

THE CONCEPT OF DHARMA

Hindu Law is a body of principles or rules called 'Dharma'. Dharma according to Hindu texts embraces everything in life. According to the Hindus, 'Dharma' includes not only what is known as law in the modern sense of the term but all rules of good and proper human conduct.

We know that the word Dharma is related to Hindu law. Let me explain to you, the word "Dharma" according to Hindu Mythology means "duty". Looking at the contexts and the religious references Dharma has different meanings just like, the Buddhists believe that the word Dharma means only a universal law which is very much essential and the Jains and the Sikhs believe that it is only a religious path for the victory of the truth.

According to the Hindu Jurisprudence, Dharma means the duties in many ways. Just like the sociological duties, legal duties or spiritual duties. Through this context, we can say that Dharma can be referred to as the concept of justice.

One of the most explained meaning of Dharma is the responsibility. As mentioned above, meaning of Dharma depends upon different context and different religious philosophies. For instance, Buddhists explain Dharma as cosmic law whereas Jains and Sikhs uses Dharma to explain the path of religious practices.

Referring Dharma to Hindu Jurisprudence it means "responsibility in different aspects of life which explains it as either religious responsibility or social, legal and even spiritual duties. Whereas some people understand Dharma as righteousness which enables moralistic interpretation. Legally speaking Dharma refers to the concept of justice. Hence there is no difference between Dharma and Law, but it is always understood as a religious and morale basis as well.

As referred to in the "Bhagwat Geeta", God creates a life using the principles of Dharma. They are patience, forgiveness, self-control, honesty, sanctity (cleanliness in the mind, body and soul), control of senses, reasons, knowledge, truthfulness and absence of anger. Accordingly, The salvation which means "Moksha" is the eternal Dharma for humans according to Hinduism.

Hindu epics like the Ramayana and Mahabharata also refers to Dharma. They say that executing one's Dharma is the right aim of every individual. And also at that time, the king was known as Dharmaraj because the main motive of the king was to follow the path of

Dharma.

Despite the other schools of Jurisprudence, the Hindu Jurisprudence takes more care over the duties more than the rights. The nature of these Dharma changes from person to person. There are many duties of many people in this world like earlier, the king's duty was to uphold the religious law and the other hand a farmer's duty is to produce food, the doctor has to cure the people, the lawyers have to fight for justice. Being a highly religious concept in nature, Dharma is multi-faceted. It contains many laws and customs in a large range of subjects which is essential and needed to be followed by each and every person. For example, Manusmriti deals with religion, administration, economics, civil and criminal law, marriage, succession, etc.

A Hindu

The term 'Hindus' denotes all those persons who profess Hindu religion either by birth from Hindu parents or by conversion to Hindu faith.

In *Yagnapurushdasji v. Muldas* [AIR 1966 SC 1119], the Supreme Court accepted the working formula evolved by Tilak regarding Hindu religion that 'acceptance of vedas' with reverence, recognition of the fact that the number of Gods to be worshiped at large, that indeed is the distinguish feature of Hindu religion.

A person can be called as a Hindu, who:

- Is a Hindu by religion in any form.
- Is a Buddhist, Jaina or Sikh by religion.
- Is born from Hindu parents.
- Is not a Muslim, Parsi, Christian or Jews and are not governed under Hindu law.

The Supreme Court of India in the landmark case of *Shastri vs Muldas* expressly defined the term 'Hindu'. This case is related to the Swami Narayan temple in Ahmedabad. There are a group of people called the Satsangi who were managing the temple and they restricted non-Satsangi Harijans to enter the temple. They argued that Satsangi is a different religion and they are not bound by Hindu Law. The Supreme Court of India held that the Satsangi, Arya Samajis and Radhaswami, all these belong to the Hindu religion because they are originated under Hindu philosophy.

Who are 'Hindus':

1.Hindu by Religion:

In this category two types of persons fall -

- a)Those who are originally Hindus, Jains, Sikhs or Buddhist by religion, and
- b)Those who are converts or reconverts to Hindu, Jain, Sikhs or Buddhist religion.

Any person who follows Hindu religion in any of its forms or development, either by practising it or by professing it, is a Hindu. However it is difficult to describe what is Hinduism.

Swaminarayana Sampradaya:

This sampradaya prevails in Maharashtra and Gujarat, founded by Shajanand (called later Swami Narayan) a Brahmin by birth and the pupil of Ramanuj. The followers of this Sampradaya were called Satsangi. In Yagna - Purusdasji v Muldas. a question arose whether the followers of this Sampradaya came within the purview of Hindu or not. Their main argument was that the Swaminarayan Sampradaya, being a non-Hindu sect and the temple being also a non-Hindu temple, the HarUans had no right to enter it. This Sampradaya is different from Hindu Religion. So the provisions of Hindu Law are not applied to this temple. The Supreme Court decided that this Sampradaya was not different from Hindu Religion and the provisions are applied to this temple also.

