



Estd. 1950

Focus

- * By interim order final relief should not be granted. 572
- * Plea of adverse possession is not a pure question of law but a blended one of fact and law. 661
- * When a custom has been repeatedly recognized by Courts, it is blended into the law of land and proof of the same would become unnecessary under Sec. 57 of Evidence Act, 1872. 599

MODE OF CITATION

2010 (8) SCJ

16th Dec., 2010**PART - 50****CONTENTS**

| | |
|---------------|------------|
| INDEX | 49 TO 64 |
| JOURNAL | 17 TO 32 |
| REPORTS | 513 TO 672 |



SUPREME COURT JOURNAL™

Weekly Law Journal

Judgments of Supreme Court & Articles

Chief Advisors

SRI JUSTICE M. JAGANNADHA RAO
(Former Judge, Supreme Court of India)
(Former Chairman, Law Commission of India)

DR. JUSTICE AR LAKSHMANAN
(Chairman, Law Commission of India)

Honorary Editors

SRI JUSTICE S. RAJENDRA BABU
(Former Chief Justice of India)

SRI JUSTICE K.T. THOMAS
(Former Judge, Supreme Court of India)

Editor - in - Charge

VEPA P. SARATHI
(Senior Advocate, Supreme Court)

Editorial Board

Sri Justice S. Saghir Ahmed
(Former Judge, Supreme Court of India)

Sri Justice U.C. Banerjee
(Former Judge, Supreme Court of India)

Editors

K.V.G. Krishna Murthy
G. Krishna Moorthy
Manohar Gogia

Published & Edited by

L.D. Gogia, Neeraj Gogia

Annual Subscription for the Year 2010 - Rs. 4500/- (In 8 Vols.)

Single Part for the subscriber Rs. 150/- for other: Rs. 200/-

NOTE: Complaint of non-receipt of parts will not be attended to, if not received within 15 days after the due-date

If undelivered please return to :

ALT PUBLICATIONS

16-11-418/3, Balaji Sadan, Dilsukhnagar, Hyderabad - 500 036 (A.P.) India.
Press : 24045358 / 24042555, Shop : 24529301, e-mail : aalt@yahoo.com

For fast access to 'Latest Judgments' log on to
scj.in

CONCEPT OF DHARMA, JUSTICE AND LAW : A STUDY

By

Dr. Mukund Sarda*

1. Any Government will have a strong basis for its survival, "if it is founded on liberty and justice."¹ Justice under law without social justice², no longer has any meaning or significance.

2. It is no doubt that people since times immemorial hoped for justice and its survival at all times³ and 'justice' has been the watchword of all major social and political reform movements. Endless and ceaseless efforts were made to abolish injustice, tyranny and exploitation. In the common parlance justice is equated with everything that is good, mercy, charity and truth and other equivalent expressions. However, in the words of a Greek thinker Thrasymachu, it cannot be defined as the interest of the stronger⁴. Justice is not an irrational idea⁵ and the search for it is an eternal quest⁶.

3. Whatever is considered as 'just', according to a reasonable man is considered as 'justice.'⁷ Gandhiji emphasized the need for establishing a 'just society' which he considered; as a

necessary ideal for India's survival as an independent and vibrant nation⁸ in his concept of Ram Rajya and Swarajya which he elucidated as follows:-

- (1) Poorest shall have an effective voice in the making of the Country;
- (2) No distinction/existence of rich and the poor;
- (3) All communities shall live in peace;
- (4) No curse of untouchability or curse of intoxicating drugs or drinks; and
- (5) Women shall enjoy the same rights as men. Nehru highlighted the need for 'social justice', and "only through social justice, chronic poverty in India will be solved... ending of poverty, ignorance, disease and inequality of opportunity to wipe every tear from every eye"⁹.

4. In ancient Indian Society, Law and Dharma were not distinct concepts. In Dharma Sastras, Smrities and Arthasastra, the concept of Justice, law and religion were not distinguished and invariably justice was equated to Dharma and Vide-versa¹⁰ and the Mosaic Law of Israel considered 'Law' and justice' as inextricably inter-woven¹¹ and "justice' is considered as a distinct segment of morality to which law must conform¹²

5. Stammler¹³ classified the principles of justice in two categories:-

* Principal & Dean, Faculty of Law, Bhartiya Vidya Peet New Law College, Pune.

