; in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever pleases his subjects.

Paired, these texts offer a rich repository of knowledge and ethical guidelines which will inform and enhance modern legal practices.⁶ The principles of justice and law in ancient Indic legal philosophy are well known for their comprehensive consideration of moral matrices and factors. Very important to this framework is the concept of *Dharma*, and that encompasses, duty and righteousness, guiding both personal conduct and legal obligations. Another key principle is *Nyaya*, which focuses on treatment and justice, integrating both legal and ethical dimensions to make sure fairness and equity. Along with this, *Artha* addresses material needs and emphasises the welfare of the state and its people. Together, these principles create a holistic approach to justice and law, which balances the ethical considerations with practical governance.⁷

5 Arthashastra, Book I, Chapter 19.

6 John Brockington, *The Sanskrit Epics* 98 (Brill Academic Publication, 1998).

7 Manuel Velasquez, Claire Andre, et. al., “Justice and Fairness” *Marquette Center for Applied Ethics*, August 01, 2014, available at: <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/> (last visited on August 01, 2025).

The British colonial regime saw radical changes introduced in the Indian legal scenario. Colonial policy imposed English common law and, in so doing, displaced numerous traditional practices leading to a legal hybridity that frequently devalued indigenous knowledge. During the colonial era, British law frequently clashed with Indian customs and beliefs in a complex dance between Western legal standards and indigenous moral concerns. This section describes the difficulties and results of this hybridization process.

Indian Knowledge System

India has a rich intellectual tradition facilitated by various schools of thought that have significantly contributed to epistemology. Key schools include *Nyaya*, the Indian school with the most ancient origin in the history of philosophy, one of India's oldest schools of logic and epistemology. *Nyaya* denounces blind belief or faith as the sole way for human beings to reach truth, emphasizing reason and evidence. Another important school is *Mimamsa*, which emphasizes ritual and ethical duties while supporting the supremacy of the *Vedas*.⁸ *Vedanta* focuses on metaphysics and the nature of reality. It also focuses on concepts like reincarnation, and emphasizes duty and righteousness. These schools together enrich India's philosophical landscape, and offer a unique insight into the pursuit of knowledge and truth.⁹

Mimamsa Rules and Principles of Interpretation

Jaimini's Sutras fully address the rules of interpretation concerning two main questions: determining the meaning and interpretation of words and sentences and ascertaining their precise legal character. These rules and principles are classified into five categories: elementary principles or axioms of interpretations, general principles for interpreting words and texts, specific rules and settled points known as *Nyayas*, broad general principles regarding the application of texts, and rules specifically related to the character and interpretation of Smriti texts and usages.

Within the *Mimamsa* paradigm, the six axioms of interpretation serve as fundamental principles. Sarthakya stresses the need for each word and sentence to have a function, so as not to make any element unnecessary or inconsequential. *Laghava* prefers shorter, simpler structures. According to *Arthaikatva*, a word or statement shouldn't have two meanings in one context. According to *Gunapradhana*, when a subordinate concept conflicts with a primary idea, the former should be modified or ignored. This is commonly exemplified by the proverb "the great and the small fish," which

8 J. Gonda, *Vedic Literature: Samhitās and Brāhmanas* (Harrassowitz, 1975).

9 Kalwala Jyothi, "Concepts of Vedanta and their relevance to modern human development" 9 *International Journal of Humanities and Social Science Invention* 72-74 (2020).

states that the greater idea always wins out. *Samanjasya* advocates applying potentially contradictory texts to diverse settings and purposes in order to reconcile them rather than jumping to conclusions about inconsistencies too quickly. Finally, *Vikalpa* allows for the adoption of one of the contradictory matters at the interpreter's discretion when a real contradiction is unavoidable, suggesting that reason and justice should guide the choice, but only as a last resort.

These principles provide a robust framework for interpreting the *Vedic* texts and have been widely recognized and applied in various systems of law. The *Mimamsa* rules offer a structured approach to legal interpretation, ensuring that texts are understood and applied consistently and meaningfully, reflecting their intended purpose and preserving their integrity.¹⁰

III. Integration of Ethics and Law

Ethical Foundations

The legal systems of ancient India were closely linked to ethical concepts, guaranteeing that laws fostered ethical behaviour and the well-being of society. *Ahimsa* (non-violence), a basic ethical value governing both individual behaviour and legal institutions, was one of the key ideas.

अहिंसा सत्यवचनं सर्वभूतहितं परमम् ।

अहिंसा परमो धर्मः स च सत्ये परतिष्ठितः

सत्ये कृत्वा परतिष्ठां तु परवर्तन्ते परवृत्तयः ॥¹¹

Word-by-Word-Meaning - अहिंसा (*ahimsā*) — non-violence; non-injury; सत्यवचनम् (*satyavacanam*) — truth-speaking; speaking what is true; सर्वभूत-हितम् (*sarva-bhūta-bitam*) — the welfare of all beings; परम् (*param*) — supreme/highest; अहिंसा (*ahimsā*) — non-violence; परमः (*paramah*) — highest/supreme; धर्मः (*dharmah*) — dharma; righteousness, duty; स (*sah*) — that (i.e., non-violence); च (*ca*) — and; सत्ये (*satye*) — in/upon truth; परतिष्ठितः (*pratis thitah*) — established; grounded, founded; सत्ये (*satye*) — in truth; upon truth; कृत्वा (*krtvā*) — having made; having established; परतिष्ठाम् (*pratis thām*) — a foundation/basis; तु (*tu*) — indeed/rather; परवर्तन्ते (*pravartante*) — set in motion/proceed/operate; परवृत्तयः (*pravrttayah*) — activities; courses of conduct; undertakings.

Meaning- Virtuous men are always kind to all creatures, and well-disposed towards regenerate men. They abstain from doing injury to any creature, and are never

10 Tshering Choden Bhutia, "Ancient Indian Rules of Interpretation and Its Relevance in Contemporary Society" 6(3) *International Journal of Multidisciplinary Research* 2582-2160 (2024).

11 *Krishna Dvaipāyana Vyāsa, Mahābhārata, Vana Parva* 3.198–199.

rude in speech. Those good men who know well the consequences of the fruition of their good and evil deeds, are commended by virtuous men.

Truthfulness, or *satya*, was regarded as a crucial attribute in court cases and judicial behaviour, guaranteeing the integrity and honesty of the legal system.

In the recent case *Venkata Rami Reddy v. The State of Telangana*,¹² the court held that:¹³

The Indian society has long been founded upon the fundamental value of truth (*satya*), a concept that transcends mere honesty to embody a proud adherence to righteousness, authenticity, and moral integrity. Satya is one of cardinal principles of Indian philosophy, enshrined in texts such as the Upanishads, the Bhagavat Gita, and reaching of great Indian Leaders like Mahatma Gandhi. In its essence, truth in Indian society is not just about speaking factual words but living in harmony with the universal law of justice, ethics, and moral conduct. It represents the pursuit of the highest reality, aligning one's actions, thoughts and words with the divine order and moral law. the significance of *satya* is seen in the importance its holds in everyday life. From the ancient scriptures to cultural practises, the commitment to truth has been the cornerstone of Indian ethics. In the modern context, the reverence for Satya remains integral in ensuring the integrity of social, legal, and political systems, reinforcing the importance of truth in upholding justice, human dignity, and collective progress. This case depicts a classic example how such a cherished basic value by Indian Society for centuries has been put under carpet by petitioner.

Karma, or the law of cause and effect, strengthened moral responsibility and accountability by motivating people to act morally when they were aware that their choices had repercussions. Together, these tenets ensure that the legal system served as a moral foundation for the overall improvement of society rather than merely a collection of regulations.¹⁴ The *Brihadaranyaka Upanishad* in chapter 4.4.5 states:

यथाकारी यथाचारी तथा भवति ।
साधुकारी साधुर्भवति पापकारी पापो भवति ॥

Word-by-Word-Meaning - यथा-कारी (*yathā-kārī*) — “as one acts/according to one's deeds”; यथा-चारी (*yathā-cārī*) — “as one conducts oneself/according to one's

¹² Writ Petition No. 163 of 2025 (High Court of Telangana).

¹³ *Id.*, at para 1.

¹⁴ *Supra* note 4.

conduct”; तथा (*tathā*) — “so/in that way”; भवति (*bhavati*) — “becomes/is”; साधुकारी (*sādhū-kārī*) — “one who does good/righteous acts”; साधु: (*sādhuh*) — “good/virtuous (person)”; भवति (*bhavati*) — “becomes”; पाप-कारी (*pāpa-kārī*) — “one who does evil/sinful acts”; पाप: (*pāpah*) — “evil/a sinner (lit. ‘evil one’)”; भवति (*bhavati*) — “becomes.”

Meaning- As it does and acts, so it becomes; by doing good it becomes good, and by doing evil it becomes evil—it becomes virtuous through good acts and vicious through evil acts.

Evolution of Legal Ethics in India

The evolution of legal ethics in India can be traced back to the traditional principles enshrined in ancient texts, transitioning through colonial influences, and culminating in the modern ethical frameworks governing legal practice today. During the colonial period, British legal principles heavily influenced Indian law. The introduction of the Indian Penal Code and the establishment of the formal judiciary system marked a shift from traditional practices to Western legal norms.¹⁵

Post-independence, India sought to integrate traditional values with modern legal standards. The Bar Council of India, established under the Advocates Act of 1961, plays a pivotal role in regulating legal ethics and maintaining professional standards among lawyers.¹⁶

■ *What Constitutes Legal Ethics Today*

Legal ethics today encompasses the professional responsibilities and moral conduct of legal practitioners. It includes principles such as confidentiality, integrity, competence, and the duty to uphold justice.¹⁷ Modern professional norms have replaced ancient ethical frameworks in the development of legal ethics in India. A significant advancement in legal practice and professional ethics is the Advocates Act,¹⁸ which created the Bar Council of India and specified the code of conduct for advocates. Judicial reforms have also been put into place to improve ethical standards and modernise the judiciary, making sure that the legal system remains grounded in ethical values even as it changes to meet modern demands. This change is an amalgamation of traditional principles and contemporary laws to maintain honesty and responsibility in the legal industry.¹⁹

¹⁵ *Ibid.*

¹⁶ Chunuram Soren, “Legal Education in India: An Analytical Study” 8 *International Journal of Research and Analytical Reviews* 935 (2021).

¹⁷ Karl H. Potter, *The Encyclopaedia of Indian Philosophies* 24-27 (Princeton University Press, 1977).

¹⁸ The Advocates Act, 1961 (Act 25 of 1961).

¹⁹ *Supra* note 9.

Intersections Between Indian Knowledge Systems and Contemporary Legal Ethics

While there are many similarities between the Indian and Western legal systems, there are also important philosophical and cultural distinctions. Indian legal ethics frequently draw from ancient texts and cultural values, placing a strong emphasis on *Dharma* and community welfare. This contrasts with Western legal ethics, which are primarily influenced by concepts of individual rights and justice as fairness, reflecting philosophical traditions from thinkers like John Stuart Mill and Immanuel Kant.²⁰

Due in great part to their emphasis on moral rectitude, justice, and the well-being of society, ancient Indian concepts continue to have significant relevance in modern legal ethics. Comprising duty, righteousness, and law, the notion of *Dharma* offers a comprehensive approach to ethics by combining individual, occupational, and social duties. This idea emphasises the value of moral obligation and moral behaviour in a variety of spheres of life, including the practice of law.²¹ Since *Dharma* emphasises moral obligation and moral behaviour in all spheres of life, it is a good fit with contemporary legal ethics. It promotes a strong feeling of accountability and righteousness, which should be evident in the practice of law through upholding moral principles and integrity on a personal level.

In addition, traditional Indian ethical principles can be modified to fit modern legal procedures in order to tackle new issues. Law decision-making procedures that take into account values like compassion, communal welfare, and moral obligation ensure that legal ethics continue to be in line with both conventional wisdom and contemporary requirements.²² Compassion in legal ethics ensures that the legal system is humane and takes into account the wider effects of legal decisions on people and communities. This method not only demonstrates a strong dedication to justice and improves the efficiency and equity of the judicial system.²³

20 Wayne P. Pomerleau, "Western theories of Justice" Internet Encyclopaedia of Philosophy, available at: <https://iep.utm.edu/justwest/> (Last visited on November 13, 2025).

21 S. P. Sathe, Review on "Alternatives in Development: Law: The Crisis of the Indian Legal System by Upendra Baxi" 18 (32) *Economic and Political Weekly* 1388 (1983).

22 Manuel Velasquez, Dennis Moberg, et.al., "A framework of ethical decision making" *Markkula Centre for Applied Ethics* 2021, available at: <https://www.scu.edu/ethics/ethics-resources/a-framework-for-ethical-decision-making/> (Last visited on November 13, 2025).

23 Susan A. Bandes, "Compassion and the Rule of Law" 13 *International Journal of Law in Context* 185 (2017).

Case Studies and Applications

Modern legal cases in India have occasionally referenced ancient principles, demonstrating their enduring relevance and applicability.

■ *Environmental Jurisprudence*

The Indian judiciary has drawn on traditional principles to address contemporary environmental issues. The principle of sustainable development, akin to the ancient concept of respecting nature, has been upheld in several landmark judgments.²⁴

■ *Social Justice*

The Supreme Court of India has invoked principles of social justice rooted in ancient texts to advance the rights of marginalized communities. This includes the application of equitable principles in cases related to affirmative action and social welfare.²⁵

This section examines historical legal cases from ancient India, illustrating how ethical principles were applied in practice. Examples include:

Case of the Righteous King

■ *Harishchandra*

King *Harishchandra*'s case serves as an example of ancient Indian law. *Harishchandra* was renowned for his unwavering commitment to justice and truth. According to folklore, King *Harishchandra* was well-known for his fidelity to *Dharma* and suffered greatly on behalf of justice and the truth. The tale of *Harishchandra* is told in great length in a number of literatures, such as the *Mahabharata* and many Puranic texts. Despite experiencing significant personal grief, he had previously vowed to hand up his kingdom to the sage *Vishwamitra*. *Harishchandra* sold himself and his family into labour in order to fulfil his commitment. Ethics and altruism were highly prized in the legal systems of ancient India. The moral dimensions of the custom are brought to light by this instance.²⁶

■ *The Trial of Shibi Rana*

Another significant case is that of King *Shibi*, known for his exceptional sense of justice. In this tale, a dove seeks refuge with *Shibi*, pursued by a hawk. The hawk demands its prey, and *Shibi* offers his own flesh equivalent to the dove's weight to

24 *S. Jagannath v. Union of India* (1997) 2 SCC 87.

25 *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

26 *Supra* note 4.

save it. This story highlights the ancient Indian legal principle of protecting the vulnerable and the king's role as a protector of all beings.²⁷

■ *The Wisdom of Vikramaditya*

King *Vikramaditya*'s court was famous for its justice and fairness. Numerous stories, known as the *Vikramaditya* tales, describe how he resolved disputes with wisdom and impartiality. One such story involves two women claiming to be the mother of the same child. *Vikramaditya*'s clever strategy to identify the real mother demonstrates the king's commitment to justice and the application of ethical reasoning in legal decisions.²⁸

IV. Contemporary Legal Ethics

Legal ethics today is the code of conduct that governs the professional behaviour of lawyers and judges. This includes principles such as integrity, confidentiality, impartiality, and the duty to provide competent representation to clients. Legal ethics make sure that legal practitioners adhere to high standards of professionalism and contribute to the proper administration of justice.²⁹

The rich ethical traditions of ancient IKS offer invaluable insights into contemporary legal ethics. By integrating these traditional principles, modern legal practices in India can achieve a more culturally aligned, morally grounded, and humane approach to justice. The enduring relevance of ancient concepts such as *Dharma*, combined with the practical applications demonstrated in modern case studies, highlights the potential for a harmonious blend of tradition and modernity in the legal profession.³⁰

PIL: Drawing Parallels with Ancient Practices

Public Interest Litigation (PIL) in India represents a contemporary mechanism for ensuring justice and addressing public grievances through the judicial system. It allows individuals or groups to seek legal redress on behalf of the public or marginalized communities, even if they themselves are not directly affected. This legal approach can be traced back to ancient Indian practices where seeking justice for the community was a key aspect of societal governance. Ancient texts, such as the *Manusmriti* and various *Dharmashastras*, emphasize the role of rulers and individuals in protecting and upholding the welfare of society.

27 V. S. Sukthankar, *The Mahabharata: Adi Parva* (Bhandarkar Oriental Research Institute, 1957).

28 Hiral Pandey, "Administration of Justice under King *Vikramaditya* and its reflection on the contemporary Justice system" 4 *Indian Journal of Law and Legal Research* (2023).

29 *Supra* note 9.

30 V. K. Shekhawat and G. Chauhan, "The influence of Indian epics and Puranas on ethical values" *Advances in Social Science, Education and Humanities Research* 61-64 (2025).

The relevance of PIL is in its alignment with these ancient principles, reflecting a continuous thread of communal justice and responsibility. By enabling legal actions that address broader social issues, PIL embodies the traditional Indian ethos of ensuring that the legal system serves the public interest and contributes to societal well-being. This connection underscores how historical concepts of justice and community welfare continue to influence modern legal practices.

CSR: Aligning Business Practices with Principles from Traditional Indian Knowledge

The modern Corporate Social Responsibility (CSR) has also had an ancient resonance which is found in the Holy *Bhagavad Gita* where Lord *Shri Krishna* preaches about the nature and consequences of Charity/Donation/Gift given, which is discussed as:

दातव्यमिति यद्दानं दीयतेऽनुपकारिणे ।
देशे काले च पात्रे च तद्दानं सात्त्विकं स्मृतम् ॥³¹

Word-by-Word-Meaning - दातव्यम् (*dātavyam*) — “to be given; fit to be given”; इति (*iti*) — “thus”; यत् (*yat*) — “which”; दानम् (*dānam*) — “gift; giving”; दीयते (*dīyate*) — “is given”; अनुपकारिणे (*anupakārine*) — “to one who will not return the favour; to a non-benefactor”; देशे (*dese*) — “in the proper place/context”; काले (*kāle*) — “at the proper time”; च (*ca*) — “and”; पात्रे (*pātre*) — “to a worthy recipient”; च (*ca*) — “and”; तत् (*tat*) — “that”; दानम् (*dānam*) — “giving gift”; सात्त्विकं (*sāttvikam*) — “of the nature of sattva; pure”; स्मृतम् (*smrtam*) — “is regarded/remembered as; is held to be.”

Meaning- The essence of this sermon is that a gift/charity bestowed as a part of one’s duty and for which no return is expected, and which is given to a worthy person at the proper time and proper place is treated and declared as *Sattvik* i.e. a kind of righteousness/rectitude.

CSR involves businesses adopting practices that contribute positively to society beyond their profit-making activities. In India, CSR has gained prominence as companies are encouraged to engage in activities that support community development, environmental sustainability, and ethical governance. This modern concept echoes traditional Indian ethical principles found in texts such as the *Arthashastra* and various *Upanishads*, which advocate for responsible and ethical behaviour in both personal and professional realms.

31 Bhagavad Gita, Chapter 17, Verse 20.

CSR reflects a deep-seated tradition of moral responsibility and social welfare by aligning business activities with values like *Dharma* and *Ahimsa*. This connection highlights how ancient ethical teachings continue to shape contemporary business practices, bridging traditional wisdom with modern corporate ethics and demonstrating the enduring influence of IKS on current practices.³²

यत्तु प्रत्युपकारार्थं फलमुद्दिष्टं वा पुनः ।
दीयते च परिक्लिष्टं तद्दानं राजसं स्मृतम् ॥³³

Word-by-Word-Meaning — यत् (yat) — “that which”; तु (tu) — “however/but”; प्रत्युपकारार्थम् (pratyupakârâartham) — “for the sake of a return favour; expecting reciprocation”; फलम् (phalam) — “reward/result/benefit”; उद्दिष्टम् (uddhisya) — “having in view; aiming at”; वा (vâ) — “or”; पुनः (punah) — “again/alternatively”; दीयते (dîyate) — “is given”; च (ca) — “and”; परिक्लिष्टम् (pariklishtam) — “grudgingly; with distress/reluctance”; तत् (tat) — “that”; दानम् (dânam) राजसम् “gift; giving”; राजसः (râjasah) — “of the rājasic (passion-driven) kind”; स्मृतम् (smrtam) — “is considered/held to be.”

Meaning- It says a charity given in a grudging spirit and with the object of getting a service in return or in the hope of obtaining a reward is called *Rajasika* i.e. a charity done in the mood of passion.

Relevance to Modern Times and Practical Application

The ethical foundations embedded in ancient IKS remain highly relevant in addressing contemporary legal issues. The principles derived from texts like the *Vedas*, *Upanishads*, and *Dharmashastras* emphasize concepts such as justice, duty, and righteousness, which are essential to modern legal ethics.

■ *Justice (Nyaya)*

In ancient Indian legal systems, the concept of ‘*Nyaya*’ or justice was not just about legal correctness but also about moral righteousness. This holistic approach to justice can address modern legal issues by promoting fairness and equity in the legal process.³⁴

■ *Duty (Dharma)*

32 Lokesh Tomar and Salil Seth, “Navigating Corporate Social Responsibility in the realms of Indian Knowledge system” 15 (01) *International Journal of Science and research Archive* 356-358 (2025).

33 Bhagavad Gita, Chapter 17, Verse 21.

34 *Supra* note 22.

'Dharma' or duty is a central tenet in ancient Indian jurisprudence. It encompasses ethical and moral obligations that individuals and legal practitioners must uphold. In contemporary contexts, this principle can enhance the sense of responsibility and ethical conduct among legal professionals.³⁵

■ *Righteousness and Morality*

Ancient texts emphasize the importance of righteousness and morality in legal practices. This can guide modern legal ethics by ensuring that legal decisions are not only legally sound but also morally justifiable.³⁶ The integration of traditional Indian principles, such as 'Dharma' (duty) and 'Nyaya' (justice), can significantly enhance ethical decision-making in modern legal practice. These concepts provide a moral framework that helps practitioners navigate complex ethical situations by ensuring that their actions align not only with legal standards but also with deeper moral values. For instance, the principle of 'Dharma' emphasizes the duty of individuals to act in a manner consistent with ethical and social responsibilities, while 'Nyaya' focuses on delivering justice fairly and impartially.³⁷

One concrete application of these principles is in the realm of judicial integrity. Adopting the ancient principle of 'Raja Dharma', or the duty of the ruler, which mandates fairness, impartiality, and moral righteousness, can strengthen judicial conduct. By integrating 'Raja Dharma' into contemporary judicial practice, the judiciary can mitigate corruption and foster greater public trust, ensuring that legal decisions are made with integrity and ethical commitment.³⁸

■ *Legal Education and Training*

Incorporating traditional knowledge systems into legal education and training can cultivate more ethically aware legal professionals. By including traditional Indian principles in the curriculum, law schools can offer students a broader understanding of the moral dimensions of law, encouraging a commitment to justice and community welfare. This approach not only enhances students' grasp of legal ethics but also instils a sense of responsibility towards societal well-being. Developing curricula that integrate studies of ancient texts and their ethical teachings can provide students with a more comprehensive perspective on legal ethics. This educational strategy helps future legal professionals appreciate the historical and cultural contexts of legal principles, preparing them to apply these insights in contemporary legal

35 A.A. Aditi, "Evolution of Indian Legal Concepts: Dharmashastra to Indian Constitution" 5 *Indian Journal of Integrated Research in Law* 820-825 (2025).

36 Robert Lingat, *The Classical Law of India* (University of California Press, 1973).

37 *Supra* note 22.

38 *Supra* note 33.

practice. By connecting traditional wisdom with modern legal challenges, this approach enriches the training process and fosters a deeper commitment to ethical practice.³⁹

■ *Community Legal Services*

Applying traditional principles in community legal services can make sure that legal aid and support are delivered in a manner that respects local customs and values. This approach promotes greater acceptance and effectiveness of legal interventions by aligning them with the ethical and cultural norms of the communities served. For example, legal aid clinics operating in rural and indigenous communities can integrate the principles of '*Nyaya Panchayats*' (traditional village councils) into their dispute resolution processes. By incorporating these traditional methods, legal aid services can address disputes in ways that resonate with local values and customs, thereby enhancing the relevance and impact of legal support. This integration of traditional principles makes sure that legal interventions are not only effective but also culturally sensitive, fostering greater trust and cooperation within the community.⁴⁰

V. Ancient Systems: Strengths and Limitations

Ancient Indian legal systems are often celebrated for their holistic approach to justice, which integrates ethical considerations deeply into legal practices. These systems emphasize moral duty, community welfare, and the role of ethics in ensuring justice, offering a rich framework that can enhance modern legal frameworks. The focus on ethical principles such as *Dharma* and *Nyaya* reflects a commitment to aligning legal practices with broader societal values, providing a foundation for a more comprehensive understanding of justice.

But, ancient systems also face limitations that pose challenges in their application to contemporary contexts. The rigidity of these systems, coupled with their lack of inclusivity and contextual relevance, can be problematic.⁴¹ The hierarchical and conservative nature of ancient texts, along with their prescriptive roles based on caste and gender, highlights issues that may conflict with modern, egalitarian ideals. These limitations necessitate careful consideration when integrating traditional principles into current legal practices.⁴²

Modern Systems: Evolution and Challenges

³⁹ *Supra* note 16.

⁴⁰ *Supra* note 4.

⁴¹ *Supra* note 23.

⁴² *Supra* note 36.

Modern legal ethics have undergone significant evolution, focusing on professional conduct, client rights, and impartiality. These principles are codified and enforced by regulatory bodies, which play a crucial role in ensuring accountability and professionalism within the legal profession. The development of these ethical standards has led to more structured and transparent legal practices, promoting fairness and integrity in the legal system.

Despite these advancements, modern legal systems face ongoing challenges, including navigating ethical dilemmas in complex cases, balancing individual rights with community welfare, and maintaining integrity amid a rapidly evolving legal landscape. Integrating traditional ethical principles can address some of these challenges by providing a more nuanced and comprehensive ethical framework.⁴³ By drawing on historical wisdom, modern systems can enrich their approach to justice and ethical decision-making.⁴⁴

■ *Balancing Tradition and Modernity*

Balancing traditional and modern elements requires a thoughtful approach that honours ancient principles while adapting them to contemporary contexts. Developing hybrid models that incorporate traditional wisdom alongside modern legal practices can help achieve this balance. Continuous evaluation and adaptation of legal practices are essential to make sure that they remain relevant and effective in addressing current legal challenges.⁴⁵

Case studies of effective integration can provide valuable insights for legal professionals. These examples illustrate how traditional wisdom can be modified to fit contemporary legal situations, offering practical strategies for blending ethical teachings from ancient systems with modern legal practices. By examining these case studies, legal professionals can strengthen moral behaviour and advance justice in a way that respects both historical and contemporary values.⁴⁶

Challenges and Criticisms

Ancient Indian legal systems, while offering valuable insights into justice and ethics, are not without their criticisms. One of the primary critiques is their rigidity and conservatism. Texts such as the *Manusmriti*, which outline strict codes of conduct based on caste and gender, have been criticized for recurring social inequalities and conservative values. These rigid structures often enforced hierarchical norms which are viewed as inconsistent with modern principles of equality and social justice.

43 *Supra* note 23.

44 *Supra* note 21.

45 *Supra* note 8.

46 *Supra* note 36.

One more significant issue is the lack of inclusivity within traditional legal systems. The roles and duties prescribed by ancient texts frequently marginalized women and lower castes, limiting their participation and recognition in both legal and social spheres. This exclusion underscores a fundamental limitation of traditional systems, where rigid social norms constrained the rights and roles of certain groups.⁴⁷ Such relevance of ancient principles in the contemporary era also presents challenges. Although the ethical foundations of these principles are robust, the specific societal norms and prescriptions of ancient texts may not align with modern values and human rights standards. This disjunction makes it difficult for applying traditional principles directly to current legal contexts without significant adaptation.⁴⁸

Integrating traditional knowledge with contemporary legal ethics introduces its own set of dilemmas. One main issue is balancing traditional values with modern legal requirements. For instance, the ancient emphasis on community welfare may sometimes conflict with contemporary notions of individual rights and personal freedoms. This tension highlights the challenge of reconciling historical principles with the evolving needs of modern legal systems.⁴⁹ Adapting traditional ethical principles to contemporary legal contexts is another complicated task. Legal practitioners must navigate potential conflicts between ancient moral duties and current professional ethics, such as confidentiality and impartiality. This process requires careful consideration to make sure that these traditional principles are applied in ways that are both relevant and consistent with modern ethical standards.

The practical implementation of traditional principles within modern legal systems demands thoughtful adaptation. This includes developing frameworks that respect the core values of ancient traditions while ensuring their applicability to contemporary legal practices. Effective integration needs creating models that honour historical wisdom while addressing current legal and ethical challenges.⁵⁰

To balance tradition and modernity effectively, a nuanced approach is necessary. Legal practitioners can draw on the ethical foundations of ancient texts, such as principles of truthfulness, justice, and community welfare, which continues to stay relevant today. Developing hybrid models that meld traditional and modern elements can provide help to create a more comprehensive and culturally resonant legal system. Continuous evaluation and adaptation are essential to make sure that traditional principles continue to be effective and applicable in the changing legal

47 *Supra* note 22.

48 *Supra* note 36.

49 *Supra* note 16.

50 *Supra* note 21.

51 *Supra* note 9.

landscape. This ongoing dialogue within the legal community helps address emerging ethical challenges and integrates ancient wisdom with contemporary practice.⁵¹

Strategies for Integration

Several tactics can be used to successfully combine old IKS with modern legal ethics. In this process, training and education are essential. Future legal practitioners might gain a greater awareness of both historical and contemporary ethical frameworks by incorporating classical ethical ideas into legal education and professional training. This strategy makes sure that upcoming generations of solicitors are knowledgeable about both historic values and modern norms, contributing to the development of a more comprehensive understanding of legal practice. Modern legal systems incorporate classical concepts through policy improvements as well. Enacting legal reforms that integrate moral lessons from IKS can bring modern legal practices into line with traditional values, strengthening the ethical underpinnings of the legal system.

These reforms can integrate ideas that advance justice, accountability, and societal benefit in order to bridge gaps in the current system. Participating in the community is another crucial tactic. Encouraging communication and cooperation among academics, legal experts, and communities can help to promote understanding and the sharing of ideas. Through the engagement of several stakeholders in dialogues regarding the assimilation of conventional values, legal frameworks can cultivate more comprehensive and culturally sensitive procedures.⁵²

V. Conclusion

This paper has explored the integration of ancient IKS with contemporary legal ethics, highlighting the ethical dimensions of traditional legal systems, the evolution of legal ethics in India, and the intersections between traditional principles and modern practices. The examination of case studies, both ancient and modern, demonstrates the enduring relevance of these principles and their potential applications in today's legal landscape. Integrating IKS with contemporary legal ethics offers significant benefits for legal practice. By drawing on the ethical foundations of traditional texts, legal practitioners can enhance their commitment to justice, integrity, and community welfare. This integration can also promote a more culturally resonant and morally grounded approach to legal practice, benefiting both practitioners and the broader society.

52 Kerstin Knopf, "The Turn Toward the Indigenous: Knowledge Systems and Practices in the Academy" 60 *Amerikastudien/American Studies* 179–200 (2015).

In addressing current legal concerns, this study has looked at the applicability of ancient IKS. It has done so by comparing and contrasting them with Western legal ethics, emphasising their usefulness, and critically analysing both ancient and modern systems. Traditional values can be successfully incorporated into contemporary legal practice to improve moral decision-making, advance justice, and handle current issues.

Legal practice can benefit from the integration of traditional ethical ideas into modern legal ethics since it offers a more comprehensive and culturally relevant approach. This integration has the potential to strengthen the moral foundation of legal practitioners, advance equity and justice, and increase public confidence in the legal system.

Future research could explore additional case studies to further illustrate the practical applications of traditional principles in modern legal contexts. Comparative studies between Indian and other cultural legal systems could also provide valuable insights into the universal applicability of these principles. Additionally, empirical research examining the outcomes of integrating traditional ethics into contemporary practice could offer evidence-based recommendations for legal professionals.

JUSTICE ORIENTATION OF LAW STUDENTS IN INDIA: POSSIBILITIES FOR A RESTORATIVE FUTURE

*Jaya Sukul & Ambika Gupta**

Abstract

India's justice system continues to rely heavily on retributive frameworks, yet meaningful engagement with alternative approaches remains limited. Restorative justice offers a paradigm shift, viewing crime not only as a legal violation but as harm that fractures relationships within communities, emphasizing repair over punishment. While Indian law incorporates restorative principles in certain areas, such as alternative dispute resolution and juvenile justice, little research has explored how these ideas are understood or valued by the broader public. This study seeks to address this gap by investigating justice orientations among Indian law students, which is a key group of future legal actors. A survey among 192 law students (mean age 28) in the Delhi National Capital Region was also done using a scale of restorative and retributive models. Upon carrying out comparative statistical analyses, a statistically significant and greater inclination towards restorative justice was found. Considering law students' position as important stakeholders due to their future entry into the legal system as lawyers, judges and legal policy makers capable of implementing change, these results point to greater possibilities for a restorative future. As a one-of-a-kind study of the justice attitudes of the Indian populace, it also points to an increased possibility of restorative justice processes being incorporated and the public's response being more positive.

Keywords: *Restorative Justice, Retributive Justice, Justice Orientation, Law Students*

I. Introduction

II. Conceptual and Philosophical Foundations of Restorative Justice

III. Justice Orientations Among Law Students

IV. Conclusion

I. Introduction

LEGAL SYSTEMS across the globe, particularly those rooted in the common law tradition, predominantly conceive of crime as a violation against the State, with justice being meted out through punishment proportional to the offense.¹

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1 Anju Vali Tikoo and Sonia Pandey, "Ensuring Justice to Victims Through Restorative Justice Strategies: Some Underpinnings" 6 *Kamkeus Law Journal* 1 (2022).

The Indian criminal justice system is a paradigmatic example of this framework, largely a holdover from its colonial past, where the primary objective was state control and the maintenance of order rather than the redressal of interpersonal harm. This state-centric, retributive model defines crime as a violation of abstract legal codes thereby positioning the State as the primary victim and demoting the person harmed to the periphery of the justice process. Within this adversarial structure, victims are often reduced to the status of a witness, their role instrumental to securing a conviction but their personal needs for healing, information, and participation largely ignored. The systemic failures of this inherited model are manifold and well-documented.²

The Indian judiciary is fraught by immense case backlogs, leading to protracted and expensive trials that render justice inaccessible for a significant portion of the population.³ Prisons are severely overcrowded, with a disproportionately high number of undertrials, many of whom belong to religious and caste-based minority communities,⁴ languishing in pre-trial detention for years. Thus, the cracks in the current legal system become evident when those with power are acquitted without accountability while those who are marginalized face incarceration for crimes that might otherwise be considered minor.⁵

Furthermore, the focus on punishment as a primary deterrent has proven largely ineffective in rehabilitating offenders or reducing recidivism, often failing to address the root causes of criminal behaviour and instead fostering a cycle of crime.

Restorative Justice as a Paradigm Shift

Restorative justice conceptualizes crime as an act that harms individuals and communities, disrupting personal dignity and social relationships. Its primary goal is to repair this harm by actively involving all stakeholders in the justice process. Those most affected by the offense collectively identify the harm caused, determine the needs that require redress, and establish accountability measures to promote healing and restore damaged relationships.⁶

2 *India Justice Report 2022* (Tata Trusts 2023) 44–50, available at: https://indiajusticereport.org/files/IJR%202022_Full_Report.pdf (last visited on Jan. 20, 2025).