2.Hindu by Birth:

A child whose both the parents were Hindus, Sikhs, Jains or Buddhists at the time of his birth, is regarded as Hindu. If one of the parents is Hindu and the other is Jain, Sikh or Buddhist, then also the child will be Hindu. It makes no difference that such child does or does not profess, practise or have faith in the religion of its parents. If after the birth, both or one of the parents become convert to another religion, the child will continue to be a Hindu, unless, in the exercise of parental right the child is also converted into the religion in which the parent or parents have converted (In case of legitimate child this right is on father, and in illegitimate case is on the mother).

A person child is brought up as a member of the tribe, community, group or family to which Hindu parent belonged at the time of his birth.

If both the parents of a child are not Hindu and the child is brought up as a Hindu, the child will not be Hindu unless he becomes converted Hindu.

3. Who are not Muslims, Christians, Parsis or Jews:

Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law, is governed by Hindu law, unless it is proved that Hindu law is not applicable to such a person (Raj Kumar v/s Barbara). Those persons who are atheists or who believe in all faiths, or in conglomeration of faiths, may fall under this class.

4. Converts and Reconverts are also Hindus :

SC, in the case of **Peerumal v Poonuswami** AIR 1971, has held that a person can be a Hindu if after expressing the intention of becoming a Hindu, follows the customs of the caste, tribe, or community, and the community accepts him.

In **Mohandas vs Dewaswan board** AIR 1975, Kerala HC has held that a mere declaration and actions are enough for becoming a Hindu.

Hindu Concept of Law:

For the Hindus, law is a branch of dharma. Dharma pervades throughout the Hindu philosophical thought and the Hindu social structure. Law in this sense is considered as a branch of dharma. According to Manu "Dharma" is what is followed by those who are learned in Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection. Further, Medhatithi, one of the early commentators on Manu, says that the term "dharma" stands for 'duty'. It signifies the sum total of religious, moral, social and legal duties. From this aspect, it has been said that Hindu system is a system based on duties.

Hindu law is a law which emanates from Smritis expounded in Sanskrit commentaries and digests. These Smriti texts do not make any clear-cut distinction between rules of law and rules of morality or religion. These rules of religion and morality were dealt with at one and the same place with the rules of law. In the case of **Shri Balsu**, the privy Council distinguished between mandatory (legal) rules and directory (moral) rules. The High Courts in India have tried to lay down some tests (See e.g. **Ram Harakv. Jagan Nath**, (1938) 53 All. 815

approved in *Abhiraj v. Devendra*, 1962 S.C. 351). On this basis an entire body of Hindu law has been built up. Even during the Mohammedan rule in the country, the Smriti law was continued to be fully recognised.

Hindu concept of law does not conform to the Austinian view. According to analytical jurists most of the rules of Hindu law would still be accepted that a rule of law to be called as such need not emanate from a determinate or particular authority and it need not be rules of law as the commands of Austin's sovereign, because they were obeyed by the people for whom they were made.

Hindu Law in Modern Times:

Hindu law as administered by the Courts of India is applied to Hindus, But, in fact, it is not the original Hindu law which is applicable to Hindus in India. It is an amended and modified law which has changed and altered a considerable portion. Original Hindu law does not apply to all the matters. It is subjected to alterations and modifications. Original Hindu law has been interfered with by the changing demands and needs of the society. For instance, the nature of Hindu marriage is materially altered by –

- The passing of the Hindu Marriage Act, 1955;
- Adoption among Hindus is governed by the Hindu Adoption and Maintenance Act, 1956;
- For matters of succession there is the Hindu succession Act, 1956;
- Minors are dealt with by the Hindu Minority and Guardianship Act, 1956 etc.

SOURCES OF HINDU LAW

- The phrase “source of law” has several connotations.
- It may be the authority which issues rules of conduct which are recognized by Courts as binding.
- In this context, “source of law” means “the maker of law”.
- It may mean the social conditions which inspires the making of law for the governance of the conditions. In this context it means „cause of law“.
- It may also mean in its literal sense the material from which the rules and laws are known.
- In this sense the expression means the “evidence of law” and it is in this sense that the expression “source of law” is accepted in Jurisprudence.

Sources of Hindu Law can be divided into two parts - Ancient and Modern.

1. ANCIENT SOURCES

Before the codification of Hindu Law, the ancient literature was the only source of the law.

These sources can be divided into four categories:

1. Shruti

- It literally means that which has been heard. The word is derived from the root “shru” which means ‘to hear’.
- In theory, it is the primary and paramount source of Hindu law and is believed to be the language of the divine revelation through the sages.
- The synonym of Shruti is veda.
- It is derived from the root “vid” meaning ‘to know’.
- The term Veda is based on the tradition that they are the repository of all knowledge.

There are four Vedas namely,

- Rig Veda (containing hymns in Sanskrit to be recited by the chief priest),
- Yajurva Veda (containing formulas to be recited by the officiating priest),
- Sama Veda (containing verses to be chanted by seers)
- Atharva Veda (containing a collection of spells and incantations, stories, predictions, apotropaic charms and some speculative hymns).