1. Renganath Mira CJ in All India Judges Association v. Union of India, AIR 1992 SC P. 165 at P. 177.

2. Telram Conference on Human Rights, 1966 quoted by Pratap Subhas "international Workshop on Human Rights", 1992 AIR August Journal P. 113 at 114.

3. See for details WU John C.H. 'cases and materials on jurisprudence, West Publishing Co: 1958.

4. Quoted by Cohen and Cohen. 'A reading in Jurisprudence and legal philosophy', Little Brown & Co., Boston, 1951 at p. 621.

5. Bodenheimer, E 'Jurisprudence', 1951 P. 178

6. Hans Kohen, Bishin and CD Stone "Law Language and ethics, New York, 1952 P. 39.

7. Lord Wright, 'Future of Common Law' P.114.

8. Deshpande, M.S. "Light of India - Message. of Mahatma' Wilco Publishing House, 1956 P. 172.

9. Quoted by V.R. Krishna Iyer "Human Rights and the law" Vedpal Law House, 1994.

10. Sen Gupta NC "Evolution of Ancient Indian Law" Calcutta, 1954 P. 336.

11. Quoted by Julius Stone, "Human Law and Human Justice" P.22.

12. Hart HLA 'The concept of law' 1972 p. 152-153.

13. Quoted by WU John CH, Cases and Materials on Jurisprudence, West Publishing Co., 1958 P. 499-500.

- (1) Principles of respect; and
- (2) Principles of participation

Respect for human person and means of participation shall be ensured and no one shall be subjected to arbitrary will of another and no member shall be arbitrarily excluded from the legal community. John Rawls¹⁴ proposed a general concept of justice in these terms: "All social primary goods – liberty and opportunity, income and wealth, and the basis of self-respect—are to be distributed equally, unless an unequal distribution of any or all of these goods is to the advantage of the least favoured". To establish justice in the World is to destroy the bad and the evil, to stop the strong exploiting the weak, to develop knowledge and welfare of the people.¹⁵ Verily that which is justice is truth¹⁶ and the law is a means to an end and justice is that end.¹⁷

6. A Knowledge-based society is basis to social justice¹⁸ and to serve mankind is service to God and thus concept of service becomes a national ideal¹⁹. It is therefore, necessary that every rule must promote which is good to people. In the happiness of the subject lies the King's happiness, in their welfare his welfare. What pleases himself, the king shall not consider good but whatever pleases his subjects the king shall consider good²⁰. This is conveyed in unequivocal terms by Bentham thus: "The

public good ought to be the object of the legislator, General utility ought to be the foundation of his reasonings. To know the true good of the community is what Constitutes the science of legislation, the art consists in finding the means to realize that good"²¹ Dharma is a special attribute of man. Bereft of Dharma, man is equal to animal²². The Vedas are considered as the 'first source of Dharma'²³. Dharma constitutes the foundations of all affairs in the World. Everything in this World is founded on Dharma and it is therefore, considered 'supreme'²⁴. Commandants of Dharma like Nature's laws, admit of no meddling²⁵.

7. It has been emphasized that those who exercise political power must wear the hand glove of Dharma and 'principles of Dharma governs every sphere of activity including governance of the Country'²⁶. The duty of the king was clearly defined in Dharma Sastras and for violation, the king becomes unfit to rule²⁷ and Dharma Rajya means 'rule of law'. King respected by the people only if he acted according to law (Dharma). Rules of Dharma not alterable according to whim and fancy of the king and it was essential that the exercise of political power must be in conformity with Dharma – an essential aspect of governance. This is what is meant by 'Rule of law' in the present day context. According to Dr. S. Radhakrishnan, "Dharma righteousness is the king of kings. It is the ruler of both the people and the ruler