3 *Ibid.*

4 Irfan Ahmad and Md. Zakaria Siddiqui, “Democracy in Jail: Over-representation of Minorities in Indian Prisons” 52(44) *Economic and Political Weekly* 98–106 (2017); National Crime Records Bureau, *Prison Statistics India 2023* (MHA 2024) 12–15.

5 Riddhi Dastidar, “Cancel Culture vs Rape Culture, and the Case for Repairing Harm” *The Wire*, August 10, 2019, available at: <https://thewire.in/rights/cancel-culture-vs-rape-culture-and-the-case-for-repairing-harm> (last visited on Jan. 20, 2025).

6 Howard Zehr, *The Little Book of Restorative Justice* 40 (Good Books, 2nd edn., 2015).

Across various stages of procedural justice in India, crime victims often experience dismissal and invalidation of their suffering. The current mainstream justice system offers no dedicated forum for victims to share their narratives, seek accountability, receive recognition, or obtain an apology from offenders as part of their restoration.⁷ Instead, victims and their families remain peripheral to a justice process that prioritizes punishing perpetrators over addressing harm. This marginalization is compounded by the inaccessibility of courts and the burdens of lengthy, expensive trials, leaving many victims unable to attain justice, even within a retributive framework.⁸

Throughout the different stages of procedural justice in the country, victims of crime face dismissal and invalidation of their experience of harm done. There is no forum in the present mainstream justice system that allows the victim to express their narrative of what happened and seek accountability, recognition or apology from the perpetrator to facilitate their restoration.⁹ In this process, the victims are sidelined and their definition of justice is never considered. In a post-colonial democracy such as that of India where most of the laws persist from the colonial past or have been borrowed from other legal structures.

The Relevance of Justice Orientation

Justice orientation, broadly defined, refers to an individual's underlying beliefs, values, and priorities regarding how justice should be conceptualized within society. It reflects a spectrum of approaches, ranging from punitive or retributive models that emphasize punishment and deterrence, to restorative approaches that focus on healing and repair of harm. Justice orientation is deeply subjective which is often shaped by cultural norms, legal education, lived experiences, and moral frameworks, and is therefore crucial in understanding how individuals interpret justice in both personal and institutional contexts.¹⁰

The relevance of studying justice orientation lies in its power to illuminate the moral underpinnings of legal systems and predict future decision-making by those who shape and enforce laws. In a country like India, where justice has historically been tied to punitive traditions and colonial legacies, exploring justice orientation

7 Justice P. V. Reddy, "Role of the Victim in the Criminal Justice Process" 18(1) *National Law School of India Review* 1 (2006).

8 M.P. Ram Mohan, Muhammed Faisal, *et.al.*, "Public Perception of Courts in India: Unmeasured Gap between the Justice System and Its Beneficiaries" *SSRN, IIMA Working Paper* (2020).

9 T.F. Marshall, *Restorative Justice: An Overview* 20 (Home Office Research Development and Statistics Directorate, London) 1999.

10 Terrill O. Taylor and Tamba Bailey, "The Restorative Justice Attitudes Scale: Development and Initial Psychometric Evaluation" 50(1) *The Counselling Psychologist* 6-39 (2022).

helps identify pathways for reform that resonate with social values rather than impose top-down change. Law students, as future lawyers, judges, and policymakers, hold particular significance because their orientation towards justice will influence courtroom practices, policy decisions, and the interpretation of justice norms in years to come. By assessing their orientation, this study sheds light on evolving cultural attitudes toward justice and the potential receptivity to innovative, community-centered approaches.

Findings from this research indicate that law students demonstrated a stronger inclination toward restorative principles over retributive ones, suggesting that, despite the dominance of punitive paradigms, emerging legal professionals are open to justice models that prioritize repair, empathy, and community healing. This preference also reflects a broader cultural shift: in contexts where victims' experiences are often marginalized, the inclination towards restoration represents a deeper commitment to addressing harm in a more inclusive and relational manner.

II. Conceptual and Philosophical Foundations of Restorative Justice

The modern restorative justice movement is largely rooted in the foundational principles that posit that crime is fundamentally a violation of people and relationships and it creates an obligation to make things right. This philosophy is built upon a triad of core concepts: the harms caused by the offense (to victims, the community, and offenders themselves), the needs that arise from these harms (such as the victim's need for information, truth-telling, empowerment, and restitution), and the obligations of the offender to address these needs and repair the harm. The process is inherently participatory, seeking to empower those directly affected to find a resolution that promotes healing and reintegration over alienation and punishment.¹¹

While these principles have been formalized in Western contexts, their underlying ethos is not entirely alien to the Indian socio-cultural and philosophical landscape. The principles of Gandhian thought, for instance, resonate deeply with a restorative worldview. Mahatma Gandhi's philosophies of non-violence (*ahimsa*), forgiveness, and the belief in the inherent capacity for human transformation align closely with the restorative emphasis on healing relationships and reintegrating offenders rather than ostracizing them through punitive measures. Similarly, traditional Eastern philosophies prevalent in India, such as those found in Buddhism, emphasize concepts of social harmony, reconciliation, and compassion, providing a fertile cultural ground for restorative ideals. This suggests that a shift towards a more restorative system would not be a mere importation of a foreign concept but

11 *Supra* note 6.

could be framed as a reclamation and formalization of indigenous values that were supplanted by the colonial retributive framework.

Restorative justice emphasizes harmony and reconciliation over punishment, aligning with ancient Indian wisdom. The *Rig Veda* advocates for unity and collective healing:

संगच्छध्वं सं वदध्वं सं वो मनांसि जानताम्।

देवा भागं यथा पूर्वं सज्जानाना उपासते ॥¹²

Word by Word Meaning - संगच्छध्वं : move together सं: : together वदध्व: : speak स: : together व: your मनांसि : minds जानताम् : let them know, be united देवा: gods भागम्: share, portion यथा: : as पूर्वे: : of old, previous सज्जानाना: knowing, aware उपासते: : worship, sit together.

Meaning - Meet together, talk together, let your minds apprehend alike; in like manner as the ancient gods concurring accepted their portion of the sacrifice. This underlines restorative justice as an age-old call for unity, dialogue, and healing.

Nascent Restorative Practices in the Formal Legal System

Despite the dominance of the retributive model, elements of restorative justice are present, albeit in a fragmented and nascent state, within India's formal legal system. These mechanisms, however, often appear to have been co-opted to serve the efficiency-oriented goals of the primary retributive framework, creating a restorative veneer over a fundamentally punitive structure.

- *Alternative Dispute Resolution (ADR)*: Mechanisms such as mediation, arbitration, and *Lok Adalats* (People's Courts) are well-established in India, primarily through the Legal Services Authorities Act, 1987, and the Arbitration and Conciliation Act.¹³ These forums prioritize settlement and reconciliation over adversarial confrontation.¹⁴ However, their application is overwhelmingly concentrated in civil and commercial disputes. Their use in the criminal justice system is limited and often depends on judicial discretion rather than a systemic policy, serving more as a tool to reduce judicial backlogs than to advance a distinct philosophy of justice.
- *Compounding of Offenses*: Section 359 of the Bharatiya Nagarik Suraksha Sanhita, 2023 provides a direct statutory gateway for victim-offender mediation (for brevity, 'VOM') by allowing certain, mostly minor, offenses to be "compounded" or settled between the parties, leading to the acquittal of the

¹² *Rig Veda*, Chapter 10, *Sukta* 191, *Shloka* 2.

¹³ The Arbitration and Conciliation Act., 1996.

¹⁴ Muhammad Asadullah, "Decolonization and Restorative Justice: A Proposed Theoretical Framework" 3(1) *Decolonization of Criminology and Justice* 27-62 (2021).

accused. While this provision embodies a restorative spirit of mutual resolution, its scope is severely restricted. The fixed list of compoundable offenses excludes most serious crimes, thereby preventing the application of restorative principles precisely where the harm is greatest and the need for healing most profound. This limitation ensures that for a vast category of crimes, the state's retributive mandate remains unchallenged.

- *Plea Bargaining*: Introduced into the CrPC in 2005, plea bargaining allows an accused to plead guilty in exchange for a lesser sentence. While it encourages the offender to take accountability for the harm caused which is a key restorative step. Its primary drivers are pragmatic: to provide faster justice and reduce the caseload of overburdened courts. The process is often more of a negotiation between the offender and the State, with victim participation being procedural rather than central to the resolution.
- *Victim Compensation Schemes*: Both statutory provisions, notably section 396 of the BNSS, and a series of landmark judicial pronouncements have established victim compensation as an integral part of the justice process. This acknowledges the reparative dimension of justice, focusing on the material needs of the victim. However, implementation remains a significant challenge, with inconsistent application across states, inadequate awareness among victims about their rights, and bureaucratic delays often hindering access to these funds.

India has a long and rich history of traditional, community-based dispute resolution mechanisms that predate the colonial legal system and align closely with restorative principles.¹⁵ Systems like the *Panchayat* (a council of village elders) and the more formalized *Gram Nyayalayas* (village courts) emphasize community involvement, accessibility, use of local language, and a focus on reconciliation and restoring social harmony over punishment.¹⁶ These informal structures conceptualize crime not as an offense against a distant state, but as a disruption within the community that the community itself must address. However, a romanticized view of these traditional systems is untenable.

While they offer a valuable counterpoint to the alienating formalism of the state-run courts, they are also deeply embedded in the very social hierarchies they are meant to regulate. Numerous studies and reports have highlighted how these forums can become sites for the perpetuation of regressive patriarchal and caste-based power dynamics. Decisions can be influenced by caste and class power, and women seeking justice, particularly in cases of gender-based violence, may face bias and

¹⁵ *Ibid.*

¹⁶ *Ibid.*

pressure to compromise. The denial of appeal against a consented decision in some of these forums further opens the door for the misuse of power, violating the core restorative principle that any resolution must be voluntary and not coerced. Therefore, while these indigenous systems offer a cultural blueprint for restorative justice, their modern application requires critical engagement and significant reform to ensure they align with constitutional principles of equality and fairness. Mahabharata offers an ancient guideline for proportional justice:

दण्डः शास्ति प्रजाः सर्वा दण्ड एवाभिरक्षति ।

दण्ड सुप्तेषु जागर्त्ति दण्डं धर्मं विदुर्बुधाः ॥¹⁷

Word by Word Meaning- दण्डः Punishment, authority, discipline शास्ति - Rules, governs, disciplines प्रजाः - Subjects, people, citizens सर्वाः - All, everyone दण्डः - Punishment एव - Alone, indeed अभिरक्षति- Protects, safeguards दण्डः -Punishment सुप्तेषु- When others sleep, in times of negligence जागर्त्ति - Remains awake, vigilant दण्डम् - Punishment धर्म- Righteousness, justice, moral order विदुः - Know, understand बुधाः - The wise, the learned

Meaning- Punishment disciplines all equally and protects with righteousness; it should neither be excessive nor too lenient.

The Juvenile Justice System as a Restorative Archetype

In stark contrast to the adult criminal system, India's juvenile justice framework stands as the nation's most comprehensive and philosophically coherent embodiment of restorative principles. The Juvenile Justice Act,¹⁸ (for brevity JJ Act), is explicitly oriented towards rehabilitation and social reintegration rather than punishment. Acknowledging the vulnerability and amenability to change of children in conflict with the law, the Act prioritizes their best interests and focuses on addressing the harm caused rather than solely punishing the perpetrator.

This restorative ethos has been repeatedly affirmed by the judiciary. In the case of *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*,¹⁹ the Supreme Court explicitly observed that meaningful rehabilitation for a child is impossible unless the fundamental components of restorative justice are acknowledged and applied. The court thus noted:²⁰

¹⁷ *Mahabharat*, Shantiparva, Chapter 15.

¹⁸ The Juvenile Justice (Care and Protection of Children) Act, 2015.

¹⁹ *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*, (2017) 4 SCR 625.

²⁰ *Id.*, at para 45.

The importance of rehabilitation and social re-integration clearly stands out if we appreciate the objective of the JJ Act which is to foster restorative justice. There cannot be any meaningful rehabilitation, particularly of a child in conflict with law who is also a child in need of care and protection unless the basic elements and principles of restorative justice are recognized and practiced.

The JJ Act mandates the establishment of Juvenile Justice Boards (JJBs) which are empowered to utilize a range of non-punitive measures, including counselling, community service, and participation in victim-offender mediation. Scholars and practitioners have proposed further embedding restorative processes at various entry points within the juvenile system, such as introducing mediation at police stations (with adequate safeguards) and using restorative practices within childcare institutions to strengthen relationships and create an environment conducive to reintegration. The JJ Act thus serves as a powerful domestic model demonstrating that a justice system can be legislatively designed around a core philosophy of restoration rather than retribution.

Restorative Justice and Heinous Crimes

The application of restorative justice to serious and violent crimes, particularly sexual offenses, represents its most critical and contentious frontier in India. These offenses are non-compoundable under the BNSS, meaning they cannot be legally settled through private compromise. In ancient Indian texts, the punishment and acquittal both being sanctioned by law.²¹

Manusmriti argues that:

शासनाद् वा विमोक्षाद् वा स्तेनः स्तेयाद् विमुच्यते ।
अशासित्वा तु तं राजा स्तेनस्याप्नोति किल्बिषम् ॥²²

Word by Word Meaning- शासनात् - By punishment, by discipline वा - Or विमोक्षात् - By pardon, by forgiveness वा - Or -The thief -From theft, स्तेयात्- from his crime विमुच्यते - Is released, is freed अशासित्वा - Without punishing तु - But तं -Him, that thief राजा - The king, ruler अशासित्वा - Of the thief स्तेनस्य -Incurs, attains किल्बिषम् - Sin, guilt.

Meaning - The thief becomes absolved from the theft, either through punishment or through acquittal. By not punishing the thief, the king imbibes the guilt of the thief.

21 Ganganath Jha, *Manusmriti with the Commentary of Medhatithi* (Motilal Banarsidass, 3rd edn., 2016).

22 *Manusmriti*, Chapter 8, *Shloka* 316.

This legal barrier is reinforced by strong judicial precedent and significant socio-political resistance. The Supreme Court, in landmark cases such as *Madanlal*,²³ and *Shimbbu*,²⁴ has unequivocally condemned any attempts at compromise in rape cases, viewing them as an affront to the dignity of women and a trivialization of a grave crime against society.

This stance is strongly supported by Indian feminist scholars and was echoed in the influential Justice Verma Committee Report of 2013,²⁵ which was constituted in the wake of the 2012 Delhi gang rape case. The report categorically rejected mediation for rape, arguing that such crimes demand the utmost seriousness and stringent penal consequences. The central critique is that in a deeply patriarchal society, mediation risks becoming a tool of coercion, where survivors are pressured by family and community to “forgive” or accept marriage or monetary compensation as a settlement, thereby reviving oppressive traditional practices and undermining the survivor’s autonomy and rights.

A seminal qualitative study conducted by the Counsel to Secure Justice Centre and the Centre for Criminology and Victimology at National Law University Delhi documented the justice experiences of adult survivors of child sexual abuse.²⁶ Despite these formidable and legitimate concerns, a growing body of research suggests that the purely retributive approach also fails to meet the complex needs of many survivors.²⁷ The findings revealed a nuanced set of needs that the formal justice system is ill-equipped to address. While survivors desired punishment and safety, many also expressed a profound need for active participation in the process, a genuine apology from the abuser, answers to questions like “why me?”, and an assurance that the harm would not be repeated.

These needs become even more complex when the abuser is a close family member, where the survivor may want the abuse to stop without severing family ties entirely. The adversarial system, which discourages admissions of guilt and offers no avenue for dialogue or apology, makes fulfilling these needs impossible. This research suggests that while restorative justice cannot and should not replace the formal trial process for heinous crimes, there may be a crucial role for carefully designed,

23 *State of Madhya Pradesh v. Madanlal*, (2015) 7 SCC 681, 690–92.

24 *Shimbbu v. State of Haryana* (2014) 13 SCC 318, 324–26.

25 Government of India, “Report of the Committee on Amendments to Criminal Law” (January 23, 2013).

26 Perspective of Justice: Restorative Justice and Child Sexual Abuse in India, NLU Delhi, available at: <https://nludelhi.ac.in/download/publication/2017/Perspectives%20of%20Justice.pdf> (last visited on Aug. 13, 2025).

27 *Ibid.*

voluntary, and professionally facilitated post-conviction restorative processes that can supplement the retributive outcome and address the deep-seated psychological and emotional needs of survivors that are currently left unmet.

III. Justice Orientations Among Law Students

An individual's "sense of justice" is a foundational moral and political concept, described by philosophers from Plato to Rawls as a virtue concerned with fairness and rendering to each person their due. From a psychological perspective, this sense manifests as "justice sensitivity", an awareness of fairness and equity, which motivates a person to address and correct perceived injustices. This internal moral compass shapes an individual's "justice orientation," predisposing them toward specific philosophies of justice, such as a retributive focus on punishment or a restorative focus on repairing harm. Studying this orientation within the specific cohort of law students is a critical necessity for understanding and shaping the future of the legal system itself.

Law students are the architects of future legal landscapes. They are poised to become the lawyers, judges, policymakers, and advocates who will interpret, enforce, and create the laws that govern society. As such, their fundamental beliefs about the purpose and meaning of justice are of paramount importance. These orientations will directly influence their professional actions, from how they advise a client to the judicial philosophy they apply from the bench.

Research Design and Participants

This study utilized a quantitative, cross-sectional survey design to empirically measure and compare the retributive and restorative justice orientations among law students in India's National Capital Region (NCR). A sample of 192 law students was recruited using an initial selective sampling method to access various law schools, followed by a snowball sampling technique where participants shared the survey with their peers.

The demographic profile of the participants was recorded, focusing on age and gender. The sample was composed predominantly of men (65.1%). The age distribution was varied, reflecting the trend of individuals pursuing legal education at different life stages. The largest cohort (53.6%) was young adults aged 17 to 25, followed by those aged 26-35 (26.0%), with a notable portion of students aged 36 and above (19.8%). A detailed breakdown is provided in Table 1.

Table 1
Socio-Demographic details of participants

Demographic	Frequency, n (%)
Gender	
▪ Men	125 (65.1)
▪ Women	65 (33.9)
▪ Blank	2 (1)
Age	
▪ Men	1
▪ 17 to 25 years old	103 (53.6)
▪ 26 to 35 years old	50 (26)
▪ 36 to 45 years old	24 (12.5)
▪ 46 years old and above	14 (7.3)
▪ Blank	1 (0.5)

Note. N= 192

To assess justice orientation, the study employed the 12-item Retributive Versus Restorative Orientation measure developed by Okimoto et al. (2012). This validated psychometric tool consists of two 6-item subscales designed to measure an individual's general preference for either retributive justice (e.g., "Justice requires that criminals get the punishment they deserve") or restorative justice (e.g., "Justice should focus on repairing the harm done"). Data was collected via a self-constructed Google Form and analyzed using IBM SPSS Statistics.

Initial normality tests revealed that the data from both subscales were not normally distributed. Consequently, a non-parametric equivalent of the independent samples t-test, the Mann-Whitney U test, was selected to ensure methodological rigor in comparing the scores from the retributive and restorative justice scales.

Table 2
Difference between retributive and restorative justice scores using Mann-Whitney U test

Variables	n	M	MR	SD	Z	p
Retributive justice	192	29.3854	178.11	8.47957		
Restorative justice	192	31.3958	206.89	7.92964	- 2.545*	0.011

Note. n = 80. M= Mean. SD= Standard Deviation. MR= Mean Rank. * p<0.05.

A demonstrated inclination among future practitioners towards alternative paradigms, such as restorative justice, signals a foundational readiness for change from within the profession. This “bottom-up” alignment is a critical prerequisite for the successful and sustainable implementation of any new justice policies.

Interpreting the Findings

The central finding of this study, that law students in India’s National Capital Region exhibit a significantly stronger orientation towards restorative justice than retributive justice, is profoundly significant. As restorative justice is currently practiced in the country through alternative dispute resolution mechanisms, the juvenile justice system and by non-governmental organizations.²⁸ It presents a powerful counter-narrative to the entrenched dominance of the punitive, state-centric legal system in which these students are being trained. This inclination suggests that despite being educated within a framework that prioritizes punishment and procedure, the next generation of legal professionals resonates more deeply with principles of harm repair, victim participation, and community-based solutions. This finding implies a latent, “bottom-up” demand for systemic reform originating from within the very cohort that will soon occupy key positions as lawyers, judges, prosecutors, and policymakers. Such an inclination towards restoration of stakeholders to a state of well-being after harm is experienced makes possible a future where the legal system can reform to include more restorative practices in various contexts of crimes including serious crimes such as sexual and domestic violence.²⁹

This restorative preference can be interpreted as a critical resource for change. It signals that future legal practitioners may be more open to advocating for, implementing, and creatively applying restorative alternatives in their professional lives. It challenges the assumption that the legal profession is inherently and monolithically committed to the retributive status quo. Instead, it points to a potential ideological shift, where the concept of justice is increasingly understood not just as the application of punitive sanctions but as a process of “reaffirming our belief in shared values” and restoring stakeholders to a state of well-being after harm has occurred. This ideological alignment is a crucial prerequisite for any meaningful and sustainable legal reform.

Global practices offer valuable lessons for India’s legal reform efforts. For example, the United Kingdom’s Sex Offender Treatment Programmes (SOTPs), rooted in

28 Sayantan Gupta, “Alternative Criminal Dispute Resolution System: An Evolving Interface in India” *SSRN, Madras Law Journal* (2009).

29 Aisha K. Gill and Karen Harrison, “Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches” 8(2) *International Journal of Criminal Justice Sciences* 166 (2013).

cognitive-behavioral therapy, emphasize offender accountability, empathy-building, and reducing recidivism.³⁰ These Programmes ask offenders to discuss their crimes, the possible causal factors that led to it, its consequences and their thoughts about their crimes.³¹ In this process, they also work with the offenders' empathy, especially with regard to the victim, their social functioning and self-esteem. Working on these also aids in these Programmes helping with preventing reoffending. The SOTPs in the Indian context can be an alternative to ensure greater community safety without relying on capital punishment.³²

Indian researchers also identify the restorative practice of holding circles of support and accountability (COSA) for offenders within prisons as one that can lower the risk of reoffending.³³ These circles usually constitute of volunteers who are part of the offender's support system and justice professionals (lawyers, psychologists etc.) who can manage risk if and when it arises. Various human rights organizations have been putting pressure on the government to introduce COSAs as part of prison reform since they reduce recidivism by engaging the offender in accountable relationships. In recent years, similar structures such as welfare units within the prison system consisting of the police, lawyers, psychologists, probation officer and welfare officer have been recommended by the Bureau of Police Research and Development (BPR&D) in its National policy on Prison Reform.³⁴

Restorative principles already embedded can be executed with more efficiency and completeness to ensure they meet survivor needs and are contextually relevant for the various stakeholders. Various NGOs such as Enfold and Counsel to Secure Justice have found entry points in the current juvenile justice system for restorative practices such as circles of support and accountability for the persons harmed and those who perpetuated the harm.³⁵

IV. Conclusion

This study is among the first to examine justice orientation within a segment of the Indian population, focusing specifically on law students who represent a critical

30 Karen Harrison, "Managing High Risk Sex-Offenders in the Community" (Willan, 1st edn., 2010).

31 *Id.*, at 81.

32 *Ibid.*

33 *Ibid.*

34 G. Pal, "Exploring the Potentials of Restorative Justice Mechanisms (SOTP AND COSA) in treating child sexual offenders in India" 5(2) *Journal of Victimology and Victim Justice* 202-220 (2022).

35 Enfold, "Restorative Practices Team: Creating a Restorative Culture that Values Relationships, Empathy, and Accountability" (Nov. 17, 2023).

group of future legal stakeholders. As prospective lawyers, judges, and policymakers, their perspectives hold significant potential for shaping systemic reforms. The findings suggest that legal education, when combined with exposure to contemporary debates on justice, encourages students to critically evaluate India's predominantly retributive system. Notably, participants demonstrated alignment with restorative justice principles regardless of prior familiarity with the concept, indicating that restorative values resonate strongly with broader conceptions of justice.

These findings highlight opportunities for integrating restorative processes into the legal system and suggest that public acceptance of such reforms may be favourable. By understanding the justice orientation of future legal professionals, educators can better design curricula that introduce restorative practices, their underlying principles, and their applicability within or alongside existing legal structures. Future research should expand this inquiry to other demographic groups to evaluate societal readiness for alternative justice models and identify community-specific pathways for their integration.

While the use of a survey provided valuable quantitative data on students' justice orientations, the study lacks qualitative insights into participants' perceptions, reasoning, and personal experiences with justice. As such, the findings serve as a preliminary assessment that future mixed-method studies could build upon. Moreover, the participant pool lacked diversity: most respondents were men aged 17–25, and all were enrolled in institutions located in Delhi NCR. Broader demographic representation, across age, gender, geographic regions, and socio-economic backgrounds, would enhance the generalizability of these results and provide a more comprehensive understanding of justice orientations within India.

LEGISLATIVE COMMENT ON THE UNIFORM CIVIL CODE, UTTARAKHAND, 2024

Hritvik Ravi and Priyal***

Abstract

The Uniform Civil Code (UCC), Uttarakhand, 2024, represents India's first comprehensive state-level civil code. It marks a significant attempt to actualize the constitutional directive of article 44. This legislative comment analyzes the Code's endeavor to synthesize constitutional equality with India's social heterogeneity while examining its historical context and the scope of state intervention in personal laws. The Code introduces several progressive reforms, including the prohibition of polygamy, the abolition of all extra-judicial divorce, and the establishment of a uniform, faith-neutral succession framework. It grants equal inheritance rights to sons and daughters. It also provides a novel statutory framework for live-in relationships and grants partners maintenance rights and legitimizing children born from such unions. However, the analysis argues that these progressive advancements are coupled with provisions reflecting socially conservative overreach and moral policing. The paper particularly critiques the mandatory, punitive, and intrusive registration requirements for both marriages and live-in relationships. It contends that these measures threaten individual autonomy and privacy, potentially transforming a civil registration process into a tool for state surveillance. The comment concludes that while the Uttarakhand Code is a historic step in moving the UCC debate from theory to practice, its intrusive regulations require careful judicial scrutiny to ensure constitutional compliance.

Keywords: *Uniform Civil Code, Uttarakhand Code 2024, Personal Laws, Gender Justice, Live-in Relationships*

I. Introduction

II. Historical Progression towards Uniformity

III. Analysis of the Code

IV. Conclusion

I. Introduction

INDIA CURRENTLY operates under a system of multiple personal laws, with different communities governed by different statutes. Despite having the idea of a Uniform Civil Code (*hereinafter* referred to as 'UCC'), which finds an unequivocal place in the Directive Principles of State Policy under article 44 of the Constitution of India,¹ its legislative actualization has remained elusive for over seventy years. One curious justification which is given is that the post-colonial India did not in

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1 The Constitution of India, art. 44, The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

fact aim for the kind of UCC that so many modernist observers and stakeholders had been vigorously demanding.² Instead, India re-learned an ancient lesson about demanding the impossible, culturally envisaged as asking for the moon.³ In the ancient Indian story, the child god *Krishna* asks his mother *Yashoda* to give him the moon as a toy and the clever doting mother hands him a mirror with a reflection of the moon.⁴ This kind of projection is evident in the careful creation of something that looks like the UCC, a system where personal laws are brought together in a more uniform and balanced way. In other words, we may say that, the *ideal* (emphasis added) of a UCC has taken shape not through uniformity alone, but via a harmonised personal law system. Over decades, states, an activist Supreme Court, and a responsive Parliament have deliberately crafted a legal framework that, while retaining personal laws, skilfully achieves functional legal uniformity.

Uttarakhand's move to legislate The Uniform Civil Code, Uttarakhand (*hereinafter* referred to as 'the Code')⁵ at the state level is therefore a moment of remarkable legal and historical significance. It is the first full-fledged civil code which is implemented by any Indian state since independence and also the most comprehensive attempt to synthesize the constitutional promise of equality with the lived heterogeneity of Indian social life, which some argue is the reason behind delayed implementation of uniformity in civil code.

Dr. B.R. Ambedkar noted during the Constituent Assembly Debates⁶

...we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 (article 44 of the constitution) as part of the Constitution to bring about that change.

Despite this vision, the Constituent Assembly, mindful of the religious sensitivities of the newly independent and partition-scarred nation chose to locate the UCC in

2 Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda" 9(3) *German Law Journal* 211-250 (2008).

3 *Id.*, at 212.

4 *Ibid.*

5 The Uniform Civil Code, Uttarakhand, 2024 (Act 03 of 2024).

6 Constituent Assembly Debates on November 23, 1948, *available at*: <https://www.constitutionofindia.net/debates/23-nov-1948/> (last visited on July 18, 2025).

the non-justiciable part of the Constitution as an aspirational Directive Principle rather than a binding Fundamental Right. This compromise did not erase the normative thrust of the provision. Rather, it set the stage for a perennial debate between majoritarian uniformity and minority autonomy. A classic example is the 1985 *Shah Bano* case,⁷ where the Supreme Court applied the secular Code of Criminal Procedure to grant maintenance to a divorced Muslim woman while overriding her personal law. This judicial push for uniformity was met with fierce opposition from conservative Muslim leaders, who argued it was an infringement on their religious autonomy and personal law. The ensuing political pressure led Parliament to pass the Muslim Women Act, 1986, which tried to effectively overturn the Supreme Court's uniform ruling, thus, prioritizing minority autonomy over a common civil provision.

Scope of State Intervention in Personal Laws

Personal laws govern intimate social institutions such as marriage, divorce, inheritance, and religious endowments, which are very, so to say intimate in nature. These are contrasted with civil laws, which regulate interactions between individuals and the state. While civil laws, like the Bharatiya Nyaya Sanhita or the Bharatiya Nagarik Suraksha Sanhita, which apply uniformly across communities, personal laws often differ by religion and custom. So, to what extent the state can intervene?

Firstly, India is a democratic and secular republic whose constitution is supreme. And the core idea behind the directive of a UCC is the belief that in a civilised society, personal laws need not be tied to religion.⁸ In a country as diverse as India, social relationships should be governed by laws that transcend these identities. Thus, Constituent Assembly has also noted that, religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation.⁹

Article 25 and 26 of the Constitution provide the right to religious freedom but subject this right, there are reasonable restrictions based on public order, morality, and health.¹⁰ Moreover, article 25(2) explicitly empowers the state to intervene in religious practices for the purpose of social reform and welfare, even if such laws affect religious practices. What the state protects is religious faith and belief. If

⁷ *Mohd. Ahmed Khan v. Bano Begum*, AIR 1985 SC 945.

⁸ *John Vallamattom v. Union of India*, 2003 (6) SCC 611.

⁹ *Supra* note 6.

¹⁰ The Constitution of India, art. 25(1), Subject to public order, morality and health and to the other provisions of this Part...; art.26, Subject to public order, morality and health.

religious practices turn counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way for the good of the people of the state as whole.¹¹

Thus, personal laws, despite being rooted in religious traditions are subject to reform in accordance with constitutional values like justice, equality, and fraternity. This means that, the social relations are required to be regulated on a basis that cuts across all such considerations as of religion, race, caste sex, etc. Article 25, which protects the freedom to practice and propagate religion, and article 44, which seeks to separate religion from personal and social relations. Matters such as marriage, divorce, and succession are secular in nature and, therefore, fall outside the scope of article 25 and 26. Legislation that treats these inherently secular issues as religious rights may be constitutionally questionable.

Now this secularisation is evident in The Hindu Marriage Act of 1955 (*hereinafter* referred as 'HMA'). Earlier, Hindu marriage was considered a sacred and eternal bond, indissoluble even beyond death. However, over time, it was acknowledged that marriage serves social and personal functions, companionship, cohabitation, and child-rearing. When these purposes fail, the law must offer a remedy. To address the deep gender imbalance, where men could remarry but women were trapped in indissoluble unions. The Act introduced the principles of monogamy and legal divorce. This move effectively detached personal law from religious belief and treated marriage as a secular social institution.¹² K.M. Munshi has famously noted that, the attitude of mind perpetuated under the British rule, that personal law is part of religion, has been fostered by the British and by British courts. We must, therefore, outgrow it.¹³

Secondly, article 26(b) provides religious denominations the right to manage their own affairs in matters of religion, but this right is not absolute. The phrase "*in matters of religion*" acts as a limitation, thus, administrative, financial, and secular activities connected with religion can be regulated by the state.

Indeed, the State has historically reformed personal laws without rendering them unconstitutional. The Hindu Code Bills of the 1950s introduced divorce rights, equal inheritance for daughters, monogamy, and in fact these reforms were initially met with resistance but are now viewed as landmark advancements in gender

11 D.C. Manooja, "Uniform Civil Code: A Suggestion" 45(2) *Journal of the Indian Law Institute* 448-457 (2000).

12 Virendra Kumar, "Uniform Civil Code Revisited: A Juridical Analysis of *John Vallamattom*" 45(3) *Journal of the Indian Law Institute* 315-334 (2003).

13 *Supra* note 6.

justice, specially after 2005 amendments to the Hindu inheritance laws.¹⁴ Similarly, Christian personal laws were reformed through amendments in the Indian Divorce Act¹⁵ and the Christian Marriage Act.¹⁶ These examples illustrate that the state's role in reforming personal law is constitutionally permissible and also are requirements of the broader goals of equality. Thus, constitutionally speaking, states have the power to legislate on matters of marriage, divorce, and inheritance, as these fall under the Concurrent List (Entry 5 of List III).

However, if a national UCC is enacted by the Parliament, it would override state-level laws under article 254,¹⁷ unless the state law has received Presidential assent post-enactment. Until then, states like Uttarakhand can implement their versions of the UCC. The Supreme Court's observation during the same-sex marriage case,¹⁸ that states may legislate independently on marriage laws, further reinforces this legal standing.

II. Historical Progression towards Uniformity

The framing of UCC is often considered counter-productive, because it is likely to evoke religious susceptibilities.¹⁹ Personal laws in India, governing areas like marriage, divorce, inheritance, guardianship, adoption, and maintenance, have traditionally been deeply rooted in religious customs and practices. British colonials, in the 'Benthamite codification', codified these laws which led to the development of separate personal laws for different religious communities, including Hindus, Buddhists, Jains, Sikhs, Muslims, Parsis, Christians, and Jews. It was this fragmented legal landscape that motivated the framers of the Indian Constitution to include a directive, envisioning a common civil code for all citizens.

The first major move toward a common civil code began with the Hindu Code Bill, which led to four key laws- the HMA (1955), and the Acts on Succession, Adoption and Maintenance, and Minority and Guardianship (all in 1956). Few comparable codifications followed until the Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted in response to *Shah Bano*, reflecting the tension

14 *Supra* note 12 at 330.

15 The Indian Divorce (Amendment) Act, 2001, removed discriminatory provisions against women, aligned the law with contemporary social norms, and addressed issues related to conversion, incurable unsoundness of mind, and leprosy.

16 The Indian Christian Marriage Act, 1872.

17 The Constitution of India, art.254, Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

18 *Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

19 *Supra* note 12 at 315.

20 AIR 1985 SC 935.

between judicial uniformity and political accommodation. After independence, only one Act was passed by Indian Parliament that applied to family relations of all Indians irrespective of their religion. The Act was the Special Marriage Act, 1954.