Each Veda has three parts viz.

- Sanhita (which consists mainly of the hymns),
- Brahmin (tells us our duties and means of performing them) and
- Upanishad (containing the essence of these duties). The shrutis include the Vedas along with their components.

2. Smritis

- The word Smriti is derived from the root “smri” meaning ‘to remember’. Traditionally, Smritis contain those portions of the Shrutis which the sages forgot in their original form and the idea whereby they wrote in their own language with the help of their memory.

Thus, the basis of the Smritis is Shrutis but they are human works.

There are two kinds of Smritis viz

Dharma Sutras and Dharma Shastras. Their subject matter is almost the same. The difference is that the

- ✓ Dharmasutras are written in prose, in short maxims (Sutras) and the
- ✓ Dharmashastras are composed in poetry (Shlokas).

However, occasionally, we find Shlokas in Dharmasutras and Sutras in the Dharmashastras. In a narrow sense, the word Smriti is used to denote the poetical Dharmashastras.

The number of Smriti writers is almost impossible to determine but some of the noted Smriti writers enumerated by

Yajnavalkya (sage from Mithila and a major figure in the Upanishads) are Manu, Atri, Vishnu, Harita, Yajnavalkya, Yama, Katyayana, Brihaspati, Parashar, Vyas, Shankh, Daksha, Gautama, Shatatapa, Vasishtha, etc.

The rules laid down in Smritis can be divided into three categories viz.

- Achar (relating to morality),
- Vyavahar (signifying procedural and substantive rules which the King or the State applied for settling disputes in the adjudication of justice) and
- Prayaschit (signifying the penal provision for commission of a wrong).

3. Digests and Commentaries-

- After Shrutis came the era of commentators and digests. Commentaries (Tika or Bhashya) and Digests (Nibandhs) covered a period of more than thousand years from 7th century to 1800 A.D.
- In the first part of the period most of the commentaries were written on the Smritis but in the later period the works were in the nature of digests containing a synthesis of the various Smritis and explaining and reconciling the various contradictions.
- The evolution of the different schools of Hindu law has been possible on account of the different commentaries that were written by various authorities. The original source of Hindu law was the same for all Hindus. But schools of Hindu law arose as the people chose to adhere to one or the other school for different reasons.
- The Dayabhaga and Mitakshara are the two major schools of Hindu law.

- The Dayabhaga school of law is based on the commentaries of Jimutvahana (author of Dayabhaga which is the digest of all Codes) and the Mitakshara is based on the commentaries written by Vijnaneswar on the Code of Yajnavalkya.

4. Custom-

- Custom is regarded as the third source of Hindu law. From the earliest period custom ('achara') is regarded as the highest 'dharma'.
- As defined by the Judicial Committee custom signifies a rule which in a particular family or in a particular class or district has from long usage obtained the force of law.

(a) Local custom – these are customs recognised by Courts to have been prevalent in a particular region or locality.

(b) Class custom – these are customs which are acted upon by a particular class. Eg. There is a custom among a class of Vaishyas to the effect that desertion or abandonment of the wife by the husband abrogates the marriage and the wife is free to marry again during the life-time of the husband.

(c) Family custom – these are customs which are binding upon the members of a family. Eg. There is a custom in families of ancient India that the eldest male member of the family shall inherit the estates.

Deivanai Achi v. chidambaram (1954) Mad. 667

In the instant case it was held that in order to become legally sanctioned by law and binding on the people a custom must be continuous in practice, it should not be vague and ambiguous and should not oppose the well established public policy. A customary rule must be in the complete observation of society.

2. MODERN SOURCES

1. Justice, equity and good conscience

Occasionally it might happen that a dispute comes before a Court which cannot be settled by the application of any existing rule in any of the sources available. Such a situation may be rare but it is possible because not every kind of fact situation which arises can have a corresponding law governing it.

The Courts cannot refuse to settle the dispute in the absence of law and they are under an obligation to decide such a case also. For determining such cases, the Courts rely upon the basic values, norms and standards of fair play and propriety.

In terminology, this is known as principles of justice, equity, and good conscience. They may also be termed as Natural law. This principle in our country has enjoyed the status of a source of law since the 18th century when the British administration made it clear that in the absence of a rule, the above principle shall be applied.

2. Legislations-

Legislations are Acts of Parliament which have been playing a profound role in the formation of Hindu law. After India achieved independence, some important aspects of Hindu Law have been codified. Few examples of important Statutes are The Hindu Marriage Act, 1955, The Hindu Adoptions and Maintenance Act, 1956, The Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956, etc.

After codification, any point dealt with by the codified law is final. The enactment overrides all prior law, whether based on custom or otherwise unless an express saving is provided for in the enactment itself. In matters not specifically covered by the codified law, the old textual law continues to have application.