14. Quoted from Miller David "Social Justice", 1976-P-40. See also Rawls John 'A theory of Justice' Oxford 1972 P.103.

15. The great King of Babylong (2124-2083 BC) Humnurali proclaimed.

16. The Upanishad 1-4-14.

17. Krishna Iyer, J in All India Judge Association v. Union of India AIR 1992 SC P.176.

18. Mohini Jain v. State of Karnataka (1992) 3 SCC P.666. See also Unnikrishnan v. State of A.P. (1993) 1 SCC P.645.

19. K.L. Sarkar, Tagore law Lectures, 1905 P.437-438.

20. Kautilya 'Artha sastra' P.39

21. Bentham's theory of legislation by Upenbra Baxi Chapter I Page (1)

22. Hitopadesha Prastavika – 25.

23. M. Roma Jois, 'Legal and Constitutional History' Vol. I P.14.

24. Mahanarayanopanisat See 79-7.

25. Dr. K.R. Srinivasa Iyengar 'Sitayana' P.166-167.

26. Fredic Max Muller, "India-what can it teach us' P.6.

27. R.C. Majumdar "Ancient India", P.154-155

themselves. It is the sovereignty of the law".²⁸ Dharma in Indian tradition also stands for law and morality and no State can be devoid of law and morality.²⁹ "Dharma is right action Dharma or virtue is conformity with the truth of things".³⁰ Dharma protects those who protect it and those who destroy it get destroyed³¹ and the entire concept of rule of law is incorporated in Dharma.³² According to K.M. Panikkar, the King's coronation ceremony is a Diksha - devoting his life to the cause (service of the people).³³ Support to the king depended on king conforming to Dharma or justice.³⁴

8. The first legal code of Hindus enshrines both philosophy of life and of law with special stress on morality, Danda (punishment) and justice.³⁵ Justice is a moral State.³⁶ Gandhiji observed: "My soul refuses to be satisfied so long as it is a helpless witness of a single wrong."³⁷

9. As Friedman observed: "The tale of natural law is the search of mankind for absolute justice and of its failure". Legal justice i.e., according to law has several inadequacies and fails to meet, what Salmond described it as 'justice in indeed

and justice in truth'. The efforts are required to be made to induct more and more moral content in the law and raise the level of legal justice to absolute justice standards.

10. In conclusion, it may be stated that rule of law rests on the strong foundation of effective enforcement of laws. If the laws are not effectively enforced, the rule of law breaks down. When rule of law breaks down, democracy collapses and when it happens the essence of 'free Government disappears and the Government ceases to be a Government of laws but gets converted into 'rule of men'. That would be the end of democracy, liberty and freedom and the system of Government becomes dictatorship and becomes an engine of oppression.

EXECUTION OF DECREE FOR
MAINTENANCE AGAINST
RESPONDENT UNDER ORDER 21
RULE 37 OF C.P.C

By

*Golagana Surya Rao, B.Sc., B.A., M.A.,
M.A., B.L.

Order 21 Rule 37 to 40 of C.P.C., deal with arrest and detention in the civil prison of JDR after due enquiry. Order 21 Rule 37 deals with show cause notice to be issued to the JDR when EP is filed for arrest of JDR and detention in civil prison for violation of money decree. Under Order 21 Rule 38 C.P.C., if the JDR does not respond to summons issued to him then arrest warrant under Order 21 Rule 38 C.P.C., would be issued to procure the presence of JDR and after his appearance in the concerned court due enquiry would be conducted with regard to means of JDR to pay decretal amount. After due enquiry, if

28. Quoted in 'the framing of India's Constitution' by Shiv Rao Vol II P.11-18.

29. Dr. L.M. Singhvi, "Freedom on trial" P.88.

30. S. Radhakrishnan, 'Hindu view of life' Chapter IV P.66. See also AIR 1996 SC P.1765 Para 62 to 82.

31. Manu VIII-15.

32. Dr. Shankar Dayal Sharma, in his convocation address at National Law School, Bangalore, 1993.

33. K.M. Panikkar, "Ideas of Sovereignty and State in Indian Political thought", P-35-36.

34. Manu's, "Manusmirithi Chapter VII-19. Manusmirithi consists of 2694 verses in 12 chapters.

35. Code of Manu constructed between 200 BC and AD 200

36. In the words of Aristotle, W.D. Ross (1954) Vol. DC P. 1134.

37. Gandhiji quoted by Deshpande M.S., 'Light of India - Message of Mahatma, P-34 (1950).

* Advocate, Secretary, All India Lawyers Union, Visakhapatnam District.