The Indian judiciary has played a pivotal role in sustaining the constitutional directive. This judicial concern became more pointed in the 1980s, particularly in the famous case in *Shah Bano*. In a historic verdict that granted maintenance to a divorced Muslim woman under section 125 of the CrPC (Now, section 144 of Bharatiya Nagarik Suraksha Sanhita), the Supreme Court lamented that article 44 had been reduced to a “dead letter”. The same year, in *Jordan Diengdeh v. S.S. Chopra*,²⁰ the Court reiterated the need for a uniform law governing marriage and divorce, calling the absence of such a code “an immediate and compulsive necessity”. The 1990s saw the judiciary becoming even more vocal. In the *Sarla Mudgal* case,²¹ the Court was faced with the issue of Hindu men converting to Islam to solemnize a second marriage without dissolving the first. The Court not only held such marriages void but also strongly rebuked the government for failing to implement a UCC.

Crafting Legal Uniformity

While the judiciary has often reiterated that only Parliament can legislate on a UCC, it has simultaneously intervened to ensure that constitutional values are not held hostage to regressive practices cloaked in personal laws. A prime example is the 2017 judgment in *Shayara Bano v. Union of India*,²² where the Court declared the practice of instant triple talaq (*talaq-e-biddat*) unconstitutional, it struck down a practice that was arbitrary, patriarchal, and antithetical to constitutional morality. In *ABC v. State (NCT of Delhi)*,²³ the Court allowed an unwed Christian mother to become the sole guardian of her child without requiring the father’s consent. The court asserted that the parental rights under personal law cannot override the welfare of the child or the autonomy of the mother.

III. Analysis of the Code

(I) Marriage

The institution of marriage in India is one of the pillars that hold up the customs and norms of society. The Code, in Part 1, seeks to create a single, universally applicable legal framework for marriage.

21 *Sarla Mudgal v. Union of India*, 1995 SCC (3) 635.

22 (2017) 9 SCALE 178.

23 2015 (10) SCC 1.

■ *Uniform Age of Marriage*

The Code standardizes the minimum marriageable age for both men and women. A minimum age of marriage as 21 for men and 18 for women.²⁴ It is in alignment with existing provisions under the PCMA²⁵ and HMA. While this may appear as a harmonizing gesture, it also quietly retains the gender disparity in age. The Act declares women under the age of 18 to be children while for men this age is 21. This difference seems to have no justifiable logic. The criteria seem more social than biological. The general arguments based on local value judgments that women should be younger in a marriage union have faded with time. Today, women stand on equal footing to men in all possible spheres of life.

■ *Monogamy and Spousal Status*

It explicitly prohibits practices that have been widely criticized for their discriminatory and often arbitrary impact on women. It bans the practice of polygamy for all individuals.²⁶ The code establishes monogamy as the standard marital norm. These provisions are major achievements in advancing gender justice and indicates a clear intent to align family laws with contemporary human rights standards and constitutional values. This provision also echoes the HMA, 1955, which similarly prohibits bigamy. While this promotes gender equality and brings India closer to international human rights norms (for instance CEDAW²⁷), critics like Tahir Mahmood have warned that unilateral impositions without intra-community reform may alienate minorities.²⁸

■ *Prohibited Degrees of Relationship*

The code lists relationships within which marriage is impermissible, such as between siblings or close blood relations.²⁹ However, it allows customary exceptions, provided they are not “against public policy or morality”.

■ *Mandatory Registration*

The Code made compulsory registration of all marriages. It mandates that any marriage solemnized after the Code’s commencement must be registered within 60 days,³⁰ and provides a six-month window for the registration of marriages that

24 *Supra* note 5, s.4.

25 The Prohibition of Child Marriage Act, 2006.

26 *Supra* note 5, s.23.

27 The Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

28 Tahir Mahmood, *Personal Law in Crisis* (Metropolitan, 1st edn., 1986),

29 *Supra* note 5, s.4.

30 *Id.*, s.6.

took place before the Code's enactment.³¹ Crucially, it clarifies that non-registration does not invalidate the marriage itself,³² but imposes a penalty for failure to register.³³ The code in its pursuit of formal uniformity has diluted a pre-existing provision. The earlier Uttarakhand Compulsory Registration of Marriage Act, 2010,³⁴ placed the primary burden of registration on the husband. Now, it's on both the parties.

The Rules lay down an exhaustive and highly detailed procedure for this registration. Couples must submit a memorandum, either online or offline, in the prescribed Form 1. This form requires extensive personal information, including Aadhaar numbers, details of parents, addresses, and, controversially, the "prior relationship status" of the parties, which explicitly asks whether they were previously in a live-in relationship that was terminated.³⁵ A host of supporting documents, including proofs of age, residency, photographs, and proof of the marriage ceremony, are also required.³⁶ The Sub-Registrar is empowered to conduct a "summary inquiry" to verify these details before issuing a certificate.³⁷

The mandatory registration regime while beneficial for creating a legal record of marriage, is implemented through a highly intrusive process. The requirement to disclose past live-in relationships and the broad, undefined power of the Registrar to conduct a summary inquiry transform a civil registration process into a potential tool for state surveillance and utmost disregard to right of privacy.

(II) Live-In Relationships

The shifting morality of the Indian society is evident from a peculiar fact that few years back, the law was penalizing same-sex consenting adults for sexual intercourse. Now, ten years down the line, we not only decriminalized it entirely but also in the path of recognizing same sex marriages. Thus, acknowledging evolving societal norms and the increasing prevalence of such unions, the Code takes a progressive step by explicitly granting legal recognition to live-in relationships, which is a move that is both legally innovative and socially provocative.

31 *Id.*, s.7.

32 *Id.*, s.20.

33 *Id.*, s.17.

34 The Uttarakhand Compulsory Registration of Marriage Act, 2010, s.3(2), Each husband shall be responsible to get the marriage registered. Provided that where such husband is under the age of 18 year or is an idiot, or a lunatic or is from sickness or infirm or is serving in any of the Armed Forces and is unable to obtain leave to register his marriage, wife shall be responsible to get the marriage registered.

35 The Uniform Civil Code Rules Uttarakhand, 2025, rule. 9(3)(e).

36 *Id.*, rule 9(3)(m).

37 *Id.*, rule 7(1)(a).

However, a key point of the Code that has caused significant furore is the requirement that live-in relationships be mandatorily registered.³⁸ The law also does recognize maintenance rights for women in live-in relationships³⁹ and legitimizes children born out of such unions.⁴⁰ These progressive steps echo Supreme Court judgments.⁴¹ However, the right to claim maintenance has been given to the women only, when she gets deserted by the other partner.⁴² Failure to do so within a month could result in penalties or imprisonment.⁴³ If either partner is under 21, their guardians and local police must be informed.⁴⁴ The registrar has the power to deny registration if the relationship is perceived to violate societal morality or lacks genuine consent,⁴⁵ terms left ambiguous in the law. The ambiguity in defining what qualifies as a live-in relationship, coupled with the broad authority granted to registrars to investigate and refuse registration, heightens the risk of arbitrariness.

■ *The Threats of State Surveillance?*

The *mandatory registration* and the severe associated penalties for non-compliance transform this positive aspect into a major point of criticism. It raises significant concerns about state overreach into private life and the possibility of abuse by local authorities or even neighbors, who can report suspected live-in couples. Critics argue that this amounts to state intrusion into citizens' bedrooms, a surveillance mechanism rooted in moral policing rather than legal necessity.⁴⁶

From a closer view, this provision has both empowering and troubling elements. On one hand, it gives legal backing to partners in live-in relationships to claim maintenance and legitimizes their children, these are steps forward in gender justice and an evolving society moral compass. It shows that the law is moving parallelly and at the same pace as society. On the other, these legitimacy and protection mechanisms are tethered to state approval and registration, it has thus elements

38 *Supra* note 5, s.378.

39 *Id.*, s.388.

40 *Id.*, s.379.

41 *See Indra Sarma v. V.K.V. Sarma*, 2013 (15) SCC 755; *Tulsa v. Durghatiya*, 1994 SCC (1) 460, in this case court said that, children born out of such a relationship would be considered legitimate. The essential precondition for such legitimacy is that the parents must be sincere towards their relationship, sharing of home, and it cohabit for a long period.; *S.P.S. Balasubramanyam v. Suruttayan*, 1994 SCC (1) 460, here also court has mentioned that, persons living as husband and wife under a roof for a long period, and their children born out of this relationship are not illegitimate.

42 *Supra* note 5, s.388

43 *Id.*, s.387.

44 *Id.*, s.385.

45 *Id.*, s.380.

46 Thulasi K. Raj, "A chilling effect on the freedom to love", *The Hindu*, Feb. 26, 2024.

which curtails individual freedom and autonomy. This could paradoxically deter individuals from entering or registering live-in relationships, thereby pushing these relationships further into legal ambiguity. Eventually, it will negate the very protections the law claims to offer. The apex court once dismissed a petition proposing such controls as a 'hare-brained idea'.⁴⁷ Ironically, this very concept now forms part of legislative reality in Uttarakhand which highlights how a progressive goal can take regressive shape in implementation.

The code's requirement to formalize live-in relationships misunderstands the deeply personal, often silent nature of love and companionship. True intimacy cannot always be captured by state sanction or societal approval, and in trying to do so, the law risks erasing the very essence of what it seeks to regulate. Indian courts have consistently held that adults above the age of 18 have the right to live with a partner of their choice.⁴⁸ The law's mandate that the state inform parents for individuals under 21 contradicts this jurisprudence thus it creates a glaring inconsistency in age-related autonomy. It upholds the marriageable age for women at 18 which means that an 18-year-old woman can legally marry without parental consent. However, the same Code mandates that if she enters a live-in relationship before the age of 21, or either party let's say of the age 20, cannot register the live-in relationship without involving parents and police.

This system of mandatory registration, police notification, and parental involvement creates a state-sanctioned database that can be easily weaponized. For inter-caste or inter-faith couples fleeing family opposition, the act of registration becomes an act of self-incrimination. The official notification to police and parents, can alert hostile families and vigilante groups to the couple's whereabouts and status that will expose them to precisely the kind of harassment and violence the state is supposed to protect them from.

The Code's provision granting legitimacy to children of live-in relationships is a progressive step. However, this right seems to be made contingent upon the registration of the relationship. This again creates a legitimacy paradox. The Supreme Court, in a series of judgments, mentioned above, has consistently held that children born out of long-term live-in relationships are legitimate and possess inheritance rights which is premised on the welfare of the child irrespective of the parents' legal status. The code now makes legitimacy conditional on the parents' compliance with a punitive registration regime which effectively punishes the child for the

47 Ashish Tripathi, "Supreme Court Trashes PIL Seeking Registration of Live-in Relationships", *Deccan Herald*, Mar. 20, 2023.

48 *Lata Singh v. State of U.P.*, 2006 (5) SCC 475; *Kaminidevi v. State of U.P.*, 2020 SCC OnLine All 1740.

“offense” of the parents. For instance, if a couple fails to register, whether out of fear, ignorance, their child could be denied the very “legitimacy” the Code claims to confer which will be a regressive step compared to the child-centric jurisprudence evolved by the courts.

(III) Divorce and Maintenance

Divorce may be sought on the grounds such as adultery, cruelty, desertion, and mental disorder.⁴⁹ Additional rights for women are also provided, *inter alia* divorce if the husband retains other wives.⁵⁰ The provision of mutual consent divorce is also there having a one-year waiting period (waivable).⁵¹ One of the most significant reforms is the absolute prohibition of all forms of extra-judicial divorce. An example of a customary divorce with no formal legal protection is a “Panchayati divorce”, where a village council dissolves a marriage based on local traditions rather than a court order. While recognized within the community, these decrees lacked enforceability in the formal legal system, often leaving individuals, particularly women, without legally guaranteed rights to alimony or property. The code unequivocally states that, notwithstanding any usage, custom, or personal law, a marriage can only be dissolved through a decree of a competent court under the provisions of the Code.⁵² It also makes the act of dissolving a marriage in contravention of section 29 a punishable offense, with imprisonment for up to three years.⁵³

■ Maintenance

The law provides for interim maintenance during divorce proceedings, extending this right across communities.⁵⁴ The court can order one party to pay the other party, who has no independent income sufficient for their support, the expenses of the proceeding and a monthly sum for their maintenance. Previously, only the Hindu Marriage Act and the Criminal Procedure Code (section 125) provided such a remedy. This harmonization upholds the constitutional principle of non-discrimination, especially beneficial for the spouses, who were not getting these under their respective personal laws. This Kerala High Court case⁵⁵ highlighted the

49 *Supra* note 5, s.25.

50 *Id.*, s.25(3).

51 *Id.*, s.27 and s.28.

52 *Id.*, s. 29.

53 *Id.*, s. 32(1)(ii), any person who- dissolves a marriage in contravention of s.29 shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

54 *Id.*, s.33

55 *Agnes Alias Kunjumol v. Regeena Thomas, Agnes Alias Kunjumol v. Regeena Thomas*, 2011 (1) KLT 588 (Ker).

legal vacuum in Christian personal law regarding maintenance. The court noted that, unlike Hindu law, there was no specific statutory provision governing the maintenance claims of a Christian wife in a civil suit. This gap meant that Christian women often had to rely on the secular remedy provided under section 125 of the CrPC. Cases like this illustrate that for communities where personal laws are either silent or provide limited remedies (the old Indian Divorce Act, 1869, for instance, capped alimony at one-fifth of the husband's income), the existence of a harmonized, secular provision is essential to ensure non-discrimination and provide a pathway to financial support.

Section 34 empowers the court, at the time of passing a decree for divorce or judicial separation or at any time subsequent thereto, to order one party to pay the other a gross sum or a monthly or periodical sum for their maintenance and support. The amount is determined by considering the income and property of both parties, their conduct, and other circumstances. A crucial proviso in this section states that any claim for permanent alimony and maintenance is in addition to, and not in derogation of, any claim for *mehr* or dower.

(IV) Succession and Inheritance

Succession laws are another area where the code makes sweeping changes. It introduces a faith-neutral succession framework, drawing upon the class-based structure of the Hindu Succession Act but applying it uniformly to all citizens (excluding Scheduled Tribes). It provides a common classification of heirs, Class I and Class II, for all communities.

■ Class I and II Heirs

It provides the provision of “Class I” and “Class II” heirs and grants equal inheritance rights to daughters and sons,⁵⁶ the code dismantles the male-preference hierarchies existing in the personal laws. This reflects the spirit of the Supreme Court's progressive judgment in *Vineeta Sharma v. Rakesh Sharma*,⁵⁷ which recognized coparcenary rights for daughters under the Hindu Succession Act. Also, the Code elevates both the mother and the father of the deceased to the status of Class-I heirs which is a significant departure from the Hindu Succession Act.

The code places no restrictions on a person's right to bequeath their property by will thus, granting absolute testamentary freedom to the individual. This may sound a celebrated feature but has double edged sword elements. The Hindu Succession (Amendment) Act, 2005, was a landmark reform that granted daughters a right by

⁵⁶ *Supra* note 5., ss.49-53.

⁵⁷ AIR 2020 SC 3717.

birth in ancestral (coparcenary) property, making them coparceners on par with sons. This right was indefeasible and could not be taken away by a will. By abolishing the distinction between ancestral and self-acquired property, the Code removes this crucial protection. Now, the entire estate, including what was formerly protected ancestral property, can be freely willed away. In a society with a deeply entrenched patriarchal mindset and strong son-preference, this grant of absolute testamentary freedom creates a significant risk that fathers will use their wills to disinherit their daughters completely. Thus, a measure intended to enhance gender equality might, in practice, lead to the greater economic disempowerment of women.

Interestingly, the code excludes Scheduled Tribes from its purview, approximately 3% of Uttarakhand's population.⁵⁸ This is significant, as tribal customs often include polyandry or polygamy and operate under distinct customary laws. Tribes, unlike religions, are ethnic entities, conversion into or out of them is not legally recognized, thus their exemption preserves their unique socio-legal traditions without triggering the religious sensitivities the code aims to standardize.

IV. Conclusion

All religious communities have resisted change at some point. Yet, the constitution demands reform in the service of justice. The Uniform Civil Code, Uttarakhand, 2024, represents a bold and historic legislative endeavor which marks the first significant step towards realizing the constitutional vision of a common civil law for all citizens. For e.g., it successfully introduces several progressive reforms premised on gender equality and social justice. The prohibition of polygamy, the abolition of discriminatory unilateral divorce practices, and the establishment of equal inheritance rights for sons and daughters are commendable achievements that align with modern legal principles. Furthermore, providing a statutory framework for live-in relationships, including maintenance rights for deserted partners and legitimacy for their children, the Code acknowledges the evolving nature of social institutions and seeks to provide a protective legal regime.

However, there is no denial that many of the Code's provisions are aligned with the goals of gender justice, legal uniformity, and secular governance, but its implementation in Uttarakhand also brings with it an unmistakable whiff of moral policing. This combination of progressive rights (such as banning polygamy and ensuring equal inheritance) with socially conservative overreach (such as criminalising unregistered relationships and requiring disclosure of past relationship status during

58 Public Works Department, Government of Uttarakhand, "Uttarakhand State Roads Investment Program" available at: <https://www.adb.org/sites/default/files/project-documents/38255-043-ind-rp-02.pdf> (last visited on July 14, 2025).

marriage registration) creates a unique cocktail. The intrusive and punitive regulations will require careful judicial scrutiny to ensure they meet constitutional standards.

Thus, the code should be viewed as a foundational first step rather than a final destination. It has successfully moved the long-standing debate on a uniform civil code from the realm of abstraction into the domain of concrete legislation.

ENVIRONMENTAL JUSTICE THROUGH INDIAN KNOWLEDGE SYSTEMS AND CONSTITUTIONAL MANDATES: A CASE COMMENT ON *SANJAY KULSHRESTHA V. URBAN DEVELOPMENT DEPARTMENT*

*Anadhesh Chaturvedi**

Abstract

The case comment examines the case of *Sanjay Kulshrestha v. Urban Development Department* before the National Green Tribunal (NGT). It highlights the persistent environmental crisis caused by severe pollution of the Yamuna River in Agra and Mathura - Vrindavan. The judgment represents a watershed moment in Indian environmental jurisprudence by integrating ancient Indian Knowledge Systems (IKS) with contemporary legal frameworks. The judgment exposes systemic administrative failures, technical inefficiencies, and statutory violations contributing to the discharge of untreated sewage and industrial effluents. It reinforces the constitutional mandate under Articles 21, 48A, and 51A(g) for environmental protection and sustainable development. The judgment incorporates *Vedic* principles regarding water sanctity and environmental protection, demonstrating how traditional *dharmic* concepts inform modern environmental law, recognizing rivers as sacred entities central to India's spiritual and cultural ethos. Drawing from *Vedic*, *Dharmic*, and *Arthashastra* traditions, the judgment contextualizes principles such as the Polluter Pays Principle, the Precautionary Principle, and Sustainable Development as reflections of ancient environmental ethics rooted in *Dharma*. The case highlights the importance of administrative accountability, technological modernization, and legal enforcement in achieving environmental justice. It also marks a jurisprudential shift toward culturally rooted ecological governance, aligning science, spirituality, and law to promote ecological balance and constitutional morality.

Keywords: *Environmental Justice, Yamuna Pollution, Indian Knowledge Systems, Sustainable Development, Constitutional Environmental Rights*

- I. Introduction
- II. Facts of the Case
- III. NGT Judgment on Yamuna Pollution: Judicial Observations and Findings
- IV. Technical and Environmental Analysis of the Yamuna Pollution Crisis
- V. Indian Knowledge Systems in Environmental Jurisprudence

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VI. Legal Analysis: Statutory and Criminal Liability

VII. Conclusion

I. Introduction

THE CASE of *Sanjay Kulshrestha v. Urban Development Department*¹ brings to light a critical environmental crisis concerning the pollution of the Yamuna River in the sacred and historically significant regions of Agra and Mathura-Vrindavan.² The case was decided by a three-member bench of the National Green Tribunal (NGT), Principal Bench, New Delhi, on April 24, 2024. It comprised Hon'ble Mr. Justice Prakash Shrivastava (Chairperson), Hon'ble Mr. Justice Sudhir Agarwal (Judicial Member), and Hon'ble Dr. A. Senthil Vel (Expert Member). This matter stands at the convergence of environmental law, civic accountability, administrative inaction, and ecological degradation.

The case deals with the rising pollution levels in the Yamuna River, particularly in Agra, arising from the indiscriminate discharge of untreated sewage, industrial effluents, and municipal waste into the river. The petitioner, Dr. Sanjay Kulshrestha, a senior paediatric surgeon and environmental activist, approached the NGT under section 14-17, read with section 18(1) of the National Green Tribunal Act, 2010.³ His Original Application No. 840/2022 (referred to as OA-I) was later clubbed with OA No. 773/2022 (OA-II), a *suo moto* matter based on a letter petition sent by Mr. Rajesh Pareek regarding the condition of the River Yamuna in Mathura-Vrindavan. The issue in this matter was the severe pollution of the Yamuna River at Mathura and Vrindavan, caused by the discharge of untreated and partially treated sewage from multiple drains, despite official claims of adequate sewage treatment.

The applicant alleged that dysfunctional sewage treatment plants (STPs), high fecal coliform levels, and failure to stop direct sewage discharge were degrading water quality, harming the ecosystem, and offending religious sentiments. Both cases were heard together and disposed of by a common judgment.

The applicant highlighted mass fish deaths in the River Yamuna at Agra, green stains on the marble of the Taj Mahal caused by insects breeding in polluted waters, and the general deterioration of water quality to a level unfit even for aquatic life, let alone human use.⁴ The petitioner cited several incidents of mass fish deaths

1 *Sanjay Kulshrestha v. Urban Development Department*, OA No. 840/2022, decided on April 24, 2024, NGT (Principal Bench, New Delhi).

2 *Id.*, at paras 1-2.

3 National Green Tribunal Act, 2010 (Act 19 of 2010).

4 *Id.*, at paras 3-5.

between 2002 and 2021, pointing to abysmally low dissolved oxygen (DO) levels in the water, sometimes falling below 2 mg/L, which is critically insufficient for sustaining aquatic life. Newspaper clippings, scientific studies, and official reports were annexed with the application to demonstrate the gravity of the situation.⁵

The case reveals a complex interaction of environmental deterioration, administrative inaction, and judicial intervention. It sets the tone for a broader commentary not only on pollution control failures in the Yamuna basin but also on how courts must bridge the gap between the broader vision of the Constitution of India and existing realities marked by visible loopholes. The Tribunal thoroughly looked into the issue of legal culpability, remedial approaches, and the integration of ancient Indian knowledge systems into environmental protection.

II. Facts of the Case

The case concerns the degradation of the Yamuna River resulting from untreated sewage discharge in Agra and the Mathura-Vrindavan area. The applicant documented the alarming pollution levels in the Yamuna River near Agra, particularly in the Taj Mahal-Sikandra area. The application presented provides concrete evidence of environmental devastation, which includes repeated mass fish deaths caused by critically low Dissolved Oxygen (DO) levels of 1.7 mg/L, far below the required minimum of 3 mg/L necessary for aquatic life survival, like fish.⁶

The evidence presented revealed that the Yamuna had deteriorated to Category-E water quality,⁷ suitable only for recreation and industrial cooling, effectively transforming the sacred river into a drain near Agra.⁸ In ancient India, rivers and water were considered very sacred. In the *Rigveda*, water is treated as medicine; it purifies both the soul and the body, and it is a source of happiness and delight in the life of the people. The *Vedic* literature crystallizes this understanding through sacred verses that establish water's dual role as both healer and source of prosperity.

आप इद्धा उ भेषजीरापो अमीवचातनीः ।
आप्-सर्वस्य भेषजीस्तास्ते कृण्वन्तु भेषजम्॥⁹

5 *Id.*, at paras 4-5.

6 *Supra* note 3.

7 Central Pollution Control Board classification.

8 *Supra* note 1 at para 5.

9 Rigveda 10.137.6: "Waters verily are medicinal; waters are the dissipators of disease; waters are the medicines for everything; may they act as medicine to you" This verse establishes water's inherent healing properties as a fundamental legal principle. In contemporary environmental jurisprudence, this Rigvedic understanding forms the basis for the "right to clean water" art 21, as recognized in *Subhash Kumar v. State of Bihar* (1991).

Word-by-Word-Meaning - (आपः) जल (इत्-वै-उ) ही निश्चय से (भेषजीः) स्नान पान के द्वारा स्वास्थ्यकर हैं (आपः) जल (अमीवचातनीः) रोगनाशक हैं (आपः सर्वस्य भेषजीः) जल सबकी भेषज हैं (ताः-ते भेषजं कृण्वन्तु) वे जल तेरे लिये स्वास्थ्य करें ॥

आपो हि ह्य मयोभुवस्ता न ऊर्जे दधातन ।
महे रणाय चक्षसे ॥¹⁰

Word-by-Word-Meaning - (ताः-आपः) वे तुम जलो! (मयः-भुवः) सुख को भावित कराने वाले-सुखसज्पादक (हि स्थ) अवश्य हो (नः) हमें (ऊर्जे) जीवनबल के लिये (महे रणाय चक्षसे) महान् रमणीय दर्शन के लिए (दधातन) धारण करो ।

A particularly disturbing consequence observed during summer is that silt and sludge accumulation in the River Yamuna fosters the growth of Chironomus calligraphus insects, whose greenish-black excreta stain the Taj Mahal's marble surfaces.¹¹ These insects flourished in the stagnant, polluted water environment, aided by the absence of their natural predators, that is, fish, which were dying in large numbers due to the toxic conditions of the River.

The city's sewage infrastructure is in a very severe condition, as indicated by various government reports. Approximately 52 drains were directly discharging untreated sewage into the Yamuna, near the Taj Mahal area.¹² The city of Agra generates approximately 306 million liters per day (MLD) of sewage. With only nine operational Sewage Treatment Plants (STPs), their combined capacity of 220.75 MLD, only about 175 MLD is treated, leaving over 131 MLD (43% of total sewage) of untreated sewage flowing into the river daily.¹³ The Joint Committee Report of February 2023 revealed that of 90 major and minor drains in Agra, only 21 were tapped, 8 partially tapped, and 61 drains remained completely untapped, flowing directly into the river.¹⁴ The existing sewer network covered 1,496 km, but there is a critical gap of 1,475 km, indicating that large sections of the city lacked basic sewage connectivity.¹⁵ Storm water drains, which are supposed to carry only rainwater, are being misused for sewage discharge, contrary to law.

10 Rigveda 10.9.1 "Since water, you are the sources of happiness, grant to us to enjoy abundance, and great and delightful perception" cite the Text translator if available This verse establishes the constitutional foundation for environmental rights by recognizing water as source of happiness/wellbeing. The Supreme Court's interpretation of art 21 to include "right to wholesome environment" in *MC Mehta v. Union of India* (1987) directly reflects this *Vedic* principle.

11 *Supra* note 1 at para 5.

12 *Id.*, at para 6.

13 *Id.*, at para 10.

14 *Ibid.*

15 *Ibid.*

At the same time, OA No. 773/2022 was filed based on Rajesh Pareek's letter highlighting similar conditions in Mathura-Vrindavan, where 36 drains existed with only 30 tapped, generating 77.42 MLD of sewage while STPs remained underperforming or dysfunctional.¹⁶ The religious and cultural significance of the Yamuna, described as the "daughter of the Sun and sister of *Yamraj*" added another dimension to the environmental crisis.¹⁷

The Tribunal's enquiry, conducted through the Joint Committee comprising representatives from the Central Pollution Control Board (CPCB), Uttar Pradesh Pollution Control Board (UPPCB), National Mission for Clean Ganga (NMCG), and Principal Secretaries, revealed systemic failures in sewage management. Monthly STP monitoring reports indicated non-compliance with Biochemical Oxygen Demand (BOD), Chemical Oxygen Demand (COD), and faecal coliform parameters at facilities like *Boodhi Ka Nagla*, *Pilakhar*, and *Dhandhupura*. The Committee confirmed that 131 MLD of sewage was being directly discharged untreated into the Yamuna, with bio-remediation and phyto-remediation efforts on 61 drains serving as inadequate temporary measures rather than permanent solutions.¹⁸

The record shows a pattern of bureaucratic delays, non-compliance with judicial directions, and a significant gap between policy and ground-level execution. No new STP had been constructed since 2014, and 90.25 MLD of sewage failed to meet faecal coliform standards. The treated sewage continued to be discharged into the Yamuna without reuse due to a lack of ferti-irrigation infrastructure, while proposed future STPs with 166 MLD capacity and ten decentralized STPs under the Namami Gange program are in progress to be completed by April 2025.¹⁹

III. NGT Judgment on Yamuna Pollution: Judicial Observations and Findings

The National Green Tribunal's judgment represents a watershed moment in environmental jurisprudence, delivering a scathing indictment of systemic failures that have led to the continued pollution of the Yamuna River in Agra and Mathura-Vrindavan. Led by Chairperson Justice Prakash Shrivastava, the Tribunal conducted a comprehensive review of governmental reports²⁰ and scientific data,²¹ revealing

16 *Supra* note 1 at para 23.

17 *Id.*, at para 24.

18 *Id.*, at para 10.

19 *Id.*, at para 19.

20 *Ibid.*

21 *Ibid.*

a disturbing pattern of environmental neglect that persisted despite repeated judicial interventions dating back to 2021.

The Tribunal's findings paint a grim picture of administrative failure. In Agra alone, more than 131 MLD of untreated sewage continues to flow into the Yamuna, while existing sewage treatment plants operate at suboptimal capacity, treating only 175-182 MLD of their 220.75 MLD installed capacity.²² This means that nearly 43 percent of sewage remains untreated, creating an environmental catastrophe that violates fundamental statutory obligations under the Water (Prevention and Control of Pollution) Act, 1974²³ such as section 24 of the Act, which prohibits the discharge of pollutants into the stream, such a violation constitutes an offence under section 43, with liability extending to companies and government departments under section 47 and 48²⁴ and under the Environment (Protection) Act, 1986;²⁵ the *River Ganga (Rejuvenation, Protection and Management) Authorities Order, 2016* issued, which imposes a statutory duty prohibiting the discharge of treated or untreated sewage into the Ganga or its tributaries, including the Yamuna.²⁶ The Tribunal was particularly critical of the use of outdated technologies like Waste Stabilization Ponds.²⁷

The judgment reserves its harshest criticism for the administrative machinery, particularly the Chief Secretary of Uttar Pradesh, whose failure to submit mandatory Action Taken Reports was characterized as administrative indifference that could not be tolerated in matters of public health and ecological concern.²⁸

Scientific evidence presented to the Tribunal revealed the alarming ineffectiveness of *in situ* remediation techniques being employed in 61 drains, which failed to significantly reduce pollutant loads, particularly Biochemical Oxygen Demand (BOD), Chemical Oxygen Demand (COD), and faecal coliform levels. Only 2 out of 8 inspected drains met discharge norms, with faecal coliform counts reaching 10w10y MPN/100 mL, far exceeding the permissible limit of 230 MPN/100 mL. The Tribunal also noted three additional failings: all nine STPs in Agra were not meeting the prescribed norms for one or more parameters, ferti-irrigation

22 *Id.*, at para 10.

23 The Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974).

24 *Supra* note 1, at para 353.

25 The Environment (Protection) Act, 1986 (Act 29 of 1986).

26 *Supra* note 1, para 196-199.

27 *Id.*, at para 164.

28 *Id.*, at para 15–16. Despite the above order, no Report has been filed by Chief Secretary. However, one Report has been filed by CPCB dated December 05, 2023, another by State of UP through Joint Secretary, Urban Development dated December 06, 2023 and an Action Taken Report dated December 06, 2023 by Regional Officer, UPPCB, Agra.

infrastructure was absent, with most treated sewage still flowing into the river, and chlorination facilities at STPs were inconsistent, with disinfection often inadequate to reduce faecal contamination. Together, these findings demonstrate that reliance on in-situ remediation and poorly operated STPs cannot substitute for comprehensive sewage treatment infrastructure. This contamination poses severe public health risks and accelerates ecological collapse of the river ecosystem.²⁹

The Tribunal also criticized the failure to implement treated sewage reuse policies, noting that despite clear guidelines from the Ministry of Jal Shakti and CPCB for ferti-irrigation, horticulture, dust suppression, and industrial reuse, treated water continues to be discharged into the Yamuna. This reflects a missed opportunity for water conservation and efficient resource utilisation.³⁰

In the Mathura-Vrindavan segment, the Tribunal addressed not only environmental concerns but also cultural and spiritual dimensions, recognizing the Yamuna's sacred status in *Sanatan Dharma*.³¹ The pollution of this holy river was considered a violation of both environmental law and cultural heritage, which emphasizes the authorities of *Dharma*, or duty to protect nature and holy rivers under the constitutional structure of India.

The tribunal's response included several directions for development, technological upgradation, and administrative accountability of infrastructure, warning of potential civil and criminal punishment under various environmental laws. This decision sets an example for individual accountability of government officials for environmental protection, marking a significant development in environmental jurisprudence that prioritises both ecological restoration and administrative accountability.

IV. Technical and Environmental Analysis of the Yamuna Pollution Crisis

The case is fundamentally based on the comprehensive technical and environmental assessment of the River Yamuna, which revealed the reality of the Yamuna's ecological crisis. The Tribunal's analysis drew extensively from field inspections, committee reports, and empirical data on water quality, sewage generation, and treatment infrastructure, providing a scientific foundation for its judicial interventions.

The main environmental crisis centered on the severe mismatch between sewage generation and treatment capacity in Agra and Mathura –Vrindavan. The drainage infrastructure revealed equally disturbing gaps, with Agra's 90 identified drains

29 *Supra* note 1, para 17.

30 *Id.*, at para 25.

31 *Id.*, at para 24.

showing only 21 fully tapped, 8 partially tapped, and 61 completely untapped.³² Despite having 1,496 kilometres of sewer network, a massive gap of 1,475 kilometres remained, leaving nearly half the population without proper sewage connectivity.

The performance of existing sewage treatment plants demonstrated critical failures in meeting environmental standards. The nine STPs in Agra, operating on outdated technologies like Upflow Anaerobic Sludge Blanket (UASB), Waste Stabilization Pond (WSP), and Sequencing Batch Reactor (SBR) systems consistently failed to achieve prescribed effluent quality standards. Biochemical Oxygen Demand (BOD) levels in treated effluent ranged from 24–28 mg/L, significantly exceeding the permissible limit of 10 mg/L, while faecal coliform counts reached alarming levels much higher than the standards limits.³³ These failures highlighted inadequacies in technology, operation and maintenance protocols, and regulatory monitoring.

The Tribunal's examination of *in situ* remediation revealed its fundamental ineffectiveness for high-flow drains. Despite treating 67 minor drains through bio-remediation and phyto-remediation, Central Pollution Control Board (CPCB) sampling found that only two drains met discharge norms, with some showing even higher pollutant levels post-treatment.³⁴ These findings demonstrate that *in-situ* methods cannot replace proper sewage interception and treatment infrastructure. The reliability of *in situ* method of treating drain is questionable.

Water quality analysis of the Yamuna shows a devastating picture of ecological collapse with coliform counts as high as 25,000 MPN/100 mL, confirming gross faecal contamination and high levels of BOD and low DO.³⁵ These parameters rendered the river unfit for bathing, aquatic life, or religious purposes, essentially making it “ecologically dead” for large stretches near Agra and Mathura.

The analysis also highlighted massive inefficiencies in resource utilization, particularly the failure to reuse treated effluent for irrigation, gardening, or industrial purposes. Most STPs discharged treated water directly into the Yamuna, perpetuating pollution and wasting valuable water resources.³⁶ While projects were planned under the Namami Gange Programme, including new STPs and drain tapping initiatives scheduled for completion by April 2025, the Tribunal emphasized that without strict enforcement and performance monitoring, these efforts risked repeating past failures. This comprehensive technical assessment provided the scientific foundation for the Tribunal's subsequent legal directives and policy interventions.

