Chapter I

Introduction

Law as an element of state and society represents the standard of norm set up by any society at a given point of time. Law and society, in other words are bound by a relationship that involves both the actual and the ideal. Particular laws are related to particular society and to that extent, law becomes representative of the value system or aspirations of that society. The uniqueness of Hindu Law lies in the fact that it is a corpus that survived independent of political authority as part of a larger socio-legal ethical system of Dharma, prevalent in the Indian tradition. Here, the most ancient lore and traditions in the society were utilized by the governing Brāhmaṇa preceptors to create legal ideas and make them enforceable by attaching divine sanctions. These texts provided the ideological basis of the evolution of legal precepts in India. But how far this legal thought was retained on the hard rock of reality is by far the most important to ascertain for that alone would help in measuring the proportion of adherence to or deviations from the norm. Embedded deep into its base were the considerations of caste and gender alien to the post enlightenment ideal of human equality but governing prescriptions and sanctions of every śṛiturkāra and thus imparting a unique character to ancient Indian legal philosophy. Deviations from the norms laid down within this framework are but few and far between among available sources.

The task of sifting the ideals from the reality that might have existed becomes difficult when the period under study is considerably removed from the present. Voluminous studies have been done on the theoretical content and various enunciations made by the Hindu law writers. However, an endeavour to correlate it with the actual application of law in the societal framework is somewhat missing. The task becomes even more difficult in view of the fact that even within a single tradition, there could be numerous or divergent attitudes at various levels.

In the present study an effort has been made to see law, both the theory and practice as it evolved over time as available in both the textual and epigraphic sources. Neither the texts nor the inscriptions alone can provide a complete picture of law that
might have existed in early India under study. A correlative study of both kinds of data is important. Law in its various aspects, procedural civil and criminal seems to have been inherent in the Hindu system of jurisprudence and it is worthy to take note of its subtleties. The focus is also on gender aspect, which implies the analysis of legal injunctions or customary laws with respect of both men and women as categories of composite social existence.

The period chosen for this study is from 200 B.C. to A.D. 600. The period from 200 B.C. onwards is of crucial importance and invites attention for it saw the crystallization of certain cardinal ideas in the socio-cultural fabric of India which continued in large measure till date. It marks the beginning of a definite period in history for which direct source material is available in the form of textual and epigraphical heritage. From the point of view of law especially the period saw the codification of Hindu law and the flowering of such works which gave rise to commentaries that formed the basis of the two prominent law schools that emerged in India—the *Mitakṣarā* and the *Dāyabhāga* in the later Hindu law. The period hence, represents not only a period of ups and downs in history, construction and deconstruction of political empires but also a simultaneous evolution of legal, political, social, ethical and gender framework and philosophy.

The theory and practice of law can be studied for this period with respect to the then existing social actualities wherein lie the insecurities which explain the rigidity and orthodoxy in the political and legal thought that emerged therefrom. It is this period which saw the unique institution of caste system adopt and assimilate the foreign elements, even though theoretically remaining severe on all occasions. The period witnessed definite ideas with respect to both sexes emerge with reference to various functions and parameters such as contract of marriage, duties of husband and wife, property, divorce, widowhood, sati and monetary transactions such as debt, ownership, title, possession etc. Procedural law which is more an offshoot of analytical jurisprudence seems to have evolved from rudiments to refinement. Hence, any study on law for the period which would draw its components of actuality from various inscriptions would be meaningful as it would enable us to arrive at a holistic understanding about law as also in reaching the historical reality which is the very purpose of any such exercise.
The methodology selected for this research was first to identify the major law texts as sources of theoretical law and to study the various enunciations made by Manu, Yājñavalkya, Nārada, Brhaspati and Kātyāyana. At the same time, references with respect to law were searched for and located in the available epigraphy. For this volumes of Epigraphia Indica and Corpus Inscriptionum Indicae have been scanned and studied. Apart from this, references pertaining to civil, criminal and procedural laws were located from the plays of Kalidāsa, Śudraka and Viśākhadatta as also from Bāna’s Harṣacarita and Kādarīnbaṇī and Daśakumāracarita. References pertaining to the practice of law or legal thought are meager. Whatever references are there are incidental by nature and had to be corroborated with other references. An effort has been made to avoid drawing any simplistic parallels between the theoretical and epigraphic evidences, for such comparisons may be unwarranted given the dynamic nature of history. It is also true that the śruti law which was in large part the law of Aryāvarta did not apply to the whole of India. Legal variations might have existed within and outside the larger tradition given the extent of the Indian subcontinent and political differences. Law has been studied with respect to its various aspects such as civil, criminal or procedural rather than as existing in different regions. Even with respect to gender, no generalization for the whole of the continent is possible. The Dravidian people are supposed to have been more liberal than the Aryan households in treating of women.

In making such an exhaustive study of the history of law in India, it is of primary importance to ascertain the theory that was prevalent and could be adopted in the process of study. What is law is primary to understanding before searching the kinds of laws. A student of legal history is, however faced with many alternatives about ‘Law’.

By laws, we mean today the rules imposed by the supreme political authority of a country. In the western conception and more so in the Austrian sense, law is presumed to have originated and been promulgated under the auspices of the supreme political sovereign or authority. Radha Binod Pal has analysed that in its earliest form, this authority is that of divinely ordained or divinely dictated body of rules; in its latest form it is a dogma that law is the command of the sovereign in a politically organized society. In both these situations, the
emphasis is on single unchallengeable will - divine or temporal. However, this is not wholly true. Universal law or law of nature existed prior to the creation of a politically organized state. Even in primitive society, some kind of law or its element seem to have existed without any political sanction.

In India, law did not mean a sum total of chronological statement of king’s śāsanas and court orders. It was a more comprehensive concept than being merely legal. Law and Dharma occurred as simultaneous terms. Dharma however, was not pure law. It was a cosmic theory of cardinal importance that prescribed the norms of social and political behavior, according to the four fold aims of Hindu living and predominantly conceived by the Brāhmaṇa intellectual elite who reigned supreme in a hierarchic society fortified by attaching divine sanctions.

Law, itself did not have a fixed connotation, its definition underwent