32 *Ibid.*

33 *Supra* note 1, para 17, Table 1.

34 *Id.*, Table 2.

35 *Id.*, Table 4.

36 *Supra* note 1, para 17.

V. Indian Knowledge System in Environmental Jurisprudence

The case represents a progressive moment in Indian environmental jurisprudence, distinguished not merely by its legal and scientific rigor but by its integration of the ancient IKS into the ambit of environmental law. The case is an example of how ancient wisdom can help in contemporary legal reasoning, particularly in addressing the ecological crisis faced by the sacred rivers of India.

The case recognizes the spiritual and cultural sanctity of rivers in Indian civilisation, particularly the River Yamuna, revered in Hindu scriptures as the daughter of *Surya* and sister of *Yama*.³⁷ In the *Rigveda*, the Yamuna is personified and worshipped as a goddess, reflecting a metaphysical understanding that all elements of nature possess inherent divinity.³⁸

To protect the environment, the *Rigveda* invokes divine intervention for bliss:

**मधु वाता ऋतायते मधु क्षरन्ति सिन्धवः ।
माध्वीर्नः सन्त्वोषधीः ॥³⁹**

Word-by-Word-Meaning - हे पूर्ण विद्यावाले विद्वानो ! जैसे तुम्हारे लिये और (ऋतायते) अपने को सत्य व्यवहार चाहनेवाले पुरुष के लिये (वाताः) वायु (मधु) मधुरता और (सिन्धवः) समुद्र वा नदियाँ (मधु) मधुर गुण को (क्षरन्ति) वर्षा करती हैं, वैसे (नः) हमारे लिये (ओषधीः) सोमलता आदि ओषधि (माध्वीः) मधुरगुण के विशेष ज्ञान करानेवाली (सन्तु) हों ॥

Meaning - The winds bring sweet (rewards) to the sacrificer; the rivers bring sweet (waters); may the herbs yield sweetness to us.

**मधु नक्तमुतोषसो मधुमत्पार्थिवं रजः ।
मधु द्यौरस्तु नः पिता ॥⁴⁰**

Word-by-Word-Meaning - हे विद्वानो ! जैसे (नः) हम लोगों के लिये (नक्तम्) रात्रि (मधु) मधुर (उषसः) दिन मधुर गुणवाले (पार्थिवम्) पृथिवी में (रजः) अणु और त्रसरेणु आदि छोटे-छोटे भूमि के कणके (मधुमत्) मधुर गुणों से युक्त सुख करनेवाले (उत) और पिता पालन करनेवाली (द्यौः) सूर्य्य की कान्ति (मधु) मधुर गुणवाली (अस्तु) हो, वैसे तुम लोगों के लिये भी हो ॥

Meaning - May night and morning be sweet; may the region of the earth be full of sweetness; may the protecting heaven be sweet to us.

³⁷ *Supra* note 1, para 24.

³⁸ *Id.*, at para 223.

³⁹ *Rigveda* 1.90.6, This verse establishes the legal principle of environmental harmony as essential for social order. The concept of sweetness/harmony (*madhurya*) in natural elements reflects the constitutional directive in Constitution of India, art. 48A, requiring states to protect environment. The verse supports the 'precautionary principle' in environmental law, requiring proactive protection rather than reactive remediation.

⁴⁰ *Rigveda* 1.90.7, available at: <https://www.wisdomlib.org/hinduism/book/rig-veda-english-translation/d/doc829939.html> (last visited on July 14, 2025).

**मधुमान्नो वनस्पतिर्मधुमाँ अस्तु सूर्यः ।
माध्वीर्गावो भवन्तु नः ॥⁴¹**

Word-by-Word-Meaning - हे विद्वानो! जैसे (नः) हम लोगों के लिये (मधुमान्) जिसमें प्रशंसित मधुर सुख है, ऐसा (वनस्पतिः) वनों में रक्षा के योग्य वट आदि वृक्षों का समूह वा मेघ और (सूर्यः) ब्रह्माण्डों में स्थिर होनेवाला सूर्य वा शरीरों में ठहरनेवाला प्राण (मधुमान्) जिसमें मधुर गुणों का प्रकाश है, ऐसा (अस्तु) हो तथा (नः) हम लोगों के हित के लिये (गावः) सूर्य को किरणें (माध्वीः) मधुर गुणवाली (भवन्तु) होवें, वैसी तुम लोग हमको शिक्षा करो ॥

Meaning - May Vanaspati be possessed of sweetness towards us; may the sun be imbued with sweetness; may the cattle be sweet to us.

This Vedic hymn expresses gratitude for nourishment and reflects an early understanding of the interconnectedness of natural elements.

**मा काकम्बीरमुद्गहो वनस्पतिमशस्तीर्वि हि नीनशः ।
मोत सूर्यो अह एवा चन ग्रीवा आदधते वेः ॥⁴²**

Word-by-Word-Meaning - हे विद्वान्! आप (काकम्बीरज्) कौओं की पुष्टि करनेवाले (वनस्पतिज्) वट आदि वृक्ष को (मा, उत, वृहः) मत उच्छिन्न करो तथा (अशस्तीः) और अप्रशंसित (हि) ही कर्मों की (वि, नीनशः) विशेषता से निरन्तर नाश करो और (सूर्यः) सूर्य (अहः, एवा) दिन में ही जैसे (वेः) पक्षी के (ग्रीवाः) कण्ठों को (चन) निश्चय से (आदधते) अच्छे प्रकार धारण करते हैं, वैसे (उत) तो हम लोगों को (मा) मत पीड़ा देओ ॥

Meaning - Uproot not, *Pusan*, the forest lord with its progeny of crows; utterly destroy those who are my revilers; let not the adversary ensnare me, as [fowlers] set snares for birds.

The *shloka* from the *Rigveda* echoes the sentiment of protection of the environment: “Do not harm the environment; do not harm the water and the flora; Earth is my

41 *Rigveda* 1.90.8, This hymn’s emphasis interconnectedness (‘सर्व’ - all) establishes the foundational principle for ecosystem-based environmental protection rather than species-specific conservation. The NGT’s holistic approach in the Yamuna case, addressing not just water quality but also aquatic life, religious practices, and public health, directly implements this *Rigvedic* understanding. The verse supports the “ecosystem services” approach now recognized in environmental economics and reflected in the Supreme Court’s forest conservation orders.

42 *Rigveda* 6.48.17. This Rigvedic principle (do not harm trees and water) establishes non-violence towards nature as fundamental *dharmā*. In constitutional terms, this verse provides the philosophical foundation for Constitution of India, art. 51A(g). The NGT’s Yamuna judgment implements this principle through its emphasis on ‘restoration’ rather than mere ‘compensation,’ reflecting the *Vedic* understanding that damaged nature must be healed, not just monetarily compensated. Contemporary relevance is seen in the ‘no net loss’ policies for forest clearance and the emerging ‘rights of nature’ jurisprudence where rivers are granted legal personhood.”

mother, I am her son; may the waters remain fresh, do not harm the waters; do not cut trees, because they remove pollution.”

This personification extends beyond mere symbolism to represent a fundamental worldview where rivers are integral to spiritual consciousness and life cycles through practices such as sacred ablutions, offering *Arghya* to rising sun while standing in their waters, and performing last rites on river banks. In the *Rigveda*, water is not merely a physical substance; it is also a spiritual symbol. The *Rigveda* identifies water as the first abode or *ayana* of *nara*, the Eternal Being. This recognition elevates water to the status of *Pratishtha*, the underlying principle, the very foundation of the universe itself.⁴³

The ancient texts reveal a refined environmental ethic embedded in India’s literary and legal traditions. The *Rigveda* speaks of rivers as purifiers that cleanse both earth and people, while the *Atharvaveda* describes Earth as a nurturing mother, urging humans to live in harmony with her.⁴⁴ The *Manusmriti* underscores the need to keep water clean, while the *Padma Purana* sternly warns that those who pollute ponds, wells, or lakes will face dire consequences.⁴⁵

The *Arthashastra* written by *Kautilya*, the ancient treatise on statecraft and governance, prescribes specific rules and penalties for environmental offenses, including water pollution, forest destruction, and mismanagement of natural resources.⁴⁶ The text describes the appointment of a Superintendent of Forests responsible for protecting forests and overseeing their sustainable use. It imposes fines for cutting trees without permission or polluting water bodies, and establishes protection for public tanks, ponds, and rivers as common property resources governed by strict usage rules. Additionally, specific forests were declared protected, known as ‘*Abhayaranya*,’ where severe punishments, including capital punishment, were prescribed for offenders in the *Arthashastra*.⁴⁷

The *Arthashastra*’s concept of ‘*Abhayaranya*’ (protected forests), which includes capital punishment for violations, establishes a precedent for declaring ecologically sensitive areas with stringent protection. This principle is reflected in modern environmental law through: (1) Notification of Eco-Sensitive Zones under the Environment (Protection) Act, 1986; (2) NGT’s power under section 15 to impose deterrent penalties, and; (3) the Supreme Court’s recognition in *T.N. Godavarman v. Union of*

43 *Supra* note 1, para 262.

44 *Id.*, at para 227.

45 *Id.*, at para 261.

46 *Supra* note 1, para 249.

47 *Ibid.*

India,⁴⁸ that environmental protection can justify restrictions on fundamental rights. This shows that environmental administration in ancient India was not merely ethical or religious but institutional and administrative, with state structures existing to implement environmental policies as part of eco-centric governance.

This interconnectedness is reflected in the *Rigvedic* concept of *Rta*, the cosmic moral order requiring all human actions to align with natural harmony, where disruption leads to “*Adharma*” and subsequent social and ecological decay.⁴⁹

ऋतं च सत्यं चाभीद्धाज्ञपसोऽध्यजायत ।
ततो रात्यजायत ततः समुद्रो अर्णवः ॥⁵⁰

Word-by-Word-Meaning - - (ऋतं च) यथार्थ सर्वविद्याधिकरण वेदज्ञान भी (सत्यं च) सत् वर्तमान पदार्थों में साधु-सब को साधनेवाला तीन गुणोंवाला प्रकृति-नामक उपादान तथा (अभीद्धात् तपसः) सब ओर से दीप्त ज्ञानमय तप से (अध्यजायत) प्रसिद्ध होता है (ततः) उससे (रात्री) महाप्रलय के अनन्तर प्रलयरूप रात्रि (अजायत) प्रसिद्ध होती है (ततः) पुनः (अर्णवः समुद्रः) गतिमान् परमाणु समुद्र प्रसिद्ध होता है ॥

The Polluter Pays Principle, Sustainable Development, and the Precautionary Principle can be understood as modern reflections of ancient Indian ethical frameworks, offering continuity between traditional wisdom and contemporary environmental law. The *Rigvedic* concept of ‘*कर्मफल*’ (action–consequence) provides the philosophical foundation for the Polluter Pays Principle now central to environmental law. The Yamuna case’s application of this principle through environmental compensation reflects the ancient understanding that ‘*यत् करोषि तत् फलम्*’ (as you act, so you reap). This *dharmic* principle has shaped contemporary environmental jurisprudence in landmark cases, including *Vellore Citizens Welfare Forum v. Union of India*,⁵¹ where the Supreme Court explicitly adopted the Polluter Pays Principle, drawing upon traditional Indian concepts of restorative justice and *karmic* responsibility.”

The judgment’s exploration of devotional literature and folk traditions reveals Yamuna’s central role in *Vaishnava bhakti* traditions, particularly in Mathura – Vrindavan, where she is associated with Lord Krishna’s divine pastimes.⁵² The Tribunal recognized that Yamuna’s pollution constitutes not merely an ecological wrong but a cultural and spiritual wound inflicted upon millions of devotees,

48 (1997) 2 SCC 267.

49 *Supra* note 1, para 239.

50 Rigveda, 10.190.1 “Truth (of thought) and truthfulness (of speech) were born of arduous penance; thence was night generated, thence also the watery ocean.”

51 (1996) 5 SCC 647.

52 *Supra* note 1, para 56.

violating the constitutional right to religion for those whose religious practices involve the river.⁵³

By incorporating the ancient IKS in its legal reasoning, the case demonstrates how ancient legal principles actively guide contemporary environmental adjudication. The Tribunal's integration of *dharmic* concepts with scientific evidence creates a uniquely Indian approach to environmental justice that has influenced recent legal developments, including the 2017 Uttarakhand High Court's declaration of Ganga and Yamuna as legal persons with rights, directly implementing the *Rigvedic* personification of rivers.⁵⁴ The Supreme Court's emphasis on "intergenerational equity" in *State of Himachal Pradesh v. Ganesb Wood Products* (1995)⁵⁵ reflects the *Upanishadic* principle of responsible resource use. This synthesis demonstrates that ancient knowledge systems are not historical artifacts but living legal traditions that continue to evolve environmental jurisprudence, offering India's unique contribution to global environmental law through the integration of spiritual, scientific, and legal frameworks.

By integrating IKS into its reasoning, the case synthesises law, morality, culture, and spirituality in environmental adjudication beyond technical or administrative concerns for the concept of *Dharma*, a righteous duty towards all living beings and planet. This case represents a change in Indian environmental jurisprudence, inserting scientific rigidity with ancient knowledge, and charts a specific Indian path towards sustainable development. Through this approach, the Tribunal has displayed that ancient knowledge can provide intensive insight into contemporary environmental challenges, offering traditional knowledge systems to integrate a modern legal framework.

VI. Legal Analysis: Statutory and Criminal Liability

The case represents a decisive moment in environmental jurisprudence, establishing a comprehensive framework for legal responsibility in cases of contamination of the river. The legal analysis by the NGT in this case firmly anchored government responsibility within the constitutional and legal environment of India, beginning with the fundamental recognition that the right to a clean environment constitutes an integral part of the guarantee of the right to life under Constitution of India, article 21. The Tribunal emphasized that any act or omission leading to environmental degradation, particularly of essential water bodies, directly violates this fundamental right.⁵⁶ This constitutional foundation was strengthened by references to article

53 *Id.*, at para 24.

54 *Mohd. Salim v. State of Uttarakhand*, 2017 SCC OnLine Utt 367.

55 (1995) 6 SCC 363.

56 *Supra* note 1, para 282.

48A, which mandates state protection and improvement of the environment, and article 51A(g), which imposes corresponding fundamental duty on citizens to protect natural resources.⁵⁷

The statutory framework analysis revealed systematic violations across multiple environmental laws. Under the Water (Prevention and Control of Pollution) Act, 1974,⁵⁸ the Tribunal identified a clear breach of section 24, *i.e.*, prohibition on disposing of polluting matter into streams, and sections 25–26, *i.e.*, consent requirements for sewage outlets. Despite these violations, the Uttar Pradesh Pollution Control Board (UPPCB) had failed to exercise its powers under section 33A to issue effective directions or closures. The Environment (Protection) Act, 1986,⁵⁹ provided additional grounds for liability, with the Tribunal noting that treated effluents from STPs in Agra and Mathura-Vrindavan consistently violated discharge standards, particularly regarding faecal coliform levels. The National Green Tribunal Act, 2010⁶⁰ empowered the Tribunal to apply the Polluter Pays Principle, ensuring that restoration costs would be borne by those responsible for pollution.

The Tribunal observed that continued non-compliance would attract criminal proceedings for violation of section 24 with personal/corporate liability under sections 47–48 of the Water Act, 1974,⁶¹ which provides for imprisonment up to six years for knowingly discharging pollutants without consent. Environmental compensation emerged as a crucial civil liability mechanism, with the Tribunal observing that wastage of public funds on ineffective STPs and repeated tendering without completion could attract scrutiny under the Prevention of Corruption Act, 1988, and the Prevention of Money Laundering Act, 2002.⁶² The Tribunal held senior officers, including the Chief Secretary of Uttar Pradesh, personally accountable for persistent non-compliance, noting that disobedience is punishable under section 26 of the NGT Act, 2010.⁶³

VII. Conclusion

The case reflects a comprehensive understanding that environmental degradation represents not merely a technical failure but a systemic governance collapse encompassing administrative apathy, statutory violations, and cultural disregard for ecological values. The case emphasized that contamination of the Yamuna

57 Constitution of India, arts. 21, 48A, 51A(g).

58 *Supra* note 17.

59 *Supra* note 18.

60 National Green Tribunal Act, 2010 (Act 19 of 2010).

61 *Supra* note 17.

62 *Supra* note 1, para 383–384.

63 *Id.*, at para 99–112.

River constituted a violation of the fundamental right under article 21 while simultaneously betraying the constitutional duties of the State under articles 48A and 51A(g) of the Constitution of India. This constitutional violation demanded an immediate and enforceable corrective action instead of prolonged administrative processes or financial excuses.

The reuse and conservation directives of the case reflected principles of sustainable development, which require the treatment of sewage water for ferti-irrigation, suppression of dust, horticulture, and industrial purposes through dedicated reuse pipelines. This approach would minimize the river discharge while maximizing efficiency in resource utilization. The Court's execution mechanisms established clear consequences for breach, including civil liability, environmental compensation, and criminal prosecution under multiple environmental statutes. Misreporting or misuse of environmental funds which is obtained from public money would attract criminal investigation, creating personal stakes for officials involved in environmental governance.

The court held that the contamination of the river transcends technical solutions, which require holistic approaches integrating science, law, governance, and cultural ethics. The case exemplified the constitutional morality fused with ancient Indian environmental wisdom, positioning judicial supervision as essential for environmental protection. Comprehensive directions issued by the Court could serve as a replicable model for rejuvenation of rivers, and water bodies and render ecological justice in India. The case finally established that environmental responsibility must be enforceable through law, based on constitutional values and implemented through vigilant judicial supervision, transforming the protection of the environment from an abstract principle into a concrete legal obligation with significant consequences for government failure. The *Shanti Mantra* in the *Yajurveda* establishes a holistic approach towards environmental protection:

द्यौः शान्तिरन्तरिक्षं शान्तिः पृथिवी शान्तिरापः शान्तिरोषधयः शान्तिः ।
वनस्पतयः शान्तिर्विश्वे देवाः शान्तिर्ब्रह्म शान्तिः सर्वं शान्तिः शान्तिरेव शान्तिः सा मा
शान्तिरेधि ॥⁶⁴

64 *Yajurveda*, 36.17. The Hymn says that, "May heaven be peaceful for us; may the space world be peaceful for us; may the earth be peaceful for us; may God of Water be kind to us to be peaceful; may the Goddess bless us with peace; may the Botanical God bless us with peace; may all the gods be kind to us to be peaceful; may *Para brahma* bless us with peace; may peace also be peaceful for us."

Yajurveda, Úânti Mantra, Ch. 36. Translation adapted from Vedadhara, "Úânti Sukta of *Yajurveda*," available at: <https://www.vedadhara.com/shanti-sukta-of-yajurveda> (last visited Nov. 18, 2025).

Yajurveda, Úânti Mantra. See also Narayanashrama Tapovanam, "Úânti Mantras," available at: <https://www.holybooks.com/shanti-mantras/> (last visited Nov. 18, 2025).

Word-by-Word-Meaning - हे मनुष्यो ! जो (द्यौः, शान्तिः) प्रकाशयुक्त पदार्थ शान्तिकारक (अन्तरिक्षज) दोनों लोक के बीच का आकाश (शान्तिः) शान्तिकारी (पृथिवी) भूमि (शान्तिः) सुखकारी निरुपद्रव (आपः) जल वा प्राण (शान्तिः) शान्तिदायी (ओषधयः) सोमलता आदि ओषधियाँ (शान्तिः) सुखदायी (वनस्पतयः) वट आदि वनस्पति (शान्तिः) शान्तिकारक (विश्वे, देवाः) सब विद्वान् लोग (शान्तिः) उपद्रवनिवारक (ब्रह्म) परमेश्वर वा वेद (शान्तिः) सुखदायी (सर्वज्ञ) सङ्पूर्ण वस्तु (शान्तिः) शान्तिकारक (शान्तिरेव) शान्ति ही (शान्तिः) शान्ति (मा) मुझको (एधि) प्राप्त होवे (सा) वह (शान्तिः) शान्ति तुम लोगों के लिये भी प्राप्त होवे ॥

**STRATEGIC CHOICES, ETHICAL DILEMMAS
STORIES FROM THE MAHABHARAT (2023) by Aruna
Narlikar, Amitabh Mattoo and Amrita Narlikar. Published
by Penguin Random House India Pvt. Ltd. Pp. 184. Price
399/- ISBN: 9780143459750.**

IN AN era where society is both blessed with unprecedented technological advancements and abundant opportunities, it finds itself entangled in complex ethical dilemmas. The choices individuals or nations face are rarely straightforward, as actions often carry unintended consequences, impacting the environment, vulnerable communities, and the delicate balance of life on Earth. Inaction, however, is equally untenable, leaving us caught between competing priorities. Hence, navigating these dilemmas demands strategic choices and a guiding framework, in which we exercise mindful awareness of the consequences of our actions. The book¹ under review argues that it is possible to achieve strategic success while upholding ethical principles and embracing humanity in its most inclusive sense. Serving as a bridge between the ancient wisdom of the *Mahabharat* and the contemporary concerns of individuals and nations. The book offers an insight, how rich the content of the Indian knowledge Systems (IKS), particularly the ancient text *Mahabharat*, composed centuries ago, continues to captivate and enlighten readers with its timeless wisdom, can be used for finding solutions for present issues pertaining to daily life, foreign and security policy.

The introductory² section of the book illuminates a profound perspective on the *Mahabharat*, an epic often misconstrued by many as merely a treatise on warfare due to its title, which has become synonymous with war in contemporary understanding. However, the book compellingly argues that the *Mahabharat* transcends this narrow interpretation, offering far more than a narrative centred on battle. It delves into the intricacies of dharma (righteousness), exploring the moral and legal obligations that govern individuals and societies. It provides us with tragic examples of how to treat the environment, it also offers us heart warming illustrations of the moral and material benefits and many ways of living in harmony with nature. Moreover, unlike the *Ramayana*, which presented as a text of ideals, framing the main characters as ideal in every sense teaching us the virtues that should inspire us. However, the *Mahabharat* is framed as a complex narrative which have many heroes but all are far from perfect, based on which the book drawing

1 Aruna Narlikar, Amitabh Mattoo, *et.al*, *Strategic Choices, Ethical Dilemmas Stories from the Mahabharat* (Penguin Random House India Pvt. Ltd., India, 2023).

2 *Id.*, at 3.

parallels between the character of *Mahabharat* and present time as both were complex, multifaceted and torn.³

By analysing specific episodes from the epic *Mahabharat*, as discussed in Chapters 3–11 of the book, illustrate how the *Mahabharat*'s teachings remain relevant today. Each chapter of the book contain three sections. The first section is devoted to the inspiring story from the *Mahabharat* having direct relevance to present time problems. In the second section, the book connects the story with the practical application of the same to the present time precarious business of living. The third section draws out lessons from the story and its application to the policy and international relations. The book demonstrates through these episodes how it is possible to achieve victory while preserving one's moral integrity and soul, and how humanity, in its most inclusive and compassionate sense, can still be restored and upheld. The narratives explored in the book are diverse, offering insights relevant to contemporary issues, including cooperative partnerships, social barriers such as caste and class, the spread of misinformation and fake news, and challenges related to environmental sustainability.

In today's interconnected world, where isolation is unimaginable and society transcends local and national boundaries to form a globalized community, cooperative efforts are crucial for addressing critical issues such as climate protection, trade, Intellectual Property Rights protection, peace, and harmony. For instance, during the 20th meeting of the US-India Counterterrorism Joint Working Group, both sides reiterated that combating terrorism depends on bilateral coordination between the agencies for effective information sharing.⁴ Chapter 3, “*On Alliance and Partnerships*”⁵ draws a compelling parallel between the ancient collaboration of *Vyasa* and *Ganesha* in composing the epic and modern principles of teamwork, negotiation, and strategic alliance-building. The author extracts key principles from the following *shloka*:

याज्या मोघा वरमधिगुणे नाधमे लब्धकामा ।⁶

Word by Word Meaning - याज्या (*yāñcā*) — request, entreaty, supplication; मोघा (*moghā*) — fruitless, vain, unsuccessful; वरम् (*varam*) — better, preferable; अधिगुणे (*adhigune*) — to one superior in merit or quality; ना (*na*) — not; अधमे (*adhame*) — in one inferior, base, unworthy; लब्धकामा (*labdha-kāmā*) — one whose desire is fulfilled; literally “having attained one's wish.”

3 *Id.*, at 5.

4 Government of India, “Joint statement of the 20th US-India Counterterrorism Joint Working Group and 6th Designations dialogue” (Ministry of External Affairs, 2024).

5 *Supra* note 1 at 29.

6 Meghadoot, Poorvamegh, 6.

Meaning - A favour asked of an honourable person, even if rejected, is superior to one that is granted by a wicked person.

By analysing this mythological narrative, the book identifies three key principles vital for contemporary times: *first*, the universal value of teamwork, *second*, the importance of selecting partners wisely, and *third*, the need for negotiation grounded in mutual respect.⁷ These principles extend to international relations, where the book highlights the need for cooperative team effort in foreign policy through multilateralism for addressing global issues. However, even within such alliances, nations must engage in principled negotiations to safeguard their sovereignty while fostering mutual respect. The author illustrates this through the European Union and India's diplomatic engagements, particularly regarding India's position on the Russia-Ukraine conflict, which exemplifies how nations balance national priorities with collective goals.⁸

In the world of social media, relentless demands of our time and multiple distractions. Through much of our everyday lives, we flit mindlessly from task to task. To achieve our primary goals, it's crucial to filter out irrelevant distractions. To find an answer for this, the book extracts a well-known story from the *Mahabharat* in chapter 4, "*On Focus and the Big Picture*", where *Dronacharya* tests his students' archery skills. During which *Arjun*'s remarkable focus distinguishes him from others, when he replied to the question addressed to him by *Dronacharya*:

शिर पश्यामि भासस्य न गात्रमिति।¹⁰

Word by Word Meaning - शिर (*sirah*) — "the head" (accusative singular or nominative depending on context); पश्यामि (*pasyāmi*) — "I see" (1st person singular, present tense); भासस्य (*bhāsasya*) — "of Bhāsa"; न (*na*) — "not"; गात्रम् (*gātram*) — "the body"; इति (*iti*) — "thus/in this sense/as such (quotation marker)."

Meaning - I see only the head of the bird, I do not see the rest of its body.

Further, through a lesser-known story where *Arjun* saves *Dronacharya*, showcasing his adaptability skills during a situation of urgent crisis by remaining calm and exercising his skills effectively. The book draws a compelling parallel to modern life, where people struggle to maintain single-minded focus, stay calm, and apply their skills effectively during urgent situations. Similarly, in foreign policy and governance, the author urges policymakers to emulate *Arjun*'s ability to ignore

⁷ *Supra* note 1 at 32-24.

⁸ *Supra* note 1 at 35-38.

⁹ *Supra* note 1 at 41.

¹⁰ *Mahabharat*, I.132.7.

distractions and prioritize “first-order goals” to develop coherent and effective strategies.

Chapter 5, “*On Friendship That Transcend Social Barriers*”¹¹, examines two critical challenges facing contemporary society: social barriers such as caste, class, geographical status, etc., that hinder meritocracy and inclusivity, and the complexities of loyalty in modern contexts. The narrative referred from the *Mahabharat* to illustrate the impact of social barriers, that despite their reputation for integrity and nobility, the *Pandavas*, constrained by elitist and prejudiced societal norms, overlooked the merits of *Karna*, a highly skilled warrior. In contrast, *Duryodhana*, often portrayed as a villain, demonstrated meritocratic courage by recognizing and elevating *Karna* based on his abilities, disregarding his lower social status.¹²

Secondly, *Karna*’s unwavering loyalty to *Duryodhana*, even in the face of temptations, adds a profound ethical layer to his character, showcasing loyalty as a complex virtue. The book effectively connects these ancient episodes to modern challenges, particularly in global governance. It critiques the elitism of Western democracies, which often exclude nations from the Global South from permanent membership in the United Nations Security Council (UNSC)¹³, despite these nations meeting the necessary criteria. Additionally, the chapter explores loyalty through India’s continued participation in BRICS, despite tensions with China and differing positions on the Russia-Ukraine conflict. This narrative in the present time, in its geopolitical realities, makes it timelier and more impactful.

In an era where human activities increasingly harm the environment, causing irreversible damage and affecting all life forms, the anthropocentric view that humans own the earth disregards the equal rights of non-human species. In recent supreme court remarks reflects this perspective of prioritizing human space over animals, where the court on feeding stray dogs, expressed annoyance and displeasure, saying “there is space for these animals, no space for humans”.¹⁴ This all reflects a broader failure to recognize shared ecological rights. The book, in chapters 6¹⁵, 10¹⁶, and 11¹⁷, drawing from the *Mahabharat*, offers insights into these

11 *Supra* note 1 at 53.

12 *Id.*, at 57.

13 *Id.*, at 59-61.

14 “‘Why Don’t You Feed Them at Your Own Home?’: Supreme Court to Noida Woman in Dog Feeding Dispute” *The Indian Express*, July 17, 2025, available at: <https://indianexpress.com/article/cities/delhi/why-dont-you-feed-them-at-your-own-home-supreme-court-to-noida-woman-in-dog-feeding-dispute-10128941/> (last visited on July. 18, 2025)

15 *Supra* note 1, “On Values and Interests” at 65.

16 *Id.*, “On Compassion and Ecologism” at 121.

17 *Id.*, “On Animal Rights and Personhood” at 135.

contemporary global challenges. *Yudhishtir* acknowledges nature's prior claim over a lake, respecting non-human and marginalized communities' rights, urging a rethinking of governance to prioritize environmental equity.¹⁸

In Chapter 10, “*On Compassion and Ecologism*”, story highlights a parrot's loyalty to a dying tree, and further prompts a rethinking of narratives about climate change, sustainability, and biodiversity. However, most dominant narratives on these topics in the present time remain human-focused. The entire movement for climate change in the present time seems to be premised on the assumption that the planet belongs to humans and almost no recognition for other species. These narratives from the epic advocate for recognizing animals as kin, countering anthropocentric environmentalism. The book illustrates the same through campaigns like #StopKeralaKillings and global anti-trophy hunting movements.¹⁹ Chapter 11, “*On Animal Rights and Personhood*”, recounts *Yudhishtir's* refusal to abandon a stray dog during the *Pandavas'* Himalayan ascent, emphasizing trans-species personhood and loyalty. Indeed, in *Yudhishtir's* eyes, animals deserve not only kindness and compassion but also respect and dignity equivalent to that of humans.²⁰ By opting for this approach, *Yudhishtir* is living up to a powerful ideal, can be seen from the following *Shloka*:

स्मं सर्वेषु भूतेषु तिष्ठन्तं परमेश्वरम् ।

विनश्यत्स्वविनश्यन्तं यः पश्यति स पश्यति ।²¹

Word by Word Meaning - स्मं (*smam/samam*) — equally/alike/the same in all; सर्वेषु (*sarves u*) — in all; भूतेषु (*bhūtes u*) — beings/creatures; तिष्ठन्तम् (*tis thantam*) — abiding/residing/dwelling; परमेश्वरम् (*paramesvaram*) — the Supreme Lord, Supreme Being; विनश्यत्सु (*vinasyatsu*) — among those that perish/in the perishing; अविनश्यन्तम् (*avinasyantam*) — the imperishable one; यः (*y a h*) — who; पश्यति (*pasyati*) — sees/perceives; स (*s a h*) — he; पश्यति (*pasyati*) — truly sees/perceives rightly.

Meaning - He who sees the divine in all creatures, and in all mortal bodies sees the immortal soul, he is the one who truly understands.

This resonates with 2025's animal rights debates, including stray dog violence in India and Turkey, and live animal markets in China. Rooted in the *Bhagavad Gita's* universalism, it calls for recognizing animals as beings deserving dignity, offering a legal and ethical framework for sustainable, equitable governance.

18 *Supra* note 15 at 70.

19 *Supra* note 16 at 126.

20 *Supra* note 17 at 140.

21 *Bhagavad Gita*, 13.28.

India's foreign policy has long emphasized peace, non-alignment, and the use of military strength and war as a last resort, prioritizing diplomacy and negotiation to resolve conflicts. There are several incidents when India preferred negotiation over war, for instance, in May 2020, tensions flared along the Line of Actual Control (LAC) in eastern Ladakh, particularly in the Galwan Valley, where a violent clash on June 15, 2020, resulted in the death of 20 Indian soldiers and an unknown number of Chinese troops. Despite the escalation, India prioritized diplomatic and military-level talks to de-escalate the situation. In October 2024, India and China finalized a disengagement agreement for Depsang and Demchok, further reducing tensions.²²

However, when negotiations fail, India stands for justice, as seen in operations like Operation Sindoor against terrorism. Taking a stand for "India First", "multi-alignment" as argued by India's Foreign Minister, S. Jaishankar, in an agenda-setting speech in 2019.²³ Chapter 7, "*To War or Not to War: The Bhagavad Gita*"²⁴, applies the *Bhagavat Gita*'s teachings to modern contexts, drawing on *Arjun*'s moral dilemma and *Krishna*'s guidance on *svadharma* (duty) and *nishkaam karma* (selfless action). It frames these principles as a call to uphold justice, whether defending others or confronting workplace unfairness. Emphasising the war as a last resort, however, once the path to war is chosen, there should be no turning back. Hence, there are times in our personal lives and international politics when we must take a firm and principled stance. The *Bhagavat Gita* shows us when, why, and how.

The prevalence of fake news and misinformation in India has been on a disturbing rise. Multiple surveys have consistently shown that fake news and misinformation are poised to become India's biggest threats. From impacting elections by skewing public perception, influencing voter behaviour, and even manipulating election outcomes, misinformation and fake news have larger implications than we realise. Misinformation has also fuelled communal tension; falsehoods ignite conflicts and deepen divisions in society. False information about diseases, treatments, and vaccines has led to widespread panic and mistrust, undermining efforts to combat health crises effectively.²⁵ It has disrupted economic stability by propagating rumours that

22 Federica Marsi, "How India and China Pulled Back from a Border War — and Why Now", *Aljazeera*, Oct. 22, 2024, available at: <https://www.aljazeera.com/news/2024/10/22/how-india-and-china-pulled-back-from-a-border-war-and-why> (last visited on July 18, 2025).

23 *Supra* note 1 at 90.

24 *Id.*, at 77.

25 Nihal Kumar, "Fake News and Misinformation Poised to Become India's Biggest Threats", *The Probe*, June 12, 2024, available at: <https://theprobe.in/media/fake-news-and-misinformation-indias-biggest-threats-4758254> (last visited on July 18, 2025).

affect markets and consumer behaviour, as we saw recently with the stock market's bloodbath.²⁶

Chapter 8, “*On Fake News and Disinformation*”²⁷, highlights the consequences of fake news, recounts the tragic deception of *Dronacharya* during the *Kurukshetra* war, where the *Pandavs* exploit his love for his son *Ashwatthama* to demoralize and defeat him.²⁸ The framing of the *Pandavs*' tactic as a disinformation campaign is a brilliant modern parallel, resonating with 2025's concerns about fake news, digital manipulation, and cyber threats. The chapter highlights the *Pandavas*' strategy, using a credible source (*Yudhishthir*) and manipulating context (*Ashwatthama* the elephant), while preventing verification, as a classic disinformation campaign.²⁹

In chapter 9, “*On the Importance of Flexibility and Adaptability*”,³⁰ the book effectively uses a lesser-known story from the *Mahabharat*. *Karna*'s peculiar sense of honour and stubbornness not only cost him his own life but also resulted in the death of a fellow creature, *Ashwasen*.³¹ Using this episode, the book emphasizes flexibility as a vital attribute in both personal and strategic contexts is compelling. It serves as a powerful reminder of the devastating consequences that can arise from missed opportunities and reluctance to learn from prior mistakes. The book draws a compelling parallel between *Karna*'s errors and modern challenges, especially in the realm of foreign policy. It strongly advocates for democracies to build flexible alliances based on shared values, emphasizing that adaptability is key to navigating today's complex global landscape.

The collection at hand, by means of stories, weaves the IKS into the fabric of modern life, offering readers a profound exploration of timeless philosophies through engaging narratives. Each episode unfolds with pragmatic philosophy, delivering actionable insights that resonate deeply with today's complexities. The seamless blend of storytelling and practical wisdom ensures that readers not only reflect on their own lives but also gain a broader perspective on societal and global issues. This book is a good read for students, for practitioners of foreign policy, as it offers insights on strategy and alliance building, and for all well-intended individuals who want to gain knowledge about the IKS.

*Saneb Kumari**

²⁶ *Ibid.*

²⁷ *Supra* note 1 at 95.

²⁸ *Id.*, at 96.

²⁹ *Id.*, at 98.

³⁰ *Supra* note 1 at 109.

³¹ *Id.*, at 112.

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आधुनिक विधिशास्त्र का प्राचीन भारतीय चिंतन में अवलोकन

न्यायमूर्ति वी. राम सुब्रमण्यम¹

अनुलेखित और संपादित

ऋत्विक् रवि, पीएचडी शोधार्थी, भारतीय विधि संस्थान, नई दिल्ली

प्रियल, पीएचडी शोधार्थी, विधि संकाय, जम्मू विश्वविद्यालय

सार

यह लेख आधुनिक विधिक प्रणालियों और प्राचीन भारतीय चिंतन के बीच गहरे संबंधों की पड़ताल करता है, और तर्क देता है कि कई समकालीन विधिक सिद्धांतों की उत्पत्ति शास्त्रीय भारतीय ग्रंथों से हुई है। इसकी शुरुआत वकील के काले कोट के प्रतीकात्मक उदाहरण से होती है। यह प्रथा 17वीं सदी के इंग्लैंड से चली आ रही है, लेकिन “दया से समावेशित न्याय” [justice tempered with mercy] के विचार को काले रंग द्वारा दर्शाए जाने का उल्लेख तमिल रामायण में मिलता है। प्राचीन भारतीय संस्कृति चार जीवन लक्ष्यों (पुरुषार्थ) के आसपास संरचित थी, जिसका प्राथमिक लक्ष्य एक धार्मिक जीवन था। धर्म को समझने के लिए चौदह विद्याओं के ज्ञान की आवश्यकता थी, जिसमें धर्मशास्त्र, यानी विधि की पुस्तकें भी शामिल थीं। इस प्राचीन विधि के स्रोत आधुनिक स्रोतों से भिन्न थे। विधिक अधिकार, पवित्र ग्रंथों (वेद), ऋषियों द्वारा संकलित विधि संहिताओं (स्मृति), जानी लोगों के अनुकरणीय आचरण और महत्वपूर्ण रूप से, व्यक्ति के अपने विवेक से प्राप्त होते थे। मनु जैसे महान ऋषियों ने इन विधियों को अपने नाम पर रखे गए ग्रंथों में संहिताबद्ध किया। इन पुस्तकों में अदालती प्रक्रियाओं का विवरण दिया गया, अठारह विभिन्न प्रकार के कानूनी विवादों को वर्गीकृत किया गया, और आधुनिक विधिक सिद्धांतों के समान सिद्धांत स्थापित किए गए। कौटिल्य के अर्थशास्त्र को उसके परिष्कृत न्यायिक आचरण संहिता और शव-परीक्षा के लिए फॉरेंसिक विज्ञान की उन्नत विधियों के लिए विशेष रूप से रेखांकित किया गया है। अंत में, न्याय शास्त्र की भूमिका को जटिल नैतिक और धार्मिक संघर्षों को हल करने की एक विधि के रूप में समझाया गया है। यह साक्ष्य प्रदर्शित करता है कि प्राचीन भारत में एक अत्यधिक विकसित, व्यापक और तर्कसंगत विधिक प्रणाली थी जिसके सिद्धांत आज भी प्रासंगिक हैं।

मुख्य-शब्द: प्राचीन भारतीय विधिशास्त्र, धर्मशास्त्र, कौटिल्य, न्याय शास्त्र

I. काला कोट और न्याय का रंग [Black Coat and the Colour of Justice]

II. एक धार्मिक जीवन की नींव: पुरुषार्थ और चतुर्दश विद्या [The Foundations of a Dharmic life: Purusharthas and

* This translation has been done under the guidance of Prof. (Dr.) Anurag Deep, Professor, Faculty of Law, University of Delhi.

1. यह व्याख्यान न्यायमूर्ति वी. राम सुब्रमण्यम, भारत के सर्वोच्च न्यायालय (सेवानिवृत्त) द्वारा दिया गया है। वह भारत के राष्ट्रीय मानव अधिकार आयोग के अध्यक्ष हैं। यह व्याख्यान संगम टॉक्स के यूट्यूब चैनल पर “Similarities in Contemporary and Ancient Indian System of Jurisprudence” शीर्षक के तहत, दिनांक 26.05.2024 को अपलोड किया गया है, जो <https://youtu.be/P4xQAxgGzQk?si=T9wUQovOi0xfXWbv> पर उपलब्ध है। हम संगम टॉक्स और यूट्यूब चैनल के योगदान और प्रयास को ईमानदारी से स्वीकार करते हैं।

Chaturdasa Vidya]

- III. विधि के स्रोत: प्राचीन और आधुनिक विधिशास्त्र की तुलना [The Sources of Law: A Comparison of Ancient and Modern Jurisprudence]
- IV. धर्म का संहिताकरण: स्मृतियों का एक परीक्षण [The Codification of Dharma: An Examination of Smritis]
- V. प्राचीन न्यायालय: मनुस्मृति में प्रक्रिया और सिद्धांत [The Ancient Courtroom: Procedure and Principles in Manusmriti]
- VI. अर्थशास्त्र: न्यायिक आचरण और फॉरेंसिक विज्ञान पर कौटिल्य [The Arthashastra: Kautilya on Judicial Conduct and Forensic Science]
- VII. तर्क का विज्ञान: न्याय शास्त्र और धार्मिक संघर्ष का समाधान [The Science of Logic: NyayaShastra and Resolution of Dharmic Conflict]
- VIII. निष्कर्ष [Conclusion]

I. काला कोट और न्याय का रंग

[Black Coat and the Colour of Justice]

मैं एक बहुत ही रोचक बात से शुरुआत करता हूँ। मैंने तमिल रामायण के विधि और न्याय के सिद्धांतों पर तमिल में एक पुस्तक लिखी है।² वास्तव में, वकीलों द्वारा काला कोट पहनने की प्रथा का पता 17वीं सदी के इंग्लैंड से लगाया जा सकता है, जहाँ विधि के ज्ञाता, सर एडवर्ड कोक (1552-1634), सर मैथ्यू हेल (1609-1676), आदि, लोग इंग्लैंड की महारानी के अंतिम संस्कार में काला कोट पहनकर गए थे। मुझे नहीं पता कि रानी के अंतिम संस्कार का विधि से क्या लेना-देना है, लेकिन तब से अंग्रेजों ने सोचा कि वकीलों को काला कोट और काला गाउन पहनना चाहिए और सिर पर विग भी लगानी चाहिए ताकि अदालत से बाहर आने के बाद जनता में उनकी पहचान न हो सके।

लेकिन इसमें कुछ बहुत ही रोचक बात है। यह प्रथा जो 17वीं सदी के इंग्लैंड में शुरू हुई, उसका संबंध रामायण के तमिल संस्करण में किसी

2. न्यायमूर्ति वी. राम सुब्रमण्यम, कंबनिल सट्टमुम नीथीयम (वानथी पथिप्पगम, 2021).

बात से जोड़ा जा सकता है।³ रामायण के तमिल संस्करण में एक विशेष दृश्य है जहाँ विभीषण भगवान राम के सामने एक शरणार्थी (Refugee) के रूप में आत्मसमर्पण करते हैं। जिस क्षण विभीषण ने भगवान राम को देखा, वह चकित रह गए क्योंकि भगवान राम का रंग काला था। वह गोरी त्वचा वाले व्यक्ति नहीं थे। विभीषण ने पूछा, “हे राम, आपका रंग काला है। मैं जानता हूँ कि आप न्याय के अवतार हैं। इसलिए, मुझे संदेह है कि क्या दया से मिश्रित न्याय का रंग काला होगा।” यहाँ विभीषण “दया से समावेशित न्याय” अभिव्यक्ति का उपयोग करते हैं।

यह वाक्यांश “दया से समावेशित न्याय”⁴ हमारी अदालतों ने अंग्रेजों से, एंग्लो-सैक्सन विधिशास्त्र से उधार लिया है, लेकिन 1200 से अधिक वर्ष पूर्व भारतीय लोगों ने यह कल्पना की थी कि दया से समावेशित न्याय का रंग काला हो सकता है। इसलिए, मैंने अपनी पुस्तक⁵ में लिखा कि वकीलों ने यह संकेत देने के लिए काला कोट पहनना शुरू कर दिया कि उनसे दया से समावेशित न्याय प्रदान करने की अपेक्षा की जाती है। हमारे साहित्य में आधुनिक विधिशास्त्र के बहुत सारे चिन्ह मिलते हैं।

II. एक धार्मिक जीवन की नींव: पुरुषार्थ और चतुर्दश विद्या

[The Foundations of a Dharmic life: Purusharthas and Chaturdasa Vidya]

भारतीय संस्कृति ने मानव जीवन के चार लक्ष्य निर्धारित किए हैं। ये चार लक्ष्य पुरुषार्थ कहलाते हैं, धर्म, अर्थ, काम और मोक्ष। भारतीयों ने कभी नहीं चाहा कि हर कोई दूसरे लोक में स्थान पाने के लिए इस दुनिया का, इस दुनिया के सुखों का त्याग कर दे। हमारे पूर्वजों ने हमें सिखाया कि आप सही तरीके से जीवन जिएं, एक धार्मिक जीवन। एक धार्मिक जीवन जी कर आप धन, यानी अर्थ कमाते हैं। धार्मिक तरीके से कमाए गए धन के माध्यम से आप काम, यानी इस दुनिया के सुखों का आनंद लेते हैं और उसके बाद जीवन के एक विशेष मोड़ पर सब कुछ त्याग कर

3. रामायण के कंबर के संस्करण को “कंबरामायणम्” के रूप में जाना जाता है और इसे तमिल साहित्य के सबसे महान महाकाव्यों में से एक माना जाता है।

4. Justice tempered with mercy means giving fair judgment while softening it with compassion and forgiveness. It ensures that wrongdoers face consequences, but not in a harsh or unfeeling way, especially if they show genuine repentance. For example, when King David sinned by taking Uriah's wife, strict justice demanded death, but because he sincerely repented, God forgave him and spared his life, though David still faced the loss of his child as a consequence. This shows that justice remains, but mercy makes it humane and balanced, available at: <https://wol.jw.org/en/wol/d/r1/lp-e/1965488> (last visited on Aug. 10, 2025).

5. उपरोक्त टिप्पणी 2।

मोक्ष, अर्थात् मुक्ति की तलाश करते हैं। ये चारों लक्ष्य हमारे शास्त्रों द्वारा मनुष्यों को प्राप्त करने के लिए निर्धारित किए गए थे।

हम इन पुरुषार्थों धर्म, अर्थ, काम और मोक्ष को कैसे प्राप्त करते हैं? यदि हमें इन चार लक्ष्यों को प्राप्त करना है तो हमें पहले यह जानना होगा कि धर्म (Dharma) क्या है? जब तक आप यह नहीं जानते कि धर्म क्या है, तब तक आपके लिए धार्मिक जीवन जीना संभव नहीं है।

14 विद्या शाखाएं

हमारे शास्त्रों ने 14 विद्या शाखाएं निर्धारित की थीं। इन 14 विद्या शाखाओं को चतुर्दश विद्या कहा जाता था। चतुर्दश का अर्थ है चौदह। विद्या का अर्थ है ज्ञान। एक व्यक्ति को यह समझने के लिए कि धर्म क्या है, जीवन का सही तरीका क्या है, हमारे शास्त्रों द्वारा निर्धारित 14 विद्या शाखाएं को समझना होगा। इन 14 विद्या शाखाओं में तीन चीजें शामिल थीं, पहला- चतुर्वेद- ऋग्वेद, यजुर्वेद, सामवेद, अथर्ववेद। दूसरा जिसे षडंग कहा जाता है। जिसके छह अंग हैं- शिक्षा, व्याकरण, छंद, निरुक्त, ज्योतिष और कल्प। तीसरा- चार उपांग। जिन्हें मीमांसा, न्याय, पुराण और धर्मशास्त्र कहा जाता है। धर्मशास्त्र 14वीं विद्या शाखा का गठन करता है। आपको याद रखना चाहिए कि सभी 14 विद्या शाखाओं की नींव वेदों में पाई गई है। वेद शब्द की जड़ 'विद्' शब्द में है जिसका अर्थ है "जानना"। इसलिए, सभी 14 विद्या शाखाओं की नींव वेद थे।

III. विधि के स्रोत: प्राचीन और आधुनिक विधिशास्त्र की तुलना

[The Sources of Law: Comparison of Ancient and Modern Jurisprudence]

सभी विद्याओं के स्रोत क्या हैं? प्राचीन काल में भारतवर्ष में विधि के स्रोत क्या थे? मान लीजिए यदि आज आप विधि के किसी विद्यार्थी से पूछें कि हम सभी को नियंत्रित करने वाले विभिन्न विधियों के स्रोत क्या हैं? हम कहेंगे कि सबसे पहले आपके पास संविधान [Constitution] है। विधि का दूसरा स्रोत संसद⁶ और राज्य विधानसभाओं द्वारा बनाए गए कानून [अधिनियम enactment] हैं। विधायिका संविधान द्वारा दी गई शक्ति के आधार पर ही यह कानून बनाती है। फिर विधि का तीसरा स्रोत सरकार द्वारा संसद के अधिनियमों या विधानमंडल के अधिनियमों द्वारा प्रदत्त शक्ति का प्रयोग करते हुए जारी किए गए नियम या कार्यकारी निर्देश [rules or executive direction] हैं।⁷

6. जैसे- भारतीय साक्ष्य अधिनियम, 2023।

7. जैसे- केंद्रीय सचिवालय सेवा नियम, 1962।

विधि का चौथा स्रोत इन विधियों की अदालतों द्वारा की गई व्याख्या न्यायिक व्यवस्था [Judicial Interpretation] है।⁸ आज, आधुनिक विधिशास्त्र में आप विधि के चार स्रोत तैयार करते हैं, अर्थात् संविधान, विधायिका के अधिनियम, कार्यपालिका द्वारा जारी किए गए नियम और अदालतों द्वारा दी गई विधि की व्याख्या। ये आधुनिक समय में विधि के चार स्रोत हैं। प्राचीन काल में विधि के स्रोत क्या थे?

मनु के अनुसार विधि के स्रोत [Sources of Law as per Manu]

विद्या के क्या स्रोत हैं? मनुस्मृति में एक श्लोक है जो कहता है⁹

वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम्।

आचारश्चैव साधूनामात्मनस्तुष्टिरेव च॥

वेदः = वेद, अखिलः = संपूर्ण/पूर्ण, धर्म-मूलम् = धर्म का मूल (नींव), स्मृति-शीले = स्मृति (पवित्र परंपरा) और शील (रीति-रिवाज, प्रथाएं, आचरण), च = और, तद्विदाम् = उसे जानने वालों का (अर्थात् वेद, विद्वान्), आचारः = आचरण, प्रथा, च एव = और वास्तव में, साधूनाम् = गुणी/धार्मिक व्यक्तियों का, आत्मनः = स्वयं का (आंतरिक आत्मा, विवेक), तुष्टिः = संतुष्टि/संतोष, एव = ही/वास्तव में, च = और।

अर्थ- वेद धर्म का मूल स्रोत है। वेद को जानने वालों की स्मृतियाँ (पवित्र परंपराएं) भी इसकी नींव हैं। इसी तरह, गुणी, साधु या विद्वान् लोगों का आचरण और अंत में, अपने स्वयं के विवेक की संतुष्टि को धर्म के स्रोत के रूप में मान्यता दी गई है।

मनु द्वारा गिनाए गए विधि के स्रोत को देखें तो वेद [Veda] सभी विधियों का पहला, मूल स्रोत हैं। विधि का दूसरा स्रोत स्मृति [Smriti] है। स्मृति वह है जो सुनाई जाती है, जो दोहराई जाती है। श्रुति वह है जो सुनी जाती है। धर्मशास्त्र जिन्हें स्मृति भी कहा जाता है, मनु के

8. Danial Latifi v. Union of India, (2001) 7 SCC 740. सर्वोच्च न्यायालय ने मुस्लिम महिला (तलाक पर अधिकारों का संरक्षण) अधिनियम, 1986 की सांविधानिकता को बनाए रखा, लेकिन “उचित और निष्पक्ष प्रावधान” की व्याख्या तलाकशुदा महिलाओं की गरिमा और आजीविका सुनिश्चित करने वाले पर्याप्त भरण-पोषण की आवश्यकता के रूप में की। उपरोक्त अधिनियम मुस्लिम महिलाओं के भरण-पोषण की सीमा इददत अवधि तक ही निर्धारित करता था। न्यायालय ने इस बात पर जोर दिया कि भरण-पोषण केवल इददत अवधि तक ही सीमित नहीं होना चाहिए, बल्कि एक उचित अवधि के लिए पत्नी की आर्थिक सुरक्षा सुनिश्चित करनी चाहिए। न्यायालय ने निर्णय दिया कि पति को इस प्रकार भरण-पोषण प्रदान करना चाहिए जिससे तलाकशुदा महिला को बिना किसी आर्थिक कठिनाई के जीवनयापन सुनिश्चित हो सके, और भरण-पोषण की राशि इतनी पर्याप्त होनी चाहिए कि तलाक के बाद पत्नी बेसहारा न हो जाए। गौरतलब यह है कि न्यायालय ने अधिनियम के प्रावधानों में बिना छेड़-छाड़ किये यह व्याख्या की।

9. मनुस्मृति, अध्याय 2, श्लोक 6।

अनुसार वह विधि का दूसरा स्रोत है। मनु के अनुसार विधि का तीसरा स्रोत साधु [learned and noble person] हैं। वे व्यक्ति जो न केवल अत्यंत विद्वान हैं, बल्कि नैतिक रूप से भी महान हैं। “साधु” शब्द केवल ज्ञानवान व्यक्ति के लिए नहीं, बल्कि ऐसे व्यक्ति के लिए प्रयुक्त होता है जो चरित्र और आचरण में भी श्रेष्ठ हो, क्योंकि कोई व्यक्ति बहुत विद्वान होते हुए भी दुष्ट हो सकता है, और ऐसा व्यक्ति कभी साधु नहीं कहलाएगा। अतः विद्वान और सदाचारी व्यक्तियों द्वारा पालन की जाने वाली आचार संहिता विधि का तीसरा स्रोत मानी जाती है। और विधि का चौथा स्रोत एक व्यक्ति का अपना विवेक [Conscience] है।¹⁰

दुनिया में कोई अन्य संस्कृति नहीं है, कोई अन्य सभ्यता नहीं है जो कहती है कि किसी व्यक्ति का अपना विवेक विधि के स्रोतों में से एक हो सकता है, क्योंकि आप किसी और को धोखा दे सकते हैं लेकिन अपने विवेक को नहीं। यदि आपके पास विवेक है, तो आप जानते हैं कि आपने जो किया है वह सही है या गलत। इसलिए, मनु इन तीन-चार- वेदों, धर्मशास्त्रों, फिर साधुओं के आचरण और अपने विवेक को विधि के स्रोतों के रूप में देखते हैं।

IV. धर्म का संहिताकरण: स्मृतियों का एक परीक्षण

[The Codification of Dharma: An Examination of Smritis]

अब जैसा कि मैंने आपको बताया कि धर्मशास्त्रों का एक और नाम स्मृति है। स्मृति वह है जो याद रखी जाती है और विस्मृति पागलपन [insanity] की एक छाया के करीब का शब्द है। यदि आप यह याद नहीं रखते कि क्या सही है [what is right] (विस्मृति), तो परिणाम पागलपन होता है। इस प्रकार, अपने समय की जरूरतों के अनुसार, इस भूमि के महान ऋषियों ने धर्मशास्त्रों या स्मृतियों को संहिताबद्ध किया। इतिहास के विभिन्न चरणों में, इन ऋषियों ने अपनी-अपनी स्मृतियों की रचना की, और धर्म के सिद्धांतों को उन परिस्थितियों के अनुकूल बनाया।

कुल अठारह ऋषि या अठारह संत हैं जिन्होंने स्मृतियों या धर्मशास्त्रों को संहिताबद्ध किया है।¹¹ हालांकि गौरतलब है कि जो भी स्मृति, धर्मशास्त्र

10. Good Conscience आधुनिक विधि का भी एक स्रोत है, विशेष रूप से “न्याय, समता और सद्विवेक” के सिद्धांत के माध्यम से। यह सिद्धांत तब मार्गदर्शक के रूप में कार्य करता है जब किसी विषय पर कोई विशिष्ट कानून या पूर्व निर्णय [precedent] उपलब्ध नहीं होती। इसके माध्यम से न्यायाधीश सामान्य नैतिकता और न्याय के सिद्धांतों के आधार पर निर्णय दे सकते हैं, ताकि विधि की कमियों या अस्पष्टताओं के कारण अन्याय न हो। यह सिद्धांत ब्रिटिश प्रभाव वाले विधिक तंत्रों से उत्पन्न हुआ है और न्यायाधीशों को विवेकपूर्ण एवं न्यायसंगत ढंग से निर्णय लेने का विवेकाधिकार प्रदान करता है।

11. इनमें मनु, सबसे शुरुआती और सबसे आधिकारिक विधि-प्रदाता हैं, उसके बाद याज्ञवल्क्य, पराशर, विष्णु, दक्ष, संवर्त, व्यास, हारीत, और शंख और लिखित का संयुक्त कार्य शामिल है। अन्य ऋषि जैसे उशना (उशनस), अत्रि, यम, आपस्तम्ब, गौतम, देवल, वसिष्ठ शामिल हैं।

संहिताबद्ध किए गए, उसका नाम उस ऋषि के साथ जुड़ गया। मनु की स्मृति मनुस्मृति बन गई। याज्ञवल्क्य द्वारा जो भी धर्मशास्त्र या स्मृति संहिताबद्ध की गई, वह याज्ञवल्क्य स्मृति बन गई। पराशर द्वारा जो भी संहिताबद्ध किया गया, वह पराशर स्मृति बन गई। आप जानते हैं, आज संयुक्त राज्य अमेरिका [USA] में, व्यक्तियों के कहने पर कई अधिनियम पारित किए गए हैं, जिसे हम यहाँ निजी सदस्य विधेयक [private members' bill],¹² कहते हैं।

हमारे यहाँ अधिनियम का नाम उस व्यक्ति के नाम पर रखने की प्रथा नहीं है, लेकिन अमेरिका में, उस अधिनियम को उस व्यक्ति के नाम पर बुलाने की प्रथा है जिसने उस अधिनियम का प्रस्ताव रखा था।¹³ यह प्रथा जो आज के अमेरिका में प्रचलित है। हजारों साल पहले मनु द्वारा संहिताबद्ध स्मृतियों को मनुस्मृति, याज्ञवल्क्य द्वारा संहिताबद्ध को याज्ञवल्क्य स्मृति, पराशर द्वारा संहिताबद्ध को पराशर स्मृति कहकर प्रचलित थी। इसलिए, निजी सदस्यों के विधेयक, कुछ इस तरह, हजारों साल पहले प्रचलित थे।

अठारह ऋषियों-मनु, याज्ञवल्क्य, पराशर, गौतम, हारीत, प्रचेता, शंखिरास, आदि ने धर्मशास्त्रों या स्मृतियों को संहिताबद्ध किया और फिर ये धर्मशास्त्रों का एक संकलन बन गए, जो मनुष्यों के अनुसरण के लिए आचार संहिता [code of conduct] थी। इन अठारह स्मृतियों या धर्मशास्त्रों के अलावा, अठारह सहायक स्मृतियाँ थीं जिन्हें उपस्मृति कहा जाता था। वास्तव में, प्रथा के अनुसार लोगों ने भगवद् गीता को उपस्मृतियों में से एक के रूप में शामिल किया है। मैं आपको केवल एक व्यापक परिचय दे रहा हूँ कि धर्मशास्त्र क्या है, अन्यथा आप केवल यह दोहराते नहीं रह सकते कि स्मृति क्या है, धर्मशास्त्र क्या है, बिना यह सब समझे।

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12. पिछली तीन लोकसभाओं में, लगभग 1,800 निजी सदस्य विधेयक पेश किए गए (16वीं लोकसभा में 999, 17वीं लोकसभा में 729, 18वीं लोकसभा में अब तक 64), स्वतंत्रता के बाद से कुल संख्या हजारों में है। ऐसे केवल 14 विधेयक अधिनियम बने हैं। 14 में से छह विधेयक 1956 में कानून बने और संसदीय अनुमोदन प्राप्त करने वाला अंतिम विधेयक सुप्रीम कोर्ट (आपराधिक अपीलीय क्षेत्राधिकार का विस्तार) विधेयक, 1968 था, जो 9 अगस्त, 1970 को पारित हुआ। उपलब्ध है: <https://www.tv9hindi.com/india/lok-sabha-433-private-bills-pending-for-discussion-only-14-private-member-bills-passed-by-both-houses-since-1952-au293-1233671.html> (last visited on Sept. 20, 2025).
 13. संयुक्त राज्य अमेरिका में, कानूनों को अक्सर दो तरीकों से पेश किया जाता है और संदर्भित किया जाता है: या तो उनके विषय वस्तु के अनुसार, जैसे कि नागरिक अधिकार अधिनियम, या उस विधायक के नाम से जिसने उन्हें प्रायोजित किया, जैसे कि शर्मन एंटीट्रस्ट एक्ट या डोड-फ्रैंक एक्ट।

विधियों का टकराव [Conflict of Laws]

हमारे पूर्वजों ने एक स्मृति और दूसरी स्मृति के बीच मतभेद की संभावना भी जताई थी। उदाहरण के लिए, मनुस्मृति में एक विशेष सूत्र हो सकता है, जो याज्ञवल्क्यस्मृति में एक दूसरे सूत्र के विपरीत हो सकता है। ऐसा नहीं है कि ये सभी अठारह स्मृतियाँ एक ही भाषा बोलती हैं और एक ही सामग्री रखती हैं।

आज संविधान के अनुच्छेद 245 से 254 तक आप विधियों के टकराव [Conflict of laws] के बारे में बात करते हैं।¹⁴ मान लीजिए कि संसद ने एक कानून बनाया है और राज्य विधानमंडल ने एक और कानून बनाया है और वे एक-दूसरे के साथ टकराव में हैं, तो कौन सा कानून प्रबल होगा। इसे सांविधानिक विधिशास्त्र में विसंगति [Repugnancy], विधि का टकराव कहा जाता है। यह कुछ ऐसा नहीं है जो 100 साल या 200 साल में सामने आया है। हजारों साल पहले हमारे पूर्वजों ने यह विचार किया था कि विधियों का टकराव अथवा विसंगति हो सकती है। इसलिए हमारे पूर्वजों ने धर्मशास्त्र निबंधन [Nibandhan] विकसित किए।¹⁵ धर्मशास्त्र निबंधन धर्मशास्त्रों के दो वर्गों के बीच संघर्ष को हल करने के लिए बनाए गए नियमों का एक वर्ग है। आज हम जो कुछ भी सीखते हैं, उसका एक निशान हमारे पूर्वजों के विधिशास्त्र में है।

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14. उदाहरण के लिए, भारत का संविधान, अनुच्छेद 254, संसद द्वारा बनाए गए विधियों और राज्यों के विधानमंडलों द्वारा बनाए गए विधियों के बीच में असंगति- (1) यदि किसी राज्य के विधानमंडल द्वारा बनाए गए कानून का कोई प्रावधान संसद द्वारा बनाए गए कानून के किसी प्रावधान के प्रतिकूल है, जिसे बनाने के लिए संसद सक्षम है, या समवर्ती सूची में उल्लिखित मामलों में से किसी एक के संबंध में किसी मौजूदा कानून के किसी प्रावधान के प्रतिकूल है, तो, खंड (2) के प्रावधानों के अधीन, संसद द्वारा बनाया गया कानून, चाहे वह ऐसे राज्य के विधानमंडल द्वारा बनाए गए कानून से पहले या बाद में पारित किया गया हो, या, जैसा भी मामला हो, मौजूदा कानून, प्रबल होगा और राज्य के विधानमंडल द्वारा बनाया गया कानून, असंगति की सीमा तक, शून्य होगा।
 15. धर्मशास्त्र निबंधन भारतीय विधिक परंपरा में वह नियमों और व्याख्याओं का वर्ग है, जिसे हमारे पूर्वजों ने विभिन्न धर्मशास्त्रों के बीच उत्पन्न मतभेदों को सुलझाने और धर्म के सिद्धांतों को सुसंगत रूप में प्रस्तुत करने के लिए विकसित किया। जब मनुस्मृति, याज्ञवल्क्य स्मृति या अन्य धर्मशास्त्रों में किसी विषय पर विरोध होता था, तब निबंधन यह निर्धारित करते थे कि किस नियम का पालन किया जाए। इनका उद्भव प्रारंभिक धर्मसूत्रों से हुआ और उद्देश्य यह था कि धर्म के नियम केवल सैद्धांतिक न रहकर समय, समाज और न्याय के अनुरूप बने रहें। इस प्रकार धर्मशास्त्र निबंधन ने भारतीय विधि-परंपरा में समन्वय, न्याय और व्यवहारिक बुद्धि का एक संगठित रूप प्रदान किया।

V. प्राचीन न्यायालय: मनुस्मृति में प्रक्रिया और सिद्धांत

[The Ancient Courtroom: Procedure and Principles in Manusmriti]

मनु अदालतों के सामने आने वाले अठारह विभिन्न प्रकार के मामलों के बारे में बात करते हैं। जो इस प्रकार हैं, 1. ऋण का भुगतान 2. जमा और गिरवी 3. स्वामित्व के बिना बिक्री 4. भागीदारों के बीच चिंताएं 5. उपहारों की वापसी 6. श्रमिकों को मजदूरी का भुगतान न करना 7. समझौतों का पालन न करना 8. बिक्री और खरीद अनुबंधों का निरसन 9. मालिक और नौकरों के बीच विवाद 10. संपत्तियों की सीमाओं के संबंध में विवाद 11. हमला 12. मानहानि 13. चोरी 14. डकैती और हिंसा 15. व्यभिचार 16. पति और पत्नी के कर्तव्य 17. विरासत का विभाजन और 18. जुआ और सट्टेबाजी। मनु कहते हैं कि ये अठारह विभिन्न प्रकार के विवाद हैं जो अदालत के सामने आते हैं। आज के समय में जो लोग अदालतों से परिचित हैं, वे जानते हैं कि जब कोई व्यक्ति दीवानी मामला [Civil Case] दर्ज करता है, तो उसे वादी [plaintiff] कहा जाता है, और जो दस्तावेज़ वह अपने दावे के समर्थन में अदालत में प्रस्तुत करता है, उसे वादपत्र [plaint] कहा जाता है। विपरीत पक्ष को प्रतिवादी [defendant] कहा जाता है। प्रतिवादी द्वारा दायर किए गए उत्तर को लिखित कथन [written statement] कहा जाता है। हमारे पास हमारी एंग्लो-सैक्सन विधिशास्त्र के आधार पर विकसित विभिन्न शब्दावली है जो लैटिन अभिव्यक्तियों का अनुसरण करती है।

अब मनु द्वारा उपयोग की गई इस बहुत ही रोचक शब्दावली को देखें। मनु के अनुसार एक दीवानी मुकदमे में प्रस्तुत वादपत्र को भाषा या प्रतिज्ञा या पक्ष कहा जाता है। वादी को अर्थी या आवेदकीय या अभियोक्ता कहा जाता है। फिर प्रतिवादी को मनु द्वारा प्रत्यर्थी कहा जाता था। दिलचस्प बात यह है कि मनु कहते हैं कि एक दीवानी मुकदमे में एक प्रतिवादी उनके द्वारा उल्लिखित चार बचावों में से एक को स्थापित कर सकता है। वह कहते हैं नंबर एक, संप्रतिपत्ति या दावे की स्वीकृति [admission of claim]।

आज, सिविल प्रक्रिया संहिता में आपके पास आदेश 12 नियम 6 के तहत एक विशेष प्रावधान है,¹⁶ यदि कोई प्रतिवादी वादी के दावे को स्वीकार

16. सिविल प्रक्रिया संहिता, 1908, आदेश 12, नियम 6, स्वीकृतियों पर निर्णय- (1) जहाँ तथ्य की स्वीकृतियाँ या तो अभिवचन में या अन्यथा, चाहे मौखिक रूप से या लिखित रूप में की गई हों, न्यायालय मुकदमे के किसी भी चरण में, या तो किसी पक्ष के आवेदन पर या अपनी गति से और पक्षों के बीच किसी अन्य प्रश्न के निर्धारण की प्रतीक्षा किए बिना, ऐसा आदेश दे सकता है या ऐसा निर्णय दे सकता है जैसा वह उचित समझे, ऐसी स्वीकृतियों को ध्यान में रखते हुए।

करता है, तो अदालत बिना कोई सबूत लिए सीधे निर्णय पारित कर सकती है। मनु कहते हैं कि एक प्रतिवादी के लिए अदालत में आकर यह कहना संभव है कि संप्रतिपत्ति, मैं दावा स्वीकार करता हूँ। दूसरा बचाव प्रत्यवस्कंदनम् [स्वीकृति और परिहार - admission and avoidance] है। तीसरा बचाव मिथ्योक्ति या वादी के दावे का पूर्ण खंडन [complete denial] है और चौथा प्राइन्याय या पूर्व न्याय-निर्णय [res judicata] जो अब सीपीसी की धारा 11 द्वारा प्रदान किया गया है।¹⁷

आज सिविल प्रक्रिया संहिता के तहत हम कहते हैं कि यदि आज किसी मामले में अदालत के समक्ष जो विवाद में है, वह पहले से ही तय किए गए मामले में एक मुद्दा रहा है, तो यह प्राइन्याय नामक सिद्धांत द्वारा वर्जित है। मनु ने कुछ ऐसा ही विकसित किया है। मनु, वाद हेतुओं के संयोजन, वाद हेतुओं के कुसंयोजन, परिसीमा [joinder, misjoinder of cause of action, limitation] के बारे में भी बात करते हैं, वे कहते हैं कि परिसीमा वह है जिसे भुक्ति [Bhukti] कहा जाता है, एक पुराने दावे का अदालत में न्याय-निर्णय नहीं किया जा सकता है।

इस प्रकार, हमारे धर्मशास्त्रों ने ऐसी बहुत सी चीजों को संहिताबद्ध किया है। अब इन धर्मशास्त्रों की इस व्यापक रूपरेखा को देखने के बाद, मुझे आपको यह भी बताना चाहिए कि ये सभी धर्मशास्त्र यह भी निर्धारित करते हैं कि किस प्रकार के न्यायाधीशों को अदालतों में नियुक्त किया जा सकता है। यह ध्यान रखना बहुत रोचक है कि ये धर्मशास्त्र उन लोगों को अलग करते हैं जिन्हें आपराधिक मामलों से निपटने के लिए न्यायाधीशों के रूप में नियुक्त किया गया है और जिन्हें दीवानी मामलों से निपटने के लिए नियुक्त किया गया है। ये स्मृतियाँ दो या तीन के संयोजन में बैठे न्यायाधीशों के बारे में भी बात करती हैं जिसका अर्थ है कि खंडपीठों [division benches] की संभावना थी, पूर्ण पीठों [full benches] की संभावना थी और कुछ मामलों को सुनने के लिए संविधान पीठों [Constitution benches] की भी संभावना थी। न्यायाधीशों की योग्यताएं क्या हैं, न्यायाधीशों द्वारा पालन की जाने वाली नैतिक संहिता क्या है, यह सब इन अधिकांश धर्मशास्त्रों में बहुत स्पष्ट रूप से चित्रित किया गया है, जिसमें कुछ और विस्तार की आवश्यकता हो सकती है।

17. वही, धारा, 11. पूर्व-न्याय- कोई भी न्यायालय किसी ऐसे वाद या विवादक का विचारण नहीं करेगा जिसमें प्रत्यक्षतः और सारतः विवाह-विषय उसी हक के अधीन मुकदमा करने वाले उन्हीं पक्षकारों के बीच के या ऐसे पक्षकारों के बीच के जितने व्युत्पन्न अधिकार के अधीन वे या उनमें से कोई दावा करते हैं, किसी पूर्ववर्ती वाद में भी ऐसे न्यायालय में प्रत्यक्षतः और सारतः विवाह रहा है, जो ऐसे पक्षवर्ती वाद का या उस वाद का, जिसमें ऐसा विवादक वाद में उठाया गया था, विचारण करने के लिए सक्षम था और ऐसे न्यायालय द्वारा सुना जा चुका है और अंतिम रूप से विनिर्णीत किया जा चुका है।

VI. अर्थशास्त्र: द्वारा न्यायिक आचरण और फोरेंसिक विज्ञान पर कौटिल्य

[The Arthashastra: Kautilya on Judicial Conduct and Forensic Science]

इन धर्मशास्त्रों की एक व्यापक रूपरेखा देने के बाद, अब हम एक संक्षिप्त परिचय देते हैं कि यह अर्थशास्त्र क्या है। जैसा कि मैंने आपको बताया कि मानव जीवन के चार लक्ष्य हैं धर्म, अर्थ, काम और मोक्ष। अर्थ जीवन के साधनों से संबंधित है। आप सभी जानते हैं कि कौटिल्य ने यह अर्थशास्त्र लिखा था और कई लोग इसे अलग-अलग समय पर रखते हैं लेकिन कम से कम इतिहासकार इस बात से सहमत हैं कि वह 350 ईसा पूर्व से 150 ईस्वी के बीच रहे होंगे। इस प्रकार, यह सभी इतिहासकारों के बारे में निश्चित है, यहाँ तक कि वे भी जो हमारे देश की महानता को स्वीकार नहीं करते हैं, वे इस बात से सहमत हैं कि अर्थशास्त्र 2000 साल पुराना होना चाहिए।¹⁸

अर्थशास्त्र तीन अलग-अलग प्रकार के न्यायिक अधिकारियों के बारे में बात करता है। पहले प्रकार के न्यायिक अधिकारियों को धर्मस्थ, यानी न्यायाधीश कहा जाता था। दूसरे प्रकार के न्यायिक अधिकारियों को प्रदेष्टृ कहा जाता था, यानी आपराधिक मामलों से निपटने वाले मजिस्ट्रेट और तीसरे प्रकार के न्यायाधीशों को समाहर्त या चांसलर कहा जाता था। न्यायाधीशों के लिए एक आचार संहिता कौटिल्य द्वारा उनके अर्थशास्त्र पुस्तक 4 अध्याय 9 में श्लोक 13 से 16 तक निर्धारित की गई है। कौटिल्य द्वारा उनके अर्थशास्त्र में निर्धारित आचार संहिता में कहते हैं की, पहला, एक न्यायाधीश किसी भी वादी को धमकी नहीं देगा, डराएगा नहीं, भगाएगा नहीं या अन्यायपूर्ण रूप से चुप नहीं कराएगा।¹⁹ दूसरा, एक न्यायाधीश अदालत के समक्ष आने वाले किसी भी व्यक्ति के साथ दुर्यवहार नहीं करेगा।²⁰ एक न्यायाधीश प्रासंगिक और आवश्यक प्रश्न पूछने में विफल नहीं होगा या अनावश्यक और अप्रासंगिक प्रश्न नहीं

18. एनसाइक्लोपीडिया ब्रिटानिका के अनुसार, अर्थशास्त्र पारंपरिक रूप से लगभग 300 ईसा पूर्व का है, हालांकि पाठ के कुछ हिस्से संभवतः बाद में रचे गए थे। उपलब्ध है: <https://www.britannica.com/topic/Artha-shastra> (last visited on Sept. 10, 2025).

19. अर्थशास्त्र, पुस्तक IV, अध्याय 9, श्लोक 2, धर्मस्थश्चेद्विवदमानं पुरुषं तर्जयति भर्त्सयत्यपसारयत्यभिग्रसते वा पूर्वमस्मै साहसदण्डं कुर्यात् । वाक्पारुष्ये द्विविगुणम् ॥ (अर्थ- यदि कोई न्यायाधीश बोलने वाले वादी को धमकाता है, गाली देता है, भगाता है, या अन्यायपूर्ण रूप से चुप कराता है, तो उसे पहले हमले के लिए जुर्माने से दंडित किया जाएगा। कठोर शब्दों के लिए, दंड दोगुना होगा)।

20. वही।

पूछेगा।²¹ यह आज भारतीय साक्ष्य अधिनियम के एक विशेष प्रावधान से पता लगाया जा सकता है जो केवल 1872 में आया था, अब भारतीय साक्ष्य अधिनियम, 2023 के तहत है।²²

कौटिल्य के अर्थशास्त्र की पुस्तक 4 का अध्याय 7 शव-परीक्षा [post-mortem examination] से संबंधित है। क्या आप उन नियमों पर विश्वास कर सकते हैं जो कौटिल्य ने शव-परीक्षा के लिए बनाए थे। कौटिल्य कहते हैं कि मजिस्ट्रेट को किसी भी अचानक अप्राकृतिक मृत्यु [Unnatural Death] के मामले में शरीर पर तेल मलने के बाद शव-परीक्षा करनी चाहिए। शरीर पर तेल मलने का उद्देश्य क्या है? एक बार जब आप एक मृत शरीर पर तेल मलते हैं तो शरीर पर कोई भी चोट, सूजन और बाहरी चोटें बहुत स्पष्ट रूप से दिखाई देंगी। और वह कहते हैं कि मृत्यु के कारण की जांच उन मामलों में भी की जानी चाहिए जहाँ किसी व्यक्ति ने आत्महत्या की हो। यह कुछ ऐसा नहीं है जिसे हमने अंग्रेजी परंपरा से उधार लिया है।

कौटिल्य मृत्यु के कारणों को तीन भागों में पहचानते हैं, 1. गला घोटने, फांसी, श्वासावरोध या डूबने से सांस रुकना 2. पीटने या ऊंचाई से फेंकने से शारीरिक चोट से मृत्यु 3. जहर से।²³

21. वही, श्लोक 3, पृच्छयं न पृच्छति, अप्रच्छयं पृच्छति, पृष्ट्वा वा विसृजति, शिक्षयति, स्मारयति, पूर्वं ददाति वा इति, मध्यम्मस्मै साहसदण्डं कुर्यात् ॥ (अर्थ- यदि कोई न्यायाधीश प्रासंगिक प्रश्न नहीं पूछता है, अप्रासंगिक प्रश्न पूछता है, पूछताछ के बाद वादी को खारिज कर देता है, उसे सिखाता है या प्रेरित करता है, उसे याद दिलाता है, या उसे (बोलने में) प्राथमिकता देता है, तो उसे हमले के लिए मध्य जुर्माने से दंडित किया जाएगा)।

22. भारतीय साक्ष्य अधिनियम, 2023, धारा 168, प्रश्न पूछने या उत्पादन का आदेश देने की न्यायाधीश की शक्ति- न्यायाधीश, प्रासंगिक तथ्यों की खोज करने या उनका प्रमाण प्राप्त करने के लिए, किसी भी रूप में, किसी भी समय, किसी भी गवाह से, या पक्षों से किसी भी तथ्य के बारे में, कोई भी प्रश्न पूछ सकता है जिसे वह आवश्यक समझता है; और किसी भी दस्तावेज़ या चीज़ के उत्पादन का आदेश दे सकता है; और न तो पक्ष और न ही उनके प्रतिनिधि ऐसे किसी प्रश्न या आदेश पर कोई आपत्ति करने के हकदार होंगे, न ही, न्यायालय की अनुमति के बिना, ऐसे किसी प्रश्न के उत्तर में दिए गए किसी भी उत्तर पर किसी भी गवाह से जिरह करने के हकदार होंगे: बशर्ते कि निर्णय इस अधिनियम द्वारा प्रासंगिक घोषित किए गए और विधिवत सिद्ध किए गए तथ्यों पर आधारित होना चाहिए: बशर्ते यह भी कि यह धारा किसी भी न्यायाधीश को किसी भी गवाह को किसी भी प्रश्न का उत्तर देने के लिए मजबूर करने, या किसी भी दस्तावेज़ का उत्पादन करने के लिए अधिकृत नहीं करेगी, जिसका उत्तर देने या उत्पादन करने से इनकार करने का वह गवाह हकदार होगा, यदि प्रश्न पूछा गया होता या दस्तावेज़ प्रतिकूल पक्ष द्वारा बुलाया गया होता; न ही न्यायाधीश कोई ऐसा प्रश्न पूछेगा जो किसी अन्य व्यक्ति के लिए धारा 151 या 152 के तहत पूछना अनुचित होगा; न ही वह किसी भी दस्तावेज़ के प्राथमिक साक्ष्य से छूट देगा, सिवाय उन मामलों के जो पहले बताए गए हैं।

23. अर्थशास्त्र, पुस्तक IV।

कौटिल्य मृत्यु के कारण को स्थापित करने के लिए फोरेंसिक साक्ष्य [Forensic evidence] के बारे में भी बात करते हैं। कौटिल्य कहते हैं कि यदि किसी व्यक्ति की गला घोटकर हत्या कर दी गई है तो, मूत्र और मल शरीर से बाहर निकल गए होंगे। यह सच है और पेट की त्वचा हवा से फूल गई होगी, हाथ और पैर सूज गए होंगे, आँखें खुली होंगी और गले पर निशान होंगे। आप इन कारकों से गला घोटने से मृत्यु के कारण की पहचान करते हैं। फिर वह कहते हैं कि यदि मृत्यु नशीली दवाओं के कारण हुई है, तो कपड़े बिखरे हुए होंगे, शरीर फैला हुआ होगा, अत्यधिक उल्टी और दस्त यह दर्शाएंगे कि व्यक्ति की मृत्यु नशीली दवाओं के कारण हुई है। शायद नशीली दवाएं कौटिल्य के समय में भी उपलब्ध थीं अन्यथा यह नहीं आ सकता था। वह कहते हैं कि जहर से मृत्यु के मामले में भोजन के अपचित भागों को पक्षियों को खिलाकर परीक्षण किया जाना चाहिए। यदि इन भागों को आग में फेंकने पर चटकने की आवाज आती है और वे बहुरंगी हो जाते हैं तो जहर साबित हो जाता है। आज भी फोरेंसिक विज्ञान यह स्वीकार करता है कि यदि आपके पेट से लिया गया एक अपचित जहरीला पदार्थ आग में फेंका जाता है तो यह चटकने की आवाज पैदा करता है और आग का रंग अलग हो जाता है। यह कौटिल्य द्वारा 2000 साल पहले पहचाना गया था।

VII. तर्क का विज्ञान: न्याय शास्त्र और धार्मिक संघर्ष का समाधान

[The Science of Logic: Nyaya Shastra and Resolution of Dharmic Conflict]

न्याय शास्त्र का स्थान कहाँ है? अभी तक हमने धर्मशास्त्र देखे हैं। हमने अर्थशास्त्र देखा है। लोगों के लिए यह जानना पर्याप्त नहीं है कि धर्म क्या है, अर्थ क्या है क्योंकि जीवन में ऐसी स्थितियाँ होती हैं जहाँ दो धर्म एक-दूसरे के साथ संघर्ष में होंगे।

राजा शिबि का न्याय [The Justice of King Shibi]

राजा शिबि का मामला लें। शिबि एक राजा थे। वह बहुत करुणा वाले व्यक्ति थे। एक दिन एक विशाल गिद्ध एक कबूतर का पीछा कर रहा था क्योंकि कबूतर गिद्ध का शिकार था। शिबि सूर्यवंश के थे, वह भगवान राम के पूर्वज थे। इस कबूतर ने शिबि की गोद में शरण ली,²⁴ एक गिद्ध पीछा करते हुए आया, राजा ने कहा, नहीं, इस कबूतर ने शरण ली है, मैं इसे तुम्हें नहीं दे सकता। तब वह गिद्ध शिबि से एक प्रश्न पूछता है,

24. संपादकीय टिप्पणी: राजा शिबि की करुणा न केवल मनुष्यों तक बल्कि जानवरों तक भी फैली हुई थी। वह कबूतर की रक्षा करते हुए भी गिद्ध को भोजन से वंचित करने के विचार से परेशान थे। अपनी प्रतिज्ञा के अनुसार, शिबि ने अपने द्वार पर आने वाले प्रत्येक साधक की मदद की, सभी के लिए समान सम्मान के साथ धर्म को बनाए रखा।

“हे राजा, आप सभी धर्मों को जानते हैं। एक गिद्ध शाकाहारी नहीं है। मैं मूल रूप से मांसाहारी हूँ; मैं केवल दूसरे जानवरों का शिकार करता हूँ; यह मेरा धर्म है कि मैं दूसरे जानवर को मारूँ जब तक कि वह मेरा भोजन है। कबूतर को शरण देकर, आप एक धर्म को बनाए रख रहे हैं, अर्थात् कबूतर के प्रति करुणा का धर्म, लेकिन मुझे मेरे भोजन से वंचित करके, आप अप्रत्यक्ष रूप से मुझे भूखा मार रहे हैं। आप एक और धर्म को मार रहे हैं, इसलिए, आप इन दो स्थितियों का मिलान कैसे करते हैं? ऐसी स्थिति में आपको किस धर्म का पालन करना चाहिए? आप एक शिकार को शरण देते हैं लेकिन आप शिकारी को भूखा मार देते हैं, कौन सा धर्म है।”

शिबि इस समस्या का एक बहुत ही अजीब समाधान लेकर आते हैं, वह कहते हैं कि मैंने कबूतर के प्रति करुणा दिखाई है, मैं इसे तुम्हें नहीं सौंप सकता। इसलिए, मैं अपनी करुणा के धर्म को बनाए रखता हूँ, लेकिन साथ ही, मैं तुम्हें भूखा नहीं मरने दूँगा, मैं तुम्हें खाने के लिए अपना मांस प्रदान करता हूँ ताकि तुम भूखे न मरो। वह अपनी जांघ से मांस काटता है और गिद्ध को प्रदान करता है और फिर गिद्ध भगवान धर्मराज का रूप ले लेता है और कहता है कि, मैं यहाँ तुम्हारे धर्म के ज्ञान और अभ्यास का परीक्षण करने आया था, जब धर्म के दो वर्ग एक-दूसरे के साथ प्रतिस्पर्धा करते हैं तो आप कैसे हल करते हैं। इस प्रश्न ने न्यायशास्त्रों के निर्माण को जन्म दिया। आप इस संघर्ष को तर्क और विवेक [logic and reasoning] से हल करते हैं। यह तर्क और विवेक न्याय शास्त्र की आधारशिला है। न्याय शास्त्र को दिया गया सबसे पुराना नाम आन्वीक्षिकी [Aanvikshiki] है।

कौटिल्य अपने अर्थशास्त्र में कहते हैं कि आन्वीक्षिकी एक ऐसा विज्ञान है जिसे एक राजा को बहुत कम उम्र में अनिवार्य रूप से सीखना चाहिए। अर्थशास्त्र का पहला अध्याय ही विनयाधिकारिक है, जो शिक्षा से संबंधित है। कौटिल्य के अनुसार अर्थशास्त्र का उद्देश्य एक राजकुमार, राजा के बेटे को बाद में राजा बनने के लिए तैयार करना है। कौटिल्य के अनुसार एक राजा को चार प्रकार का ज्ञान प्रदान किया जाना चाहिए। ये चार प्रकार के ज्ञान हैं आन्वीक्षिकी जो न्याय शास्त्र है, फिर वेद, फिर वार्ता और दण्डनीति। दण्डनीति बाद में आती है लेकिन आन्वीक्षिकी (न्यायशास्त्र) पहले आती है। न्यायशास्त्र को तर्क और विवेक के विज्ञान के रूप में विकसित किया गया था ताकि लोगों को दो धर्मों के बीच संघर्ष को हल करने में मदद मिल सके।

हमारी पौराणिक कथाओं में बहुत सारी कहानियाँ हैं कि कैसे जीवन में इस तरह के संघर्ष सामने आए हैं। उदाहरण के लिए, जब द्रौपदी का चीरहरण किया गया, द्रौपदी को दुर्योधन की सभा में लाया गया, तो वह एक प्रश्न

पूछती है कि क्या धर्मपुत्र ने उसे हारने से पहले खुद को खो दिया था या क्या उसने खुद को खोने से पहले द्रौपदी पर दांव लगाया था? इस प्रश्न का महत्व इस साधारण तथ्य के कारण था कि यदि कोई व्यक्ति पहले खुद को खो देता है, तो वह अपनी संपत्ति का अधिकार खो देता है। जब उसने अपनी संपत्ति का अधिकार खो दिया, तो द्रौपदी पर दांव लगाने का उसका क्या अधिकार था, यह उसके द्वारा पूछा गया प्रश्न था।²⁵ भीष्म जैसे शास्त्रों में इतने विद्वान व्यक्ति भी दर्शकों से कहते हैं कि धर्म इतना सूक्ष्म है, कि मैं इस प्रश्न का उत्तर नहीं खोज पा रहा हूँ।

VIII. निष्कर्ष [Conclusion]

हमारी संस्कृति मानव जीवन के चार लक्ष्य रखती है- धर्म, अर्थ, काम और मोक्ष। लोगों को यह जानने में सक्षम बनाने के लिए कि धर्म क्या है, ज्ञान की 14 शाखाएं विकसित की गईं, जिनमें से धर्मशास्त्र एक है। अठारह ऋषियों ने इन धर्मशास्त्रों को संहिताबद्ध किया जिन्हें स्मृति कहा जाता है और उन स्मृतियों का नाम इन ऋषियों के नाम पर रखा गया। यह समझने के लिए कि वे कैसे काम करते हैं, कौटिल्य ने यह अर्थशास्त्र लाया। उन्होंने प्रक्रियात्मक विधि को व्यवहार में लाया और फिर न्याय शास्त्र का उपयोग धर्म के दो वर्गों के बीच संघर्ष को हल करने के लिए किया गया।

25. संपादकीय टिप्पणी: युधिष्ठिर के कार्य को गुलामी की स्वैच्छिक स्वीकृति के रूप में पढ़ा जा सकता है, जो आधुनिक सांविधानिक विमर्श के लिए एक विदेशी विचार है, जहाँ कोई भी व्यक्ति खुद को संपत्ति में नहीं बदल सकता है। यह आधार कि द्रौपदी को संपत्ति के रूप में दांव पर लगाया जा सकता है, समानता और गरिमा के मानदंडों के खिलाफ है। इसके अलावा, *jus cogens* के तहत, आत्म-दासता अस्वीकार्य है। भले ही युधिष्ठिर का जुआ वैध था, द्रौपदी का स्वतंत्र व्यक्तित्व उसे स्वतंत्र बना देता।

प्राचीन भारतीय विधिशास्त्र से आधुनिक पश्चिमी न्यायदर्शन तक: एक तुलनात्मक अध्ययन

न्यायमूर्ति मार्कंडेय काटजू¹

अनुवादित

अवधेष चतुर्वेदी, पीएचडी शोधार्थी, विधि संकाय, दिल्ली विश्वविद्यालय

सारांश

यह लेख न्यायमूर्ति मार्कंडेय काटजू के व्याख्यान जो की उन्होंने बनारस हिन्दू विश्वविद्यालय में दिया था उसका अनुवाद है जो प्राचीन भारतीय विधिशास्त्र और आधुनिक पश्चिमी विधिशास्त्र के मध्य तुलनात्मक विश्लेषण प्रस्तुत करती है। प्राचीन भारतीय विधि के मुख्य स्रोत स्मृतियाँ थीं - जैसे मनुस्मृति, याज्ञवल्क्य स्मृति, विष्णु स्मृति आदि, जो संसदीय कानून नहीं बल्कि संस्कृत विद्वानों की रचनाएँ थीं। बाद में इन पर विस्तृत टीकाएँ लिखी गईं, जैसे विज्ञानेश्वर की मिताक्षरा और जीमूतवाहन का दायभाग। हिंदू विधि का विकास दो मुख्य शाखाओं में हुआ - मिताक्षरा और दायभाग, जिनके बीच मूलभूत अंतर 'पिंड' शब्द की भिन्न व्याख्याओं से उत्पन्न हुआ। दायभाग के अनुसार विरासत श्राद्ध देने के अधिकार पर आधारित थी, जबकि मिताक्षरा में यह रक्त संबंध पर आधारित थी। विधि की व्याख्या में मीमांसा सिद्धांतों का प्रयोग किया गया, विशेषकर अतिदेश सिद्धांत के माध्यम से दत्तक पुत्र के अधिकार निर्धारित किए गए। याज्ञवल्क्य स्मृति में विधि को धर्म से अलग करने का प्रयास किया गया। पश्चिमी विधिशास्त्र का विकास प्राकृतिक विधि के सिद्धांत से शुरू होकर बेंथम और ऑस्टिन के प्रत्यक्षवाद, और अंततः सामाजिक विधिशास्त्र तक पहुंचा। प्राचीन भारतीय विधिशास्त्र सामंती समाज के अनुकूल था जबकि आधुनिक विधिशास्त्र औद्योगिक समाज की आवश्यकताओं को पूरा करता है।

- I. प्राचीन भारतीय विधि के स्रोत [Sources of Ancient Indian Law]
- II. हिंदू विधि का विकास: मिताक्षरा और दायभाग [Development of Hindu Law: Mitakshara and Dayabhaga]
- III. विधि की व्याख्या और मीमांसा सिद्धांत [Legal Interpretation and Mimamsa Principles]

* This translation has been done under the guidance of Prof. (Dr.) Anurag Deep, Professor, Faculty of Law, University of Delhi.

1. यह व्याख्यान न्यायमूर्ति मार्कंडेय काटजू द्वारा बनारस हिंदू विश्वविद्यालय में दिनांक 27/11/2010 को दिया गया है। वे भारत के सबसे प्रतिष्ठित न्यायविदों में से एक हैं जिनका असाधारण शैक्षणिक और न्यायिक करियर है। उन्होंने "वैज्ञानिक युग में विधि" और "मीमांसा व्याख्या के नियम" सहित कई प्रशंसित कृतियाँ लिखी हैं। न्यायमूर्ति मार्कंडेय काटजू सन 2006 से 2011 तक सर्वोच्च न्यायालय में न्यायाधीश के पद पर सुशोभित रहे। यह व्याख्यान मूलतः अंग्रेजी भाषा में है, जिसका शीर्षक "Ancient Indian Jurisprudence" है जिसका हिन्दी भाषा में अनुवाद किया गया है। यह व्याख्यान बनारस हिंदू विश्वविद्यालय की वेबसाइट <https://bhu.ac.in/Images/files/JusticeKatjusLec.pdf> पर उपलब्ध है।

IV. पश्चिमी विधिशास्त्रीय सिद्धांतों का विकास [Development of Western Jurisprudential Theories]

V. प्राकृतिक विधि से प्रत्यक्षवाद तक और प्रत्यक्षवाद से सामाजिक विधिशास्त्र तक [From Natural Law to Positivism and from Positivism to Sociological Jurisprudence]

VI. निष्कर्ष: प्राचीन भारतीय और आधुनिक पश्चिमी विधिशास्त्र [Conclusion: Ancient Indian and Modern Western Jurisprudence]

I. प्राचीन भारतीय विधि के स्रोत [Sources of Ancient Indian law]

प्राचीन भारत में न केवल गणित, खगोल विज्ञान, चिकित्सा, व्याकरण, दर्शन, साहित्य आदि का तीव्र विकास हुआ, बल्कि विधि का भी तीव्र विकास हुआ। यह प्राचीन भारत में लिखे गए बड़ी संख्या में विधि ग्रंथों से स्पष्ट है (सभी संस्कृत में)। इस संपूर्ण विधि साहित्य का केवल एक बहुत छोटा अंश समय की मार से बच पाया, लेकिन जो बचा है वह भी बहुत बड़ा है।

स्मृतियाँ और टीकाएँ: हिंदू कानून की वास्तविक जड़ें [Smritis and Commentaries: The Real Roots of Hindu Law]

कहा जाता है कि सभी हिंदू विधियाँ वेदों (जिन्हें श्रुति भी कहा जाता है) से उत्पन्न हुई हैं। हालांकि, वास्तव में यह एक कपोल-कल्पना है, और वास्तव में हिंदू विधियाँ स्मृतियों नामक पुस्तकों से निकली हैं, जैसे मनुस्मृति, याज्ञवल्क्य स्मृति और विष्णु, नारद, पराशर, आपस्तंब, वशिष्ठ, गौतम आदि की स्मृतियाँ। ये स्मृतियाँ संसद [Parliament] या किसी विधानमंडल [Legislative assembly] द्वारा बनाई गई विधियाँ नहीं थीं। ये प्राचीन काल में कुछ संस्कृत विद्वानों द्वारा लिखी गई पुस्तकें थीं जिन्होंने विधिशास्त्र में विशेषज्ञता हासिल की थी। बाद में, इन स्मृतियों पर टीकाएँ (जिन्हें निबंध या टीका कहा जाता है) लिखी गईं, जैसे विज्ञानेश्वर की टीका (जिन्होंने याज्ञवल्क्य स्मृति पर मिताक्षरा नामक टीका लिखी), जीमूतवाहन की टीका जिन्होंने दायभाग नामक पुस्तक लिखी (जो किसी विशेष स्मृति पर टीका नहीं है बल्कि कई स्मृतियों का संकलन है), नंदा पंडित (जिनकी टीका दत्तक मीमांसा विशेष रूप से दत्तक-ग्रहण के विधि से संबंधित है), आदि। फिर इन टीकाओं पर टीकाएँ लिखी गईं, जैसे वीरमित्रोदय, जो मिताक्षरा पर टीका है (जिसने मिताक्षरा के बनारस स्कूल की स्थापना

की)। इसके और विस्तार में जाना आवश्यक नहीं है, क्योंकि इस चर्चा के लिए यह आवश्यक नहीं होगा।

प्रथागत विधियों से लिखित ग्रंथों तक का विकास [Development from Customary Law to Written Texts]

सभी विधियाँ मूल रूप से रूढ़िगत [Customary] विधि थी, और प्राचीन भारत में कोई वैधानिक विधि नहीं थी। इस का सरल कारण यह है कि उस समय कोई संसद या विधानमंडल नहीं था। हालांकि, रूढ़ि की समस्या यह थी कि यह अक्सर अस्पष्ट और अनिश्चित होती थी, और विस्तार में नहीं जाती थी। रूढ़िगत नियम निश्चित रूप से हमें बता सकते थे कि जब कोई व्यक्ति मरता है, तो उसकी संपत्ति उसके पुत्र को जानी चाहिए। लेकिन यदि कोई पुत्र नहीं है और मृतक केवल कई दूर के रिश्तेदार छोड़ता है, जैसे चचेरे भाई, भतीजे, चाचियाँ आदि तो क्या होगा? तब कौन उसकी संपत्ति का उत्तराधिकारी होगा? इसका स्पष्ट रूप से रूढ़ि द्वारा उत्तर नहीं दिया जा सकता है। इसलिए, इस विषय से निपटने के लिए पाठ्यपुस्तकों की आवश्यकता थी, और यह आवश्यकता प्राचीन भारत में स्मृतियों और टीकाओं द्वारा पूरी की गई, जैसा कि प्राचीन रोम में किया गया था। निस्संदेह रूढ़ि इन लिखित ग्रंथों पर प्रभावी थी, लेकिन इसके लिए, इसके अस्तित्व का दावा करने वाले व्यक्ति द्वारा स्पष्ट प्रमाण की आवश्यकता होती थी, जो आसान नहीं था।

प्राचीन रोम में, अधिकांश विधियाँ विधानमंडल द्वारा नहीं बल्कि प्रख्यात विधिविदों के लेखन द्वारा बनाया गया था, जैसे गायस, उल्पियन, पापिनियन, और अंततः महान जस्टिनियन कोड। इस प्रवृत्ति का पालन सिविल विधि प्रणाली में किया गया, जो महाद्वीपीय यूरोप में प्रचलित थी, जहाँ प्रख्यात विधिविदों की टीकाओं को विधि की अदालतों में उद्धृत किया जाता है, कॉमन लॉ सिस्टम के विपरीत (जो इंग्लैंड और पूर्व अंग्रेजी कॉलोनिजों में प्रचलित है, भारत, अमेरिका, ऑस्ट्रेलिया आदि सहित), जिसमें न्यायालयी निर्णयों को मिसालों के रूप में उद्धृत किया जाता है।

इस कम समय में विभिन्न स्मृतियों और टीकाओं से निपटना आवश्यक नहीं है, इसलिए मैं अपने आप को कुछ व्यापक रूपरेखाओं तक सीमित रखूंगा।

II. हिंदू विधि का विकास: मिताक्षरा और दायभाग [Development of Hindu Law: Mitakshara and Dayabhaga]

हिंदू विधियाँ, जैसा कि हम सभी जानते हैं, दो शाखाओं में विभाजित हैं - मिताक्षरा और दायभाग। मिताक्षरा भारत के अधिकांश भागों में प्रचलित

था, बंगाल और असम को छोड़कर, जबकि दायभाग बंगाल और असम में प्रचलित था। दोनों शाखाओं के बीच मूलभूत अंतर क्या था? यह अंतर इसलिए उत्पन्न हुआ क्योंकि टीकाकारों द्वारा 'पिंड' शब्द की दो अलग व्याख्याएँ दी गईं। इसे समझने के लिए, पहले यह जानना आवश्यक है कि पारंपरिक प्राचीन हिंदू विधि के दृष्टिकोण के अनुसार, जिस व्यक्ति को मृतक को श्राद्ध देने का अधिकार था, उसे मृतक की संपत्ति विरासत में पाने का अधिकार था। श्राद्ध मृतक की आत्मा की आवश्यकताओं को संतुष्ट करने के लिए एक धार्मिक समारोह है। प्राचीन हिंदू मान्यता के अनुसार, जब कोई व्यक्ति मरता है, तो उसकी आत्मा की अभी भी कुछ आवश्यकताएँ होती हैं, जैसे भोजन और पानी की आवश्यकता। इसलिए, उसकी मृत्यु के बाद, उसे चावल के केक (जिन्हें 'पिंड' कहा जाता है) और पानी की पेशकश की जानी चाहिए।

मनु का एक श्लोक है जो कहता है कि जब कोई व्यक्ति मरता है, तो उसकी विरासत उसके निकटतम सपिंड को जाएगी (मनुस्मृति अध्याय IX, श्लोक 106 और 187 देखें)। 'सपिंड' शब्द का क्या अर्थ है?

पिंड की व्याख्या और उत्तराधिकार के सिद्धांत [Interpretation of Pind and Theories of Succession]

यह 'पिंड' शब्द के अर्थ पर निर्भर करेगा।

जीमूतवाहन के अनुसार, 'पिंड' शब्द का अर्थ पूर्वजों को श्राद्ध समारोह में दिया जाने वाला चावल का केक है (दायभाग अध्याय XI, 32-33 और 40 देखें)। इस प्रकार, दायभाग के अनुसार, जिस व्यक्ति को मृतक को 'पिंड' देने का अधिकार है (यानी, जिस व्यक्ति को मृतक को श्राद्ध देने का अधिकार है) उसे उसकी संपत्ति विरासत में पाने का अधिकार है।

यह हमें फिर इस प्रश्न पर लाता है कि श्राद्ध देने का अधिकार किसका है? इस प्रश्न का उत्तर 'पार्वण श्राद्ध' नामक पुस्तक में दिया गया है (जो संस्कृत में भी है)। इस पुस्तक में, उन व्यक्तियों की एक सूची दी गई है जिन्हें श्राद्ध देने का अधिकार है। उक्त सूची में क्रम संख्या 1 पर पुत्र है, क्रम संख्या 2 पर पुत्र का पुत्र है, क्रम संख्या 3 पर पुत्र के पुत्र का पुत्र है, आदि। नियम यह था कि यदि इस सूची में कोई भी उच्चतर जीवित है, तो सूची के नीचे जाने की आवश्यकता नहीं है, और सूची वहीं समाप्त हो जाती है। उदाहरण देने के लिए, यदि मृतक अपने पीछे एक या अधिक पुत्र छोड़कर मरा, तो उस सूची के नीचे जाने की आवश्यकता नहीं है और पूरी संपत्ति पुत्र को विरासत में मिलेगी (यदि वह एकमात्र पुत्र है), और यदि एक से अधिक पुत्र हैं तो सभी पुत्रों द्वारा समान रूप से साझा की जाएगी (क्योंकि यदि एक से अधिक पुत्र हैं तो उनमें से प्रत्येक को अपने

मृत पिता को श्राद्ध देने का अधिकार था)।

केवल अगर कोई मृतक कोई पुत्र नहीं छोड़कर मरता है तो सूची में नीचे जा सकते हैं। उस स्थिति में, यदि मृतक ने अपने पुत्र का पुत्र छोड़ा है, तो संपत्ति उस पोते को जाएगी, क्योंकि वह पार्वण श्राद्ध की सूची में क्रम संख्या 2 पर है, और ऐसी स्थिति में आगे नीचे नहीं जा सकते।³

इस प्रकार, दायभाग ने पारंपरिक प्राचीन हिंदू विधि के दृष्टिकोण का पालन किया है कि जिस व्यक्ति को मृतक को श्राद्ध देने का अधिकार है, उसे उसकी संपत्ति विरासत में पाने का अधिकार है।

इसी कारण से, दायभाग में जन्म के समय कोई विरासत नहीं है (मिताक्षरा के विपरीत)। इस प्रकार, उदाहरण के लिए, यदि A मरता है और अपने पीछे अपना पुत्र B और B का पुत्र C छोड़ता है, तो, दायभाग के अनुसार, C को अपने दादा A की संपत्ति विरासत में नहीं मिलेगी, क्योंकि C के पास A को श्राद्ध देने का कोई अधिकार नहीं है क्योंकि जब A की मृत्यु हुई तो उसका पिता B जीवित था। चूंकि C को A को श्राद्ध देने का अधिकार नहीं है (क्योंकि B जीवित है), C अपने दादा A की संपत्ति विरासत में नहीं पा सकता, और पूरी संपत्ति B को जाती है या, यदि B के भाई हैं, तो यह सभी भाइयों द्वारा समान रूप से साझा की जाती है।

इसी कारण से, दायभाग में सहदायिक संपत्ति [coparcenary property] की कोई अवधारणा नहीं है, क्योंकि सहदायिकता में, पुत्र को अपने पिता की पैतृक संपत्ति में जन्म के समय विरासत मिलती है।

हालांकि, मिताक्षरा में, विज्ञानेश्वर पूर्णतः भिन्न दृष्टिकोण अपनाते हैं। विज्ञानेश्वर के अनुसार, 'पिंड' शब्द का अर्थ अंतिम संस्कार समारोह में दिया जाने वाला चावल का केक बिल्कुल नहीं है। इसका अर्थ मृतक के शरीर के कण हैं। दूसरे शब्दों में, विरासत रक्त या निकटता की निकटता से होती है, और इसका श्राद्ध देने के अधिकार से कोई लेना-देना नहीं है।

यह विज्ञानेश्वर द्वारा अपनाया गया एक पूर्णतः क्रांतिकारी दृष्टिकोण था, क्योंकि यह पारंपरिक हिंदू विधि के दृष्टिकोण से पूर्ण विराम था कि जिस

2.

3. यहाँ वर्णित उत्तराधिकार प्रणाली हिंदू उत्तराधिकार अधिनियम, 1956 की धारा 8 के बहुत समान है। यह विधि एक स्पष्ट क्रम निर्धारित करता है कि जब कोई पुरुष मर जाता है तो संपत्ति का उत्तराधिकार कौन प्राप्त करता है। पहले, संपत्ति श्रेणी I के उत्तराधिकारियों (जैसे पुत्र, पुत्री, विधवा) को जाती है। यदि कोई नहीं है, तो यह श्रेणी II के उत्तराधिकारियों (जैसे माता-पिता, भाई) को जाती है। यदि वे भी अनुपस्थित हैं, तो यह पुरुष रिश्तेदारों (सपिंडों) को जाती है, और अंत में महिला रिश्तेदारों (संबंधियों) को। मूल नियम यह है कि निकटतम रिश्तेदार दूर के रिश्तेदारों से पहले उत्तराधिकार प्राप्त करते हैं।

व्यक्ति को श्राद्ध करने का अधिकार है, उसे मृतक की संपत्ति विरासत में पाने का अधिकार है, और यह एक अच्छा उदाहरण है कि कैसे कानून विकसित हुआ। मिताक्षरा दायभाग की तुलना में बहुत अधिक पंथनिरपेक्ष कानून [Secular law] है, क्योंकि मिताक्षरा के अनुसार, विरासत का अधिकार श्राद्ध देने के अधिकार से कोई संबंध नहीं रखता। इस प्रकार, हम देखते हैं कि एक शब्द 'पिंड' की दो अलग व्याख्याएँ देकर, हिंदू विधियाँ दो अलग शाखाओं में विभाजित हो गईं।

याज्ञवल्क्य स्मृति और मनुस्मृति: विधि का धर्म से पृथक्करण [Yajnavalka Smriti and Manusmriti: Separation of Law from Religion]

मिताक्षरा, जैसा कि ऊपर बताया गया है, याज्ञवल्क्य स्मृति पर एक टीका है। एक दिलचस्प प्रश्न यह उत्पन्न होता है कि विज्ञानेश्वर ने मनुस्मृति पर न लिखकर याज्ञवल्क्य स्मृति पर अपनी टीका लिखना क्यों प्राथमिकता दी। मनुस्मृति याज्ञवल्क्य स्मृति की तुलना में बेहतर प्रसिद्ध और अधिक प्रतिष्ठित थी। फिर भी, विज्ञानेश्वर ने मनुस्मृति की तुलना में याज्ञवल्क्य स्मृति को प्राथमिकता दी। सवाल यह है कि क्यों?

यदि हम मनुस्मृति की तुलना याज्ञवल्क्य स्मृति से करें, तो हमें एक चौंकाने वाला अंतर मिलेगा। मनुस्मृति एक व्यवस्थित कृति नहीं है। हम एक श्लोक धर्म से संबंधित, अगला विधि से संबंधित, तीसरा नैतिकता से संबंधित पाएंगे। सब कुछ मिला-जुला है। दूसरी ओर, याज्ञवल्क्य स्मृति तीन अध्यायों में विभाजित है। पहले अध्याय को आचार कहा जाता है, जो धर्म और नैतिकता [Religion and Morality] से संबंधित है, दूसरे अध्याय को व्यवहार कहा जाता है, जो विधि [Law] से संबंधित है, और तीसरे अध्याय को प्रायश्चित्त कहा जाता है, जो तपस्या [self-discipline] से संबंधित है।

इस प्रकार, हम पाते हैं कि याज्ञवल्क्य स्मृति में, विधि को धर्म और नैतिकता से स्पष्ट रूप से अलग किया गया है। दूसरी ओर मनुस्मृति इसके विपरीत, जहाँ ये सभी (धर्म और नैतिकता) मिले-जुले हैं। इस प्रकार, याज्ञवल्क्य स्मृति (3CE - 5CE) मनुस्मृति (300 BCE) पर एक महान प्रगति [Great Progress] थी क्योंकि इसमें विधि का धर्म और नैतिकता [Religion and Morality] से स्पष्ट अलगाव है। हम विधि के धर्म, नैतिकता आदि से इस अलगाव की तुलना सकारात्मकवादी न्यायविदों बेंथम और ऑस्टिन द्वारा किए गए समान अलगाव से कर सकते हैं, जिन्होंने विधि को धर्म, नैतिकता आदि से अलग किया। याज्ञवल्क्य स्मृति मनुस्मृति के बाद लिखी गई थी, और यह बाद वाली पर एक महान प्रगति दिखाती है।

इसके अलावा, याज्ञवल्क्य स्मृति अधिक संक्षिप्त और व्यवस्थित है। इसमें

केवल लगभग 1000 श्लोक हैं, जबकि मनुस्मृति में लगभग 3000 हैं। साथ ही, यह मनुस्मृति की तुलना में अधिक उदार है, विशेषकर महिलाओं के प्रति। विज्ञानेश्वर, जिन्होंने विरासत के प्रति पंथ निरपेक्ष दृष्टिकोण अपनाया, स्वाभाविक रूप से मनुस्मृति की बजाय याज्ञवल्क्य स्मृति को प्राथमिकता दी क्योंकि पूर्व में विधि को धर्म से स्पष्ट रूप से अलग किया गया था। दूसरी ओर, दायभाग ने मनुस्मृति को प्राथमिकता दी क्योंकि इसमें विधि धर्म से अलग नहीं है, और दायभाग विरासत के प्रति धार्मिक दृष्टिकोण अपनाता है।

विधि को धर्म, नैतिकता आदि से अलग करना नारद और बृहस्पति द्वारा और आगे बढ़ाया गया, जो अपनी स्मृतियों में पूर्णतः विधि, विशेषकर नागरिक विधि तक सीमित रहते हैं।

III. विधि की व्याख्या और मीमांसा सिद्धांत [Legal Interpretation and Mimamsa Principles]

में विरासत, दत्तक-ग्रहण, विभाजन, विवाह आदि के हिंदू विधि के विभिन्न विवरणों में नहीं जा रहा हूँ। हालांकि, यह दिखाने के लिए कि विधि कैसे प्रगति करती गई, मैं केवले कुछ उदाहरण दूंगा।

वशिष्ठ के पाठ की चार व्याख्याएं [Four Interpretations of Vashishta's Text]

वशिष्ठ का एक पाठ है जो कहता है, “एक महिला को अपने पति की सहमति के बिना दत्तक-ग्रहण में पुत्र नहीं देना या लेना चाहिए”।

इसकी हमारे टीकाकारों द्वारा 4 अलग तरीकों से व्याख्या की गई है:

(1) नंदा पंडित की दत्तक मीमांसा का मानना है कि कोई विधवा दत्तक पुत्र नहीं ले सकती क्योंकि आवश्यक सहमति दत्तक-ग्रहण के समय सहमति है, और चूंकि पति मर चुका है, दत्तक-ग्रहण के समय उसकी कोई सहमति नहीं मिल सकती। मिताक्षरा के मिथिला स्कूल के संस्थापक वाचस्पति मिश्र सहमत हैं, लेकिन एक अलग कारण से। उनके अनुसार, दत्तक-ग्रहण केवल दत्तक होम नामक एक समारोह करने के बाद ही किया जा सकता है, और चूंकि एक महिला अकेले होम नहीं कर सकती, विधवा दत्तक-ग्रहण नहीं कर सकती।

(2) दायभाग का मत है कि वास्तविक दत्तक-ग्रहण के समय पति की सहमति आवश्यक नहीं है, और इसलिए यदि पति ने अपने जीवनकाल में सहमति दी थी, तो उसकी विधवा उसकी मृत्यु के बाद दत्तक-ग्रहण कर सकती है।

(3) मिताक्षरा के द्रविड़ स्कूल का मत है कि 'पति की सहमति के अलावा' अभिव्यक्ति में 'पति' शब्द केवल उदाहरणात्मक है और संपूर्ण नहीं है, और इसलिए यदि पति मर चुका है, तो उसके पिता या परिवार के अन्य वरिष्ठ पुरुष सदस्य की सहमति पर्याप्त है।

भारत और उदाहरणात्मक व्याख्या [Illustrative Interpretation in India and Examples]

इस संबंध में यह उल्लेख किया जा सकता है कि व्याख्या का उदाहरणात्मक नियम [Illustrative rule] शाब्दिक नियम [Literal Rule] से एक प्रस्थान [Departure] है जो सामान्यतः किसी पाठ की व्याख्या करते समय अपनाया जाना चाहिए। हालांकि, कभी-कभी शाब्दिक नियम से प्रस्थान स्वीकार्य होता है, और ऐसे प्रस्थानों में से एक उदाहरणात्मक नियम है। उदाहरण देने के लिए, संस्कृत में एक अक्सर उद्धृत कथन "काकेभ्यो दधि रक्षितम्" है जिसका अर्थ है "कौवों से दही की रक्षा करो"। अब इस वाक्य में 'कौवा' शब्द केवल उदाहरणात्मक है और संपूर्ण नहीं है। कथन का मतलब यह नहीं है कि दही की रक्षा केवल कौवों से करनी चाहिए लेकिन इसे बिल्लियों, कुत्तों द्वारा खाने दिया जाना चाहिए या गंदगी या मैल आदि से खराब होने दिया जाना चाहिए। इसका वास्तव में मतलब यह है कि दही की रक्षा सभी खतरों से करनी चाहिए। इसलिए उपरोक्त कथन में 'कौवा' शब्द केवल उदाहरणात्मक है और संपूर्ण नहीं।

अमेरिकी संविधान और उदाहरणात्मक व्याख्या [American Constitution and Illustrative Interpretation]

हम एक और उदाहरण ले सकते हैं। अमेरिकी संविधान में, अनुच्छेद 1 धारा 8 कहती है कि कांग्रेस (अमेरिकी संसद) सेना और नौसेना खड़ी कर सकती है। वहाँ वायु सेना का कोई उल्लेख नहीं है, स्पष्ट रूप से क्योंकि 1791 में जब अमेरिकी संविधान प्रख्यापित हुआ था तब कोई विमान नहीं था। पहला विमान राइट ब्रदर्स द्वारा 1903 में आविष्कृत किया गया था। हालांकि, आज की वास्तविकता यह है कि एक आधुनिक सेना हवाई कवर के बिना नहीं लड़ सकती।⁴

4. यह उदाहरण संविधान को समझने के बारे में एक महत्वपूर्ण नियम दिखाता है कि हमें संविधान को शाब्दिक रूप से नहीं बल्कि संदर्भित रूप से पढ़ना चाहिए - लेखकों का वास्तविक अभिप्राय क्या था, न कि केवल उनके द्वारा इस्तेमाल किए गए सटीक शब्द। जब संविधान लिखा गया था, तो संस्थापकों का मतलब था कि कांग्रेस को देश की सुरक्षा के लिए एक मजबूत सेना का निर्माण करना चाहिए। हालांकि उन्होंने केवल थल सेना और नौसेना का उल्लेख किया (क्योंकि हवाई जहाज तब मौजूद नहीं थे), उनका वास्तविक लक्ष्य अपने देश की सुरक्षा के लिए संपूर्ण सैन्य रक्षा का निर्माण करना था।

अमेरिकी संविधान में संशोधन एक बहुत कठिन और लंबी प्रक्रिया है क्योंकि इसके लिए कांग्रेस के दोनों सदनों के दो-तिहाई बहुमत और राज्यों के तीन-चौथाई द्वारा अनुसमर्थन की आवश्यकता होती है।⁵ जब तक यह हो जाता है, दुश्मन देश पर आक्रमण कर सकता है और कब्जा कर सकता है। इसलिए 'सेना और नौसेना' शब्दों को उदाहरणात्मक के रूप में व्याख्यायित करना होगा और संपूर्ण नहीं, और वे वास्तव में देश की सुरक्षा के लिए आवश्यक सभी सशस्त्र बलों का अर्थ रखते हैं (जिसमें वायु सेना भी शामिल होगी)।

(4) मिताक्षरा के बंबई स्कूल के व्यवहारमयूख और निर्णयसिंधु का मानना है कि सहमति केवल उस महिला के लिए आवश्यक है जिसका पति जीवित है, और इसलिए विधवा स्वतंत्र रूप से दत्तक-ग्रहण कर सकती है जब तक कि उसे अपने दिवंगत पति द्वारा अपने जीवनकाल में स्पष्ट रूप से मना न किया गया हो।

वशिष्ठ के पाठ की उपरोक्त व्यापक रूप से भिन्न व्याख्याएँ दिखाती हैं कि कैसे रचनात्मक व्याख्या द्वारा देश के विभिन्न भागों में कानून विकसित हुआ।

हम एक और उदाहरण ले सकते हैं। अपनी विधि अनुसार विवाहित पत्नी से एक व्यक्ति का पुत्र 'औरस पुत्र' [Biological Son with the Legally wedded wife] कहलाता है। दूसरी ओर, एक दत्तक पुत्र 'दत्तक पुत्र' [Adopted son] कहलाता है। औरस पुत्र के अधिकारों के संबंध में, वे विभिन्न विधि ग्रंथों (स्मृतियों और टीकाओं) में उल्लिखित हैं। दूसरी ओर, कहीं भी यह उल्लेख नहीं है कि दत्तक पुत्र के अधिकार और कर्तव्य क्या होंगे।

इस स्थान पर विधि की शून्यता को हमारे प्राचीन न्यायविदों द्वारा व्याख्या के मीमांसा सिद्धांतों में से एक का उपयोग करके दूर किया गया। यहाँ यह उल्लेख किया जा सकता है कि मीमांसा व्याख्या के सिद्धांत वे सिद्धांत थे जो हमारे महान न्यायविदों द्वारा नियमित रूप से उपयोग किए जाते थे जब भी उन्हें किसी विधि पाठ की व्याख्या में कोई कठिनाई (अस्पष्टता, संघर्ष आदि के कारण) का सामना करना पड़ता था। मीमांसा की पुस्तकें सभी संस्कृत में हैं, लेकिन प्रोफेसर किशोरी लाल सरकार द्वारा 'मीमांसा

5. संयुक्त राज्य अमेरिका का संविधान अनुच्छेद V के तहत संविधान की संशोधन प्रक्रिया का विवरण देता है। जानबूझकर कठिन बनाई गई यह प्रक्रिया संविधान निर्माताओं के इस उद्देश्य को दर्शाती है कि आवश्यक परिवर्तनों की अनुमति देते हुए संवैधानिक स्थिरता सुनिश्चित की जाए।

रूल्स ऑफ इंटरप्रिटेशन' नामक अंग्रेजी में एक अच्छी पुस्तक है,⁶ जिसे देखा जा सकता है यदि कोई इस विषय में गहराई से जाना चाहता है।

अतिदेश सिद्धांत

मीमांसा सिद्धांतों में से एक को अतिदेश सिद्धांत कहा जाता है, और इसका उपयोग हमारे प्राचीन न्यायविदों द्वारा दत्तक पुत्र के अधिकारों और कर्तव्यों की समस्या को हल करने के लिए किया गया था। यह अतिदेश सिद्धांत क्या है? इसे समझाने के लिए, यह उल्लेख किया जा सकता है कि कुछ यज्ञों को करने के नियम धार्मिक पुस्तकों में दिए गए हैं जिन्हें ब्राह्मण कहा जाता है, जैसे शतपथ ब्राह्मण, ऐतरेय ब्राह्मण आदि।⁷ जिन यज्ञों के प्रदर्शन के नियम ब्राह्मणों में दिए गए हैं, वे प्रकृति यज्ञ के रूप में जाने जाते हैं। इस प्रकार, दर्शपौर्णमास एक प्रकृति यज्ञ है, क्योंकि इसके प्रदर्शन के नियम शतपथ ब्राह्मण के पहले अध्याय में दिए गए हैं। इसी प्रकार, अग्निहोत्र भी एक प्रकृति यज्ञ है, क्योंकि इसके प्रदर्शन के नियम शतपथ ब्राह्मण के दूसरे अध्याय में दिए गए हैं।

हालांकि, कुछ अन्य यज्ञ थे जिनके प्रदर्शन के नियम कहीं भी नहीं दिए गए हैं जैसे सौर्य यज्ञ। ऐसे यज्ञों को विकृत यज्ञ कहा जाता है। विकृत यज्ञ कैसे किया जाना था? इस कठिनाई को हल करने के लिए (वास्तव में सभी मीमांसा सिद्धांत यज्ञ करने में व्यावहारिक कठिनाइयों को हल करने के लिए बनाए गए थे) अतिदेश सिद्धांत बनाया गया। अतिदेश वास्तव में ज्ञात से अज्ञात की ओर जाने का अर्थ है। इसलिए, यह माना गया कि विकृत यज्ञ को उसी श्रेणी के प्रकृति यज्ञ के समान नियमों के अनुसार किया जाना चाहिए। उदाहरण के लिए, सौर्य यज्ञ, जो एक विकृत यज्ञ है, दर्शपौर्णमास की श्रेणी में आता है, जो एक प्रकृति यज्ञ है। इसलिए, सौर्य यज्ञ को दर्शपौर्णमास के नियमों के अनुसार करना होगा।

अतिदेश सिद्धांत: औरस पुत्र से दत्तक पुत्र तक [Atidesa Principle: From Auras Son to Adopted Son]

अब, हम विचार कर सकते हैं कि अतिदेश सिद्धांत, जो धार्मिक उद्देश्य के लिए बनाया गया था, विधि के क्षेत्र में कैसे उपयोग होने लगा। जैसा कि ऊपर कहा गया है, एक व्यक्ति का अपनी विधि अनुसार विवाहित पत्नी से जो पुत्र होता है वह 'औरस पुत्र' कहलाता है। उसके अधिकार और कर्तव्य

6. Kisorilal Sarkar, *The Mimamsa Rules of Interpretation as Applied to Hindu Law* (Gale, Making of Modern Law, 2013).

7. यहाँ 'ब्राह्मण' शब्द का तात्पर्य ब्राह्मण जाति से नहीं बल्कि वैदिक साहित्य के एक वर्ग से है। ये ग्रंथ यज्ञ-कर्म की विधियों का विस्तृत विवरण प्रस्तुत करते हैं। उदाहरण: शतपथ ब्राह्मण, ऐतरेय ब्राह्मण आदि ॥

स्मृतियों में दिए गए हैं। लेकिन दत्तक पुत्र के संबंध में उसके अधिकार और कर्तव्य कहीं भी नहीं दिए गए हैं। इसलिए अतिदेश सिद्धांत का उपयोग किया गया और यह कहा गया कि विधि रूप से दत्तक पुत्र औरस पुत्र के समान स्थिति में खड़ा होता है, और इसलिए उसके समान अधिकार और कर्तव्य हैं। इस प्रकार, एक दत्तक पुत्र विधि रूप से बिल्कुल प्राकृतिक पुत्र के समान है (इसके अलावा कि विवाह के लिए उसकी निषिद्ध संबंध की डिग्री दोनों तरफ है, उसका प्राकृतिक परिवार साथ ही साथ उसका दत्तक परिवार भी)। दूसरे शब्दों में, औरस पुत्र को प्रकृति यज्ञ के रूप में माना जाता है, जबकि दत्तक पुत्र को विकृत यज्ञ के रूप में माना जाता है।

अतिदेश सिद्धांत आधुनिक समय में और भी अधिक उपयोगिता रखेगा क्योंकि आधुनिक युग में समाज तेजी से बदल रहा है, अक्सर ऐसे मामले न्यायालय के सामने आएंगे जहाँ विधि मौन है (क्योंकि विधानमंडल भविष्य में उत्पन्न होने वाली सभी स्थितियों की कल्पना नहीं कर सकता)।

में प्राचीन हिंदू विधि के सिद्धांतों के और विवरण में नहीं जा रहा हूँ जिसके लिए बहुत विस्तृत विश्लेषण की आवश्यकता होगी। संक्षेप में यह कहा जा सकता है कि हिंदू विधि स्थिर नहीं थी बल्कि जैसे-जैसे समाज विकसित होता गया, निरंतर विकास से गुजरता रहा, और यह विकास हमारे प्राचीन विधिविदों की रचनात्मक सोच से सहायता प्राप्त करता रहा।

प्राचीन हिंदू विधि की मूल संरचना वह थी जो स्मृतियों में निर्धारित थी जिसे रूढ़ि द्वारा पूरक और विविध बनाया गया था। हालांकि, यह केवल इसका प्रारंभिक चरित्र था। बाद में, इसने स्मृति काल के बाद की अवधि (लगभग 7वीं शताब्दी ईस्वी से शुरू) के दौरान उल्लेखनीय प्रगति की जब इस पर कई टीकाएँ और संकलन (निबंध और टीकाएँ) लिखे गए। ये टीकाएँ और संकलन न केवल इसलिए आवश्यक थे क्योंकि स्मृतियाँ श्लोकों में लिखी गई थीं जो बहुत संक्षिप्त और सार थीं, जिसके कारण कभी-कभी अर्थ समझना कठिन होता था, बल्कि इसलिए भी क्योंकि समाज बदल रहा था और इसके लिए बाद के विधिविदों की रचनात्मक सोच की आवश्यकता थी ताकि विधि को सामाजिक विकास के अनुकूल बनाया जा सके।

जॉन डी मेन ने अपने ग्रंथ 'हिंदू लॉ एंड यूसेज' में कहा है⁸ कि "Hindu law is the law of the Smritis as expounded in the Sanskrit Commentaries and Digests, which, as modified and supplemented by custom, is administered by the courts."

8. John D Mayne, *A treatise of Hindu Law and Usage* (Higginbotham & Co., Madras, 7th edn. 1906).

स्मृतिकारों और टीकाकारों ने राजा या विधानमंडल के पास मौजूद किसी भी संप्रभु शक्ति का प्रयोग नहीं किया। राजा या विधानमंडल आम तौर पर विधि के स्रोत माने जाते थे। लेकिन यहाँ स्मृतिकारों और टीकाकारों का विधि प्राधिकार उनकी गहरी विद्वता और उनके लेखन द्वारा मिले सम्मान पर आधारित था।⁹

इस संबंध में, यह उल्लेख किया जा सकता है कि स्मृतियों पर टीका करने की आड़ में, टीकाकारों ने अपनी रचनात्मकता का उपयोग करके स्मृति पाठ को अधिक विस्तार से विकसित और व्याख्यायित किया। इसी क्रम में उन्होंने उन स्मृति नियमों के बीच अंतर किया जो सुसंगत और उपयोगी थे और जो अनुउपयोगी और अप्रचलित हो गए थे। जो सुसंगत और उपयोगी थे उन्हें लागू रखा गया। उन्होंने नए रीति-रूढ़ि को भी शामिल किया जो नए उत्पन्न हुए थे।

स्मृतियों और टीकाओं ने बार-बार कहा कि रूढ़ियाँ लिखित पाठ को अधिलेखित करेंगी। इस सिद्धांत ने हिंदू विधि को गतिशील बनाया, क्योंकि रूढ़ियाँ समाज की प्रगति के साथ बदलती रहीं। साथ ही, जैसा कि वीरमित्रोदय द्वारा स्पष्ट किया गया है, स्मृतियों में अंतर आंशिक रूप से विभिन्न स्थानीय रूढ़ियों के कारण था।

मेधातिथि ने मनुस्मृति पर अपनी टीका में लिखा कि स्मृतियाँ केवल मौजूदा रूढ़ियों का संहिताकरण थीं, और यही बात स्मृति चंद्रिका (जो मिताक्षरा के द्रविड़ स्कूल का मूल पाठ है) और व्यवहार मयूख (जो मिताक्षरा के बंबई स्कूल का मूल पाठ है) में कही गई है। हालांकि, यह बहुत सटीक दृष्टिकोण नहीं है। यद्यपि निस्संदेह स्मृतिकार और टीकाकार रूढ़ियों पर भारी निर्भर थे, उन्होंने अपनी रचनात्मकता का भी उपयोग किया ताकि विधि को अपनी धारणाओं के अनुसार अधिक न्यायसंगत और तर्कसंगत बनाया जा सके।

ऐतिहासिक स्कूल [Historical School]

प्राचीन भारतीय विधि का अध्ययन “ऐतिहासिक विधिशास्त्र” के अंतर्गत आता है, जिसके संस्थापक जर्मन विद्वान सेविग्नी (1799-1861) थे और उनके

9. यह सिद्धांत अंतरराष्ट्रीय न्यायालय के विधान के अनुच्छेद 38(1)(d) को दर्शाता है, जो ‘विभिन्न राष्ट्रों के सर्वाधिक योग्य विधिशास्त्रियों की शिक्षाओं को विधियों के नियमों के निर्धारण के लिए सहायक साधन’ के रूप में मान्यता देता है। जिस प्रकार स्मृतिकारों और टीकाकारों ने अपने विधि प्राधिकार को संप्रभु शक्ति के बजाय विद्वत्तापूर्ण विशेषज्ञता से प्राप्त किया था, उसी प्रकार अंतरराष्ट्रीय विधिविदों के लेखन किसी औपचारिक विधायी या कार्यकारी प्राधिकार के माध्यम से नहीं, बल्कि उनकी शैक्षणिक प्रतिष्ठा और उनकी विद्वता के प्रति दिए गए सम्मान के कारण विधि के महत्व प्राप्त करते हैं।

अनुयायी ब्रिटिश विद्वान सर हेनरी मेन थे जिन्होंने 'एंशिंट लॉ' लिखी। सेविग्नी का मुख्य विचार था कि विधि किसी व्यक्ति या सरकार द्वारा जानबूझकर नहीं बनाया जाती, बल्कि यह समाज की आत्मा [Volksgeist] से धीरे-धीरे स्वाभाविक रूप से विकसित होती है, यानी विधि को खोजा जाता है, बनाया नहीं जाता। इसलिए वे रूढ़ि (समाज में चली आ रही परंपराओं) के प्रबल समर्थक थे और सरकार द्वारा बनाए गए विधान के विरोधी थे। उनका मानना था कि आदिम समाजों [Primitive Societies] में विधियाँ सरल सिद्धांतों से शुरू होकर धीरे-धीरे जटिल होता जाती है, और जब समाज जटिल हो जाता है तो रूढ़ियों के साथ विद्वानों के लेखन की जरूरत होती है, लेकिन इन विद्वानों को केवल समाज में पहले से मौजूद रूढ़ियों को विस्तार से लिखना चाहिए, न कि खुद से विधि गढ़नी चाहिए। विधि समाज की रूढ़ियों से स्वाभाविक रूप से उत्पन्न होती है, ऊपर से थोपी नहीं जाती।¹⁰

ऐतिहासिक स्कूल ने यह समझाकर महत्वपूर्ण योगदान दिया कि विधि केवल ऊपर से थोपे गए कृत्रिम नियम नहीं हैं, बल्कि समाज के इतिहास में विकसित सामाजिक व्यवस्था का परिणाम हैं। लेकिन यह विचारधारा प्रतिक्रियावादी थी क्योंकि इसने रूढ़ि को जरूरत से ज्यादा महत्व दे दिया और उसे एक जड़ वस्तु बना दिया। न्यायमूर्ति होम्स ने इसकी आलोचना करते हुए कहा कि "यह घृणित है कि किसी नियम के पीछे बस यही कारण हो कि यह सदियों पहले ऐसा था"। ऐतिहासिक विधिशास्त्र अठारहवीं शताब्दी के तर्कवाद के विरुद्ध एक प्रतिक्रिया था। सेविग्नी रोमन विधि के अपने गहन अध्ययन से प्रभावित थे, जहाँ विधि शताब्दियों तक धीरे-धीरे विकसित होती रही और अंत में कॉर्पस ज्यूरिस के रूप में संहिताबद्ध हुआ। यह विधिविदों द्वारा समय के साथ विधि को ढालने का आदर्श उदाहरण था। इसी कारण सेविग्नी का मानना था कि विधि को आगे बढ़ाने का काम विधायकों (सरकार) के बजाय विधिविदों को करना चाहिए, जो समाज की रूढ़ियों को समझकर धीरे-धीरे विधियाँ विकसित करें।¹¹

ऐतिहासिक स्कूल [Historical School] वैज्ञानिक युग के लिए पूर्णतः अनुपयुक्त है। तीव्र तकनीकी विकास के युग में, लोग रूढ़ि के धीमी विकास की प्रतीक्षा करने के लिए तैयार नहीं हैं। विधान, वास्तव में, आज विधि का प्रभावशाली स्रोत है, क्योंकि यह विधि में तीव्र परिवर्तन को सक्षम बनाता है, और यह तीव्र परिवर्तन आधुनिक औद्योगिक समाज में आवश्यक है,

10. Justice Katju, Ancient Indian Jurisprudence, available at: <https://bhu.ac.in/Images/files/JusticeKatjusLec.pd> 14 (last visited sept. 26, 2025).

11. *Ibid.*

जो नई वैज्ञानिक खोजों और आविष्कारों के कारण तेजी से बदल रहा है। सेविग्नी के विचार फ्रांसीसी क्रांति के प्रति उसकी शत्रुता से प्रभावित थे। इस क्रांति ने सामंती व्यवस्था को नष्ट कर दिया था और स्वतंत्रता, समानता और भाईचारे के क्रांतिकारी विचारों को फैलाया था, जिन्हें फ्रांसीसी राष्ट्रीय सभा और राष्ट्रीय सम्मेलन ने घोषित किया था।¹²

सेविग्नी का मानना था कि 'विधि लोगों से आती है, राज्य से नहीं'। यह बात सामंती या सामंती-पूर्व विधियों के लिए सही हो सकती है, लेकिन आधुनिक औद्योगिक युग में यह बिल्कुल गलत है, जहाँ लगभग सारे विधियाँ राज्य से ही आते हैं।

IV. पश्चिमी विधिशास्त्रीय सिद्धांतों का विकास [Development of Western Jurisprudential Theories]

प्रत्यक्षवाद का उदय: बेंथम और ऑस्टिन का वैज्ञानिक दृष्टिकोण [Rise of Positivism: Bentham and Austin's Scientific Approach]

विधिशास्त्र में वैज्ञानिक सिद्धांत बनाने का पहला प्रयास अंग्रेजी विधिवेत्ताओं बेंथम और ऑस्टिन के प्रत्यक्षवादी सिद्धांत से हुआ। इसलिए, हम इस सिद्धांत पर विस्तार से चर्चा कर सकते हैं। विज्ञान वस्तुनिष्ठ घटनाओं का अध्ययन करता है जैसी वे हैं, न कि जैसी हम चाहते हैं कि वे हों। यही वह दृष्टिकोण था जो प्रत्यक्षवादी विधिवेत्ताओं ने विधि में अपनाया।

विज्ञान के दो प्रकार हैं (1) प्राकृतिक विज्ञान [Natural Science] और (2) सामाजिक विज्ञान [Social Science]। प्राकृतिक विज्ञान निर्जीव पदार्थ (जैसे भौतिकी, रसायन आदि) या पेड़-पौधों और जानवरों जैसे जीवित जीवों (वनस्पति विज्ञान और प्राणी विज्ञान) और मनुष्यों के भौतिक शरीर (चिकित्सा विज्ञान, जिसमें शरीर विज्ञान, क्रिया विज्ञान आदि शामिल हैं) का अध्ययन करते हैं। दूसरी ओर, सामाजिक विज्ञान मनुष्यों के सामाजिक व्यवहार का अध्ययन करते हैं, जैसे अर्थशास्त्र, राजनीति विज्ञान, समाजशास्त्र आदि। विधिशास्त्र भी सामाजिक विज्ञानों में से एक है।

फ्रांसीसी विचारक अगस्त कॉम्टे को प्रत्यक्षवाद [Positivism] का जनक माना जाता है। उन्होंने जो किया वह था प्राकृतिक विज्ञानों की पद्धति

12. फ्रांसीसी क्रांति (1789-1799) एक महत्वपूर्ण राजनीतिक और सामाजिक उथल-पुथल थी जिसने न केवल फ्रांस बल्कि पूरे यूरोप को प्रभावित किया। इस क्रांति ने "स्वतंत्रता, समानता, भाईचारा" [Liberté, Égalité, Fraternité] का नारा दिया, जो आधुनिक लोकतांत्रिक मूल्यों का आधार बना। राष्ट्रीय सभा (1789-1791) और बाद में राष्ट्रीय सम्मेलन (1792-1795) ने सामंती विशेषाधिकारों को समाप्त किया और मानव अधिकारों की घोषणा को अपनाया।

को सामाजिक विज्ञानों में शामिल करना। यह पद्धति थी सावधानीपूर्वक अवलोकन, तार्किक विश्लेषण, प्रयोग, तार्किक निष्कर्ष आदि।

ब्रिटिश विधिवेत्ताओं बेंथम और ऑस्टिन ने अगस्त कॉम्टे के प्रत्यक्षवादी दृष्टिकोण को विधिशास्त्र के विषय में उपयोग किया। उन्होंने जोर दिया कि हमें विधि का अध्ययन करना चाहिए, जिसमें विधि की संरचना, विधि की अवधारणाएं आदि शामिल हैं, जैसे वे हैं, न कि जैसे हम चाहते हैं कि वे हों। यह वैज्ञानिक दृष्टिकोण था क्योंकि विज्ञान में भी हम वस्तुनिष्ठ घटनाओं का अध्ययन करते हैं जैसी वे हैं न कि जैसी हमें पसंद है। उदाहरण के लिए, जब हम भौतिकी में परमाणुओं का अध्ययन करते हैं तो हम नाभिक, उसके चारों ओर घूमने वाले इलेक्ट्रॉन आदि का अध्ययन करते हैं। हम यह अनुमान नहीं लगाते कि परमाणु को हमारी इच्छाओं के अनुसार कैसे व्यवहार करना चाहिए, बल्कि हम इसका अध्ययन करते हैं जैसा यह है। यही दृष्टिकोण ऑस्टिन और बेंथम ने विधिशास्त्र में अपनाया।

यह पूर्ववर्ती सिद्धांत के बिल्कुल विपरीत था जो प्राकृतिक विधि सिद्धांत कहलाता था। प्राकृतिक विधि सिद्धांत यह मानता था कि मानव निर्मित सकारात्मक विधि के साथ-साथ एक उच्च विधि भी अस्तित्व में है जो भगवान या तर्क या नैतिकता या किसी अन्य स्रोत से निकलता है। प्राकृतिक विधि दर्शनशास्त्र [Natural Law Jurisprudence] के अनुसार, यदि इस उच्च विधि और सकारात्मक मानव निर्मित कानून के बीच संघर्ष हो, तो उच्च विधि प्रबल होगी। इस प्रकार, प्राकृतिक विधि का मत था कि विधि वह है जो होनी चाहिए, और बुरी विधि बिल्कुल विधि नहीं थी।

सेंट थॉमस एक्विनास ने अपने 'सुम्मा थियोलॉजिका' में कहा है, "एक मानवीय विधि, जहां तक वह तर्क से विचलित होती है, अन्यायपूर्ण विधि कहलाती है, और इसमें विधि की प्रकृति नहीं बल्कि हिंसा की प्रकृति होती है"।¹³ 18वीं सदी के महान ब्रिटिश न्यायवेत्ता न्यायमूर्ति ब्लैकस्टोन के शब्दों में:

उन विधियों का पालन किया जाना चाहिए जो प्रकृति के अनुकूल हैं; अन्य वास्तव में शून्य हैं, और उनका पालन करने के बजाय, उनका विरोध किया जाना चाहिए। मानवीय विधियों को प्राकृतिक विधि का विरोध करने की अनुमति नहीं दी जानी चाहिए | यदि कोई मानवीय विधि प्राकृतिक या दैवीय विधि

13. Thomas Aquinas Summa Theologica, *Fathers of the English Dominican Province* (Tr.) (New York, Benziger Brothers, 1947).

[Divine Law] द्वारा निषिद्ध किसी चीज़ का आदेश देता है, तो हम उस मानवीय विधि को उल्लंघन करने के लिए बाध्य हैं।

आधुनिक काल में, प्राकृतिक विधि सिद्धांत को अमेरिकी और फ्रांसीसी क्रांतियों के दौरान सबसे जोरदार तरीके से आगे बढ़ाया गया। यह घोषणा की गई कि स्वतंत्रता [Freedom], समानता [Equality] और भाईचारा [Fraternity] मनुष्य में अंतर्निहित [Inbuilt] और 'प्राकृतिक' हैं। लेकिन ये विचार प्राचीन यूनानियों और रोमनों के लिए अस्वीकार्य होंगे, हालांकि वे भी प्राकृतिक कानून में विश्वास करते थे। एक यूनानी या रोमन के लिए, गुलामी एक 'प्राकृतिक' घटना थी, और इसलिए, समानता या स्वतंत्रता 'अप्राकृतिक' होगी। इस प्रकार, जो एक युग और एक समाज में 'प्राकृतिक' माना जाता है, वह दूसरे में ऐसा नहीं माना जा सकता।

V. प्राकृतिक विधि से प्रत्यक्षवाद तक और प्रत्यक्षवाद से सामाजिक विधिशास्त्र तक [From Natural Law to Positivism and from Positivism to Sociological Jurisprudence]

प्राकृतिक विधि सिद्धांत की समस्याएं और पतन [Problems and Decline of Natural Law Theory]

क्या प्राकृतिक है? इसका उत्तर न केवल युग से युग बल्कि व्यक्ति से व्यक्ति तक भी भिन्न हो सकता है। इस आधार पर कोई विधि की व्यवस्था कैसे बना सकता है? लोग स्पष्ट, ज्ञात विधि चाहते हैं ताकि वे तदनुसार अपना आचरण नियंत्रित कर सकें। प्राकृतिक विधि इतनी अस्पष्ट अवधारणा है कि, यदि इसे लागू करने की कोशिश की जाए, तो यह केवल भ्रम पैदा कर सकती है।

जैसा कि केल्सेन ने कहा था, प्राकृतिक विधि से कोई भी सब कुछ और कुछ भी नहीं साबित कर सकता है। बैथम ने प्राकृतिक विधि को तत्त्वमीमांसीय [metaphysical] बकवास माना। इसी तरह, डेनिश विधिशास्त्री रॉस (1899-1979) ने अपनी पुस्तक 'ऑन लॉ एंड जस्टिस (1958)' में, और कार्नाप (1891-1970) जैसे तार्किक प्रत्यक्षवादियों ने कहा कि प्राकृतिक विधि के अंतर्निहित तत्त्वमीमांसीय अटकलें [metaphysical speculations] पूरी तरह से अटकलों की पहुंच से बाहर थीं। उन्होंने बताया कि प्राकृतिक विधि का उपयोग हर संभावित मांग का बचाव या लड़ाई के लिए किया जा सकता है, और इसका उपयोग गुलामी के बचाव में किया गया था (प्राचीन ग्रीस और रोम में)। तानाशाहों [Totalitarians] को डुगुड और डेल वेक्चियो के प्राकृतिक विधि लेखन में समर्थन मिला है, जबकि अधिक

स्वतंत्रता के समर्थकों ने फ्रांसीसी दार्शनिक मारिटेन (1882-1973) और अमेरिकी न्यायवेत्ता लूसी के लेखन पर भरोसा किया है।

प्राकृतिक विधि सिद्धांत ऐतिहासिक संक्रमण [historical transition] और उथल-पुथल की अवधि के दौरान उत्पन्न हुई, जैसे, अमेरिकी और फ्रांसीसी क्रांतियों के दौरान। द्वितीय विश्व युद्ध के बाद प्राकृतिक विधि का अस्थायी पुनरुद्धार [revival] भी हुआ, विशेष रूप से जर्मनी में, जहां राडब्रुच जैसे विधिवेत्ताओं का मत था कि नाज़ी नस्लीय विधि इतनी बुरी थी कि उन्हें बिल्कुल विधि नहीं माना जा सकता था। हालांकि, इस 'पुनरुद्धार' के तुरंत बाद, प्राकृतिक विधि [Natural Law] सिद्धांत का पतन हो गया क्योंकि प्राकृतिक विधि को स्पष्ट रूप से आधुनिक औद्योगिक समाज में स्वीकार किए जाने के लिए बहुत अस्पष्ट और अनिश्चित थी, जिसे स्पष्ट नियमों और विचारों की आवश्यकता होती है।

सामाजिक विधिशास्त्र का विकास और यथार्थवादी स्कूल [Development of Sociological Jurisprudence and Realist School]

प्रत्यक्षवाद [positivism] ने विधिशास्त्र में प्रमुख सिद्धांत के रूप में प्राकृतिक विधि की जगह ले ली। प्रत्यक्षवाद वैधानिक विधि, यानी विधायिका [Legislature] या उसके प्रतिनिधियों द्वारा बनाए गई विधि पर बहुत जोर देता है, और यह औद्योगिक युग के लिए आदर्श रूप से अनुकूल है (ऐतिहासिक विधिशास्त्र के विपरीत, जो सामंती और पूर्व-सामंती युग का विधिशास्त्र था)।

18वीं सदी तक यूरोप के अधिकांश देशों में सामंती विधियों [Feudal laws] में भ्रम और अनिश्चितताएं थीं। ये उद्योग के विकास में बाधा डाल रही थीं, और उन्हें औद्योगिक युग में सरलीकरण [Simplified], व्यवस्थीकरण [Systematic], स्पष्टता [Clarity], एकरूपता [Uniform] और सटीकता [Precise] से बदलना पड़ा। [इस कार्य को प्रत्यक्षवाद बेहतर तरीके से कर सकता था।]

प्रत्यक्षवादी विधिशास्त्र इस समस्या की प्रतिक्रिया थी। ऑस्टिन की विश्लेषणात्मक [Analytical] शाखा को व्यापक रूप से शास्त्रीय प्रत्यक्षवादी [Classical Positivism] सिद्धांत माना जाता है।

ऑस्टिन के सिद्धांत: संप्रभु का आदेश और विधि की परिभाषा [Austin's Theory: Sovereign's Command and Definition of Law]

ऑस्टिन के अनुसार,

(1) विधि संप्रभु [Sovereign] का आदेश है, जो दंड द्वारा समर्थित है,

(2) विधि नैतिकता [Morality], धर्म आदि से अलग है।¹⁴

इस प्रकार, प्रत्यक्षवादी विधि को राज्य द्वारा लागू नियमों (या मानदंडों) के एक समुच्चय [Set] के रूप में देखता है। जब विधि सक्षम प्राधिकारी [Competent authority] द्वारा निर्धारित प्रक्रिया का पालन करने के बाद बनाई जाती है, तब तक इसे विधि माना जाएगा, और हमें इसकी अच्छाई या बुराई [Goodness or Badness] से कोई लेना-देना नहीं है। हम इसकी तुलना प्राकृतिक विधि सिद्धांत से कर सकते हैं, जो कहता है कि बुरी विधि, विधि है ही नहीं।

सामंती युग में नैतिकता और धर्म से विधि अलग नहीं थी। इसे अलग करना एक चुनौती थी। प्रत्यक्षवाद ने इसे अलग किया जो यूरोप में एक बड़ी प्रगति थी। ऑस्टिन ने अपनी पुस्तक “विधिशास्त्र का विज्ञान” में कहा कि सकारात्मक विधि केवल मौजूदा विधियों से संबंधित है, इस बात की परवाह किए बिना कि वे अच्छे हैं या बुरे। इस प्रकार, प्रत्यक्षवाद [Positivism] का उद्देश्य विधिशास्त्र से नैतिक मूल्यों और अच्छे-बुरे के विचारों को बाहर रखना है, और विधिशास्त्र का काम केवल मौजूदा विधियों का विश्लेषण और व्यवस्थित करना है, यानी विधि क्या है, ना कि विधि क्या होनी चाहिए।¹⁵

ऑस्टिन विधि को संप्रभु के आदेश के रूप में मानते हैं। चूंकि आधुनिक समाज में ऐसा आदेश सामान्यतः जिस रूप में आता है वह एक संविधि [स्टैच्यूट-statute] है, सांविधिक विधि [statutory law], और विशेष रूप से संहिताकरण का स्वरूप लेता है, इसे प्रत्यक्षवादी विधिशास्त्र में सर्वोच्च स्थान दिया गया। इस प्रकार, फ्रांस में, 1804 की नागरिक संहिता (कोड नेपोलियन) ने फ्रांसीसी वकीलों से बहुत प्रशंसा पाई। इस संहिता से पहले, फ्रांस में दर्जनों व्यवस्थाएं थीं, प्रत्येक प्रांत की अपनी विधियाँ थीं, (जो अक्सर स्थानीय रूढ़ि [Local Customs], रोमन कानूनों, संसदों के फरमानों [decree] आदि की खिचड़ी थी)। परिणामस्वरूप विधियों में पूर्ण भ्रम और अनिश्चितता थी।

14. John Austin, *The Province of Jurisprudence Determined* (John Murray, Albemarle Street, London, 1832), जिसमें उन्होंने विधि को “संप्रभु द्वारा दिया गया आदेश” [command of the sovereign] के रूप में परिभाषित किया। ऑस्टिन के अनुसार, विधि तीन तत्वों से बनती है: (i) आदेश [Command], (ii) दंड या प्रतिबंध [Sanction], और (iii) कर्तव्य [Duty]। संप्रभु वह शक्ति है जिसकी आज्ञा का पालन समाज के अधिकांश लोग करते हैं और जो स्वयं किसी अन्य की आज्ञा का पालन नहीं करता।

15. Justice Katju, *Ancient Indian Jurisprudence*, available at: <https://bhu.ac.in/Images/files/JusticeKatjusLec.pd> 20 (last visited sept. 26, 2025).

विधि को सरल बनाकर और उसे पूरे फ्रांस में मानकीकृत [Standardized] करके, कोड नेपोलियन का निर्माण इतिहास में एक बड़ा कदम था। इसके बाद अन्य संहिताएं आईं, जैसे 1896 की जर्मन संहिता। प्रत्यक्षवादी विधिशास्त्र इस प्रकार सामंती से औद्योगिक युग में समाज की प्रगति में बहुत सहायक था। 20वीं सदी में, मुख्य प्रत्यक्षवादी न्यायवेत्ता केल्सेन थे, लेकिन उनके सिद्धांत (विधि का शुद्ध सिद्धांत) की यहाँ चर्चा आवश्यक नहीं है।

यद्यपि कि प्रत्यक्षवाद प्राकृतिक विधि पर एक बड़ी प्रगति थी और आधुनिक औद्योगिक समाज के अनुकूल थी, इसमें एक बड़ा दोष था। यह दोष था कि यह विधि की सामाजिक, आर्थिक और ऐतिहासिक पृष्ठभूमि के अध्ययन को कठोरता से बाहर [exclude] करता था। प्रत्यक्षवाद ने केवल विधि की व्यवस्था में रूप, संरचना, अवधारणाओं आदि का अध्ययन किया। इसका मत था कि सामाजिक और आर्थिक स्थितियों एवं ऐतिहासिक पृष्ठभूमि का अध्ययन जिसने विधि को जन्म दिया, विधिशास्त्र के दायरे से बाहर था और समाजशास्त्र के क्षेत्र से संबंधित था।

हालांकि, जब तक हम उस ऐतिहासिक पृष्ठभूमि एवं सामाजिक और आर्थिक परिस्थितियों को नहीं देखते जो एक विधि को जन्म देती हैं, तब तक इसे सही तरीके से समझना संभव नहीं है। हर विधि की एक निश्चित ऐतिहासिक पृष्ठभूमि होती है, और यह देश में प्रचलित सामाजिक और आर्थिक व्यवस्था से भारी रूप से प्रभावित होती है। इसलिए, प्रत्यक्षवाद में बड़ा दोष यह था कि इसने विधिशास्त्र को केवल एक वर्णनात्मक विज्ञान [descriptive science] बना दिया जो सैद्धांतिक क्रम [theoretical order] की दृष्टि से कम गुणवत्ता वाला था। प्रत्यक्षवादी विधिवेत्ताओं द्वारा उन ऐतिहासिक और सामाजिक-आर्थिक कारकों का अध्ययन करने का कोई प्रयास नहीं किया गया था जिन्होंने विधि को जन्म दिया। दूसरी ओर सामाजिक विधिशास्त्र ने इन कारकों का अध्ययन किया। प्रत्यक्षवाद ने विधिशास्त्र को एक बहुत संकीर्ण और शुष्क [narrow and dry] विषय बना दिया, जो ऐतिहासिक और सामाजिक वास्तविकताओं से कट गया था। इस प्रकार, इसने विधिशास्त्र के विषय को मांस और खून [Flesh and blood] से वंचित कर दिया।

प्रत्यक्षवाद में इस दोष को सामाजिक विधिशास्त्र [Sociological Jurisprudence] द्वारा दूर करने की कोशिश की गई, जो बीसवीं सदी में एक महत्वपूर्ण विचारधारा बन गई। सामाजिक विधिशास्त्र विधि व्यवस्था का अध्ययन अलग [isolation] में नहीं बल्कि सामाजिक वास्तविकता के हिस्से के रूप में करता है। यह निश्चित रूप से प्रत्यक्षवाद पर एक

बड़ी प्रगति थी क्योंकि, जैसा कि ऊपर पहले से ही उल्लेख किया गया है, विधि को उसकी ऐतिहासिक और सामाजिक पृष्ठभूमि जाने बिना ठीक से समझा नहीं जा सकता। इस प्रकार, सामाजिक विधिशास्त्र ने विधिशास्त्र के दायरे को काफी व्यापक बनाया।

सामाजिक विधिशास्त्र के कई स्कूल हैं, जैसे एहरलिच का 'लिविंग लॉ' स्कूल, डुर्खीम का 'संस्थागत स्कूल', रॉस्को पाउंड का 'हार्वर्ड स्कूल' आदि। इनमें से अधिकांश में जो समान है वह है कि विधायन [legislation] पर उनका जोर कम था और न्यायाधीश-निर्मित कानून [judge made law] पर अधिक जोर था। अमेरिका में सामाजिक विधिशास्त्र का सबसे चरम स्कूल यथार्थवादी स्कूल (Realist School) था। यथार्थवादी स्कूल के संस्थापकों में से एक ग्रे के अनुसार, संविधी [statutes], नियम आदि विधि नहीं हैं बल्कि वह सामग्री हैं जिसका उपयोग न्यायाधीश विधि को बनाने में करता है। ग्रे का मत था कि हालांकि कभी-कभी यह कहा गया है कि विधि दो भागों से बनी है, विधायी विधि [Legislative law] और न्यायाधीश-निर्मित विधि [Judge made Law], सच में, सारी विधि न्यायाधीश-निर्मित विधि है। फ्रैंक ने न्यायालय के निर्णयों को 'वास्तविक विधि' [Actual Law] माना जबकि विधि, नियम आदि केवल 'संभावित विधि' [Probable Law] हैं।¹⁶ यथार्थवादी स्कूल ने इस प्रकार विधि के मानक प्रकृति [Normative Nature] को पूरी तरह नकार दिया, और इससे उसने विधि को ही नकार दिया।

मानकवाद [Normativism]

मानकवाद [Normativism] विधि की व्यवस्था की एक आवश्यक विशेषता है।¹⁷ एक विधि एक मानक (या आचरण का नियम) है जो बार-बार लागू

16. Justice Katju, Ancient Indian Jurisprudence, available at: <https://bhu.ac.in/Images/files/JusticeKatjusLec.pd> 23 (last visited sept. 26, 2025).

17. मानकवाद [Normativism]: मानकवाद कानूनी दर्शन का वह सिद्धांत है जो कानून को मानदंडों [norms] की एक व्यवस्था के रूप में देखता है। इस सिद्धांत के अनुसार, कानून यह नहीं बताता कि "क्या है" [what is], बल्कि यह बताता है कि "क्या होना चाहिए" [what ought to be]। भारतीय संविधान के अनुच्छेद 21 में कहा गया है कि "किसी भी व्यक्ति को उसके जीवन या व्यक्तिगत स्वतंत्रता से विधि द्वारा स्थापित प्रक्रिया के अनुसार ही वंचित किया जाएगा।" यह एक मानक [norm] है जो यह निर्धारित करता है कि राज्य को क्या करना चाहिए या क्या नहीं करना चाहिए। यह वास्तविक व्यवहार का वर्णन नहीं है, बल्कि एक आदर्श मानक है। भारतीय न्यायपालिका ने अनुच्छेद 21 का विस्तार करते हुए इसमें अनेक अधिकारों को समाहित किया है: *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 में प्राकृतिक न्याय और उचित प्रक्रिया का अधिकार; *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746 में जीवन का अधिकार; *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 में आजीविका का अधिकार; *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802 में मानवीय गरिमा

होने के लिए है, और एक बार पूरा होने से समाप्त नहीं होती। यह विधि एक निश्चित सामाजिक या आर्थिक संबंध को दर्शाती है, और यह संबंध किसी दिए गए समाज में तब प्रचलित उत्पादक शक्तियाँ [Productive forces] द्वारा बनाया जाता है। चूंकि समय के साथ, आर्थिक उत्पादन के चक्र खुद को दोहराते रहते थे, कुछ स्थायी सामाजिक संबंध अस्तित्व में आए जो विधि द्वारा परिलक्षित [Reflected], औपचारिक [Formal] और संरक्षित [Secured] थे। इस प्रकार, विधियाँ इन संबंधों को दर्शाने वाले नियमों के एक समुच्चय [Set] से मिलकर बनी है। यह सच है कि आधुनिक वैज्ञानिक समाज में, सामाजिक संबंध तेजी से बदल रहे हैं, लेकिन इसका मतलब यह नहीं है कि समाज में हमेशा ही अस्थिरता है। सामाजिक संबंधों में आराम और समेकन [rest and consolidation] की भी अवधि आती है, और सामाजिक प्रगति की अवधि आती है, और विधि दोनों पर विचार करती है।¹⁸

यथार्थवादियों की मूलभूत गलती विधि की प्रकृति की सच्ची समझ का अभाव है। विधि में कुछ महत्वपूर्ण क्षेत्र हैं जिनमें न्यायिक विवेक [Judicial discretion] का प्रयोग नहीं किया जा सकता। उदाहरण के लिए, हिंदू विवाह अधिनियम, 1955 के बाद, एक हिंदू की (एक समय में) केवल एक पत्नी हो सकती है। यह विधि इतनी स्पष्ट है कि भारत में कोई भी न्यायाधीश यह नहीं निर्णय नहीं दे सकता कि एक हिंदू की एक से अधिक पत्नी हो सकती है। इसके अलावा, यह कहना अति-सरलीकरण है कि 'विधि वही है जो न्यायालय वास्तव में करते हैं'।¹⁹ कई मामले कभी न्यायालय में नहीं आते, और फिर भी विधि का आमतौर पर पालन होता है।

के साथ जीने का अधिकार; *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011 में कार्यस्थल पर यौन उत्पीड़न से मुक्ति का अधिकार; *Parmanand Katara v. Union of India*, AIR 1989 SC 2039 में चिकित्सीय सहायता का अधिकार और *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 में प्रदूषण मुक्त पर्यावरण का अधिकार। सभी न्यायिक विस्तारण मानकवाद के सिद्धांत को प्रतिबिंबित करते हैं जहाँ अनुच्छेद 21 केवल एक संकीर्ण नियम नहीं बल्कि मानवीय गरिमा और स्वतंत्रता के व्यापक मानक के रूप में विकसित हुआ है।

18. Justice Katju, *Ancient Indian Jurisprudence*, available at: <https://bhu.ac.in/Images/files/JusticeKatjusLec.pd> 23-24 (last visited sept. 26, 2025).

19. Oliver Wendell Holmes Jr., "The Path of the Law" 10 *Harvard Law Review* 457 (1897). यह दृष्टिकोण अति-सरलीकरण है क्योंकि यह विधि को केवल न्यायिक निर्णयों तक सीमित कर देता है और विधायी अधिनियम, प्रशासनिक कार्यवाही, तथा कानून की सामाजिक मार्गदर्शक भूमिका की उपेक्षा करता है। भारतीय संदर्भ में, संविधान, विधियाँ और अधीनस्थ विधान करोड़ों नागरिकों के आचरण को नियंत्रित करते हैं, भले ही अधिकांश मामले कभी न्यायालय तक न पहुँचें।

चूँकि सामाजिक विधिवेत्ताओं द्वारा मानकता को अस्वीकार कर दिया गया था, स्पष्ट रूप से, कुछ न कुछ को इस शून्य को भरना था। यह सामाजिक विधिवेत्ताओं द्वारा न्यायाधीशों को मुक्त विवेक [free discretion] देकर किया गया। उन्होंने संभवतः यह मान लिया कि न्यायाधीश समाज की सभी समस्याओं को हल कर सकते हैं। इस प्रकार, सामाजिक विधिशास्त्र ने विधि की व्यवस्था के गुरुत्वाकर्षण के केंद्र को विधायन [legislation] से न्यायाधीश-निर्मित विधि [judge made law] में स्थानान्तरित कर दिया।

इस प्रकार, एक सही दृष्टिकोण से शुरू होकर, सामाजिक विधिशास्त्र जल्द ही पटरी से उतर गया। यह ऊपर उल्लेख किया गया है कि प्रत्यक्षवादी विधिशास्त्र ने वैधानिक, यानी मानव निर्मित विधि पर बहुत जोर दिया (ऐतिहासिक विधिशास्त्र के विपरीत, जिसने पारंपरिक, यानी गैर-मानव निर्मित विधि पर जोर दिया)। हालांकि, सामाजिक विधिशास्त्र ने बताया कि वैधानिक विधि [statutory law] में बड़े अंतर थे जिन्हें न्यायाधीशों द्वारा भरा जाना था, और यहां तक कि वैधानिक विधि की व्याख्या न्यायाधीशों द्वारा समाज की जरूरतों को पूरा करने के तरीके से करनी पड़ती थी। इस प्रकार, सामाजिक विधिशास्त्र ने विधि की व्यवस्था के गुरुत्वाकर्षण के केंद्र को वैधानिक विधि से न्यायाधीश-निर्मित विधि में स्थानान्तरित कर दिया। जबकि प्रत्यक्षवाद के तहत, एक न्यायाधीश केवल एक निष्क्रिय एजेंट है और विधि बनाना उसका कार्य नहीं है (यह विधायिका का काम है), सामाजिक विधिशास्त्र एक न्यायाधीश को एक सक्रिय भूमिका निभाने और यहां तक कि विधि बनाने के लिए जबरदस्त शक्तियों से प्रदान करता है।

इस प्रकार, सामाजिक विधिशास्त्र ने शास्त्रीय प्रत्यक्षवाद [Classical Positivism] में एक महत्वपूर्ण दोष को दूर किया और न्यायिक निर्णयों को भी विधि का दर्जा दिया। हालांकि, सामाजिक विधिशास्त्र भी कई दोषों से ग्रस्त है और आधुनिक समाज की बौद्धिक आवश्यकताओं को संतुष्ट करने में असमर्थ है। आखिरकार, न्यायाधीशों को व्यापक विवेकाधीन विधायी शक्तियां प्रदान करना कुछ समस्याओं का ही समाधान करता है। सभी प्रकार के न्यायाधीश हैं, वैज्ञानिक और अवैज्ञानिक, बुद्धिमान और सुस्त, सक्रिय और निष्क्रिय। ऐसे में सभी शक्ति न्यायाधीशों को देना आधुनिक दुनिया की समस्याओं का एक सतही समाधान मात्र है।

वर्तमान में, आधुनिक पश्चिमी विधिशास्त्र एक गहरे संकट से गुजर रहा है। इसने विधि की अनेक विभिन्न शाखाओं और सिद्धांतों को बनाया है। इसके बावजूद, ऐसा प्रतीत होता है कि आधुनिक पश्चिमी विधिशास्त्र किसी भी आगे के विकास की संभावना को समाप्त कर चुका है और स्थिर [stagnant] पड़ा है। महत्वपूर्ण समस्याओं के समाधान अभी भी

उपलब्ध नहीं हैं। ऐसे में आधुनिक युग में विधिशास्त्र में एक नया सिद्धांत आवश्यक है।

VI. निष्कर्ष: प्राचीन भारतीय और आधुनिक पश्चिमी विधिशास्त्र [Conclusion: Ancient Indian and Modern Western Jurisprudence]

सामंती बनाम औद्योगिक समाज: विधि व्यवस्था की भिन्नताएं [Feudal versus Industrial Society: Differences in Legal Systems]

प्राचीन भारतीय विधिशास्त्र और आधुनिक विधिशास्त्र की मूलभूत विशेषताओं को देने के बाद, दोनों के बीच के अंतरों को संक्षेप में प्रस्तुत कर सकते हैं। प्राचीन भारतीय विधिशास्त्र अर्ध-सामंती [Semi-feudal] और सामंती [Feudal] समाज से संबंधित था, जबकि आधुनिक विधिशास्त्र औद्योगिक समाज से संबंधित है। एक सामंती समाज मूल रूप से एक कृषि समाज है जिसमें उत्पादक तकनीकें पुरानी [primitive] प्रारंभिक थीं और उनमें परिवर्तन बहुत धीमा था। इस प्रकार, बैल (भारत में) और घोड़ा (यूरोप में) कृषि के लिए भूमि जोतने के लिए उपयोग किया जाता था। उत्पादन की यह विधि सदियों तक नहीं बदली। उत्पादक तकनीकें प्रारंभिक (पुरानी) होने के कारण, उत्पादन कम था, और इसलिए उत्पादक तकनीक में बदलाव का जोखिम नहीं उठाया जा सकता था इस डर से कि अगर प्रयोग असफल हो जाता, तो लोग भूखे मर जाते। चूंकि सामंती समाज में आर्थिक चक्र सदियों तक खुद को दोहराता रहा (जैसे, मानसून के दौरान खरीफ की फसल, सदियों में रबी की फसल, फिर अगले मानसून में खरीफ की फसल, और उसके बाद, आदि), उत्पादक तकनीकों में कोई मूलभूत परिवर्तन के बिना, समाज अपेक्षाकृत स्थिर था। परिणामस्वरूप, सामंती कानून का मुख्य रूप पारंपरिक कानून था जो लिखित ग्रंथों द्वारा पूरक [supplement] था।

इसके बिल्कुल विपरीत औद्योगिक समाज में अस्थिरता थी। आधुनिक उद्योग की प्रकृति क्रांतिकारी है। यही आधुनिक औद्योगिक समाज की विशेषता है। चूंकि वैज्ञानिक और तकनीकी प्रगति का कोई अंत नहीं है (नई वैज्ञानिक खोजों और आविष्कारों के कारण), सामाजिक संबंध लगातार बदलते रहते हैं। उदाहरण के लिए, 1903 में विमान का आविष्कार और 1957 में पहले कृत्रिम उपग्रह का प्रक्षेपण समाज में क्रांतिकारी बदलाव लाया है। कम समय में, मनुष्य न केवल हवा की मशीन में उड़ा है (इस प्रकार गुरुत्वाकर्षण के नियम का स्पष्ट रूप से उल्लंघन करते हुए), बल्कि वास्तव में बाहरी अंतरिक्ष में प्रवेश किया है। इंटरनेट दस साल पहले अज्ञात था, लेकिन आज अपरिहार्य है।

इस प्रकार, हम देखते हैं कि जबकि सामंती युग तक समाज अपेक्षाकृत स्थिर था और मानवीय प्रगति बहुत धीमी और काफी हद तक स्वतःस्फूर्त थी (क्योंकि सदियों तक कृषि के लिए एक ही तरह की प्रारंभिक उत्पादक तकनीक का उपयोग किया जाता था), 18वीं और 19वीं सदी की औद्योगिक क्रांति ने यूरोप और अमेरिका में, जो बाद में पूरी दुनिया में फैल गई, इस स्थिति को पूरी तरह बदल दिया है। मशीन उत्पादन ने पूरी तरह से नए प्रकार के सामाजिक संबंध शुरू किए। आधुनिक समाज की मूलभूत विशेषता आधुनिक उद्योग की क्रांतिकारी प्रकृति है। इस कारण इसकी अस्थिरता विशेष रूप से उल्लेखनीय है। उत्पादन की तकनीकों को लगातार बदलकर (नए वैज्ञानिक आविष्कारों और खोजों के कारण), आधुनिक उद्योग लगातार सामाजिक संबंधों में और इसलिए, विधियों में प्रमुख परिवर्तन ला रहा है। जबकि सामंती समाज उत्पादन तकनीकों के संरक्षण पर आधारित था, औद्योगिक समाज लगातार उन्हें बदलने और सुधारने पर आधारित है।

जैसा कि ऊपर पहले ही कहा गया है, आधुनिक समय में विधि का मुख्य स्रोत विधायिका द्वारा बनाई गई विधि [legislation] है। विधायन की प्रकृति ही ऐसी है कि, विधि एक विशेष समय में सामाजिक संबंधों में अचानक परिवर्तन लाता है।²⁰ यह पारंपरिक विधि के बिल्कुल विपरीत है, जो अतीत से कोई मूलभूत और अचानक विचलन के बिना सदियों में बहुत धीरे-धीरे विकसित हुआ। चूंकि आधुनिक औद्योगिक समाज में प्रत्येक प्रमुख तकनीकी प्रगति सामाजिक संबंधों में परिवर्तन लाती है, यह नए विधि मानदंडों की मांग करती है, जो धीमी पारंपरिक वृद्धि के माध्यम से संभव नहीं हो सकता। इसलिए, विधि आधुनिक समाज में विधि का सबसे महत्वपूर्ण स्रोत बन गया है।

हालांकि, जैसा कि सामाजिक विधिवेत्ताओं द्वारा बताया गया, वैधानिक विधि [statutory law] में कई कमियां थीं। प्रौद्योगिकी में प्रगति के कारण सामाजिक विकास की गति के साथ और वैधानिक विधि हमेशा ही

20. विधायन [legislation] आधुनिक विधि व्यवस्था का प्राथमिक स्रोत है क्योंकि यह योजनाबद्ध सामाजिक परिवर्तन का सबसे प्रभावी साधन है। विधायन की विशेषता यह है कि यह तत्काल प्रभाव से लागू होकर सामाजिक संबंधों में आमूलचूल परिवर्तन ला सकता है, जबकि न्यायिक निर्णय और प्रथागत विधि क्रमिक विकास से उत्पन्न होते हैं। भारतीय संदर्भ में उदाहरण है जैसे हिन्दू उत्तराधिकार (संशोधन) अधिनियम, 2005 ने हिन्दू संयुक्त परिवार की सहदायिकी सम्पत्ति में पुत्रियों को पुत्रों के समान अधिकार प्रदान किया। इसी प्रकार, सूचना का अधिकार अधिनियम, 2005 ने नागरिकों को सरकारी सूचना प्राप्त करने का मौलिक अधिकार प्रदान किया, जिससे प्रशासनिक पारदर्शिता और जवाबदेही में क्रांतिकारी परिवर्तन आया।

तालमेल नहीं रख पाता थी। इसके लिए कुछ परिस्थितियों में इन अंतरालों को भरने के लिए न्यायाधीश-निर्मित विधि की आवश्यकता थी।²¹

आधुनिक विधिशास्त्र: प्रत्यक्षवाद, सामाजिक विधिशास्त्र और प्राकृतिक विधि का संयोजन [Modern Jurisprudence: Combination of Positivism, Sociological Jurisprudence and Natural Law]

इसलिए, हम कह सकते हैं कि आधुनिक औद्योगिक विधिशास्त्र,²² मुख्य रूप से प्रत्यक्षवादी है क्योंकि यह मुख्यतः विधि पर निर्भर करता है। किन्तु उन परिस्थितियों में जब भी विधि अनुपस्थित हो [legal vacuum] या जब कोई बाध्यकारी सामाजिक आवश्यकता [compelling social need] उत्पन्न हो, तो विधि को पूरक [supplement] करने के लिए सामाजिक विधिशास्त्र के विचारों का उपयोग आधुनिक औद्योगिक विधिशास्त्र करता है। इसके अलावा, यह कभी-कभी प्राकृतिक विधि से कुछ अवधारणाओं का उपयोग करता है, जैसे प्राकृतिक न्याय के नियम (जब कोई वैधानिक नियम नहीं है)।

इस प्रकार, जबकि प्राचीन भारतीय विधिशास्त्र को विधिशास्त्र के ऐतिहासिक स्कूल से संबंधित कहा जा सकता है, आधुनिक विधिशास्त्र प्रत्यक्षवाद, सामाजिक विधिशास्त्र और प्राकृतिक विधि का एक संयोजन है।

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21. सामाजिक विधिवेत्ताओं, ने इस बात पर बल दिया कि वैधानिक विधि स्थैतिक [static] होती है जबकि समाज गतिशील [dynamic] है। पाउंड ने कहा कि विधि को “सामाजिक अभियांत्रिकी” [social engineering] का साधन होना चाहिए जो बदलती सामाजिक आवश्यकताओं के अनुरूप विकसित हो। भारतीय संदर्भ में, संविधान का अनुच्छेद 141 सर्वोच्च न्यायालय को विधि घोषित करने की शक्ति देता है। *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011 में, कार्यस्थल पर यौन उत्पीड़न के विरुद्ध कोई विशिष्ट कानून न होने पर सर्वोच्च न्यायालय ने विस्तृत दिशानिर्देश जारी किए जो बाद में यौन उत्पीड़न अधिनियम 2013 का आधार बने। इसी प्रकार *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 में “मूल संरचना” [basic structure] का सिद्धांत न्यायिक सृजन का उदाहरण है। *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 में आजीविका के अधिकार को अनुच्छेद 21 का भाग बताकर न्यायपालिका ने वैधानिक रिक्तता को भरा। इस प्रकार न्यायाधीश-निर्मित विधि [judge-made law] सामाजिक आवश्यकताओं और तकनीकी प्रगति के साथ विधि को समकालीन बनाए रखने का महत्वपूर्ण साधन है।
 22. उपरोक्त संदर्भ में आधुनिक औद्योगिक विधिशास्त्र का अर्थ है वह कानूनी दर्शन जो औद्योगिक युग की जटिल समस्याओं—श्रमिक-नियोक्ता संबंध, सामाजिक न्याय, औद्योगिक विवाद—को हल करने के लिए किसी भी एक विधिशास्त्रीय सिद्धांत पर निर्भर न रहकर विभिन्न कानूनी विचारधाराओं का व्यावहारिक समन्वय करता है। यह मुख्यतः प्रत्यक्षवादी [positivist] है क्योंकि यह लिखित कानूनों—जैसे औद्योगिक अधिनियमों, श्रम कानूनों—पर आधारित है और उन्हीं को प्राथमिक स्रोत मानता है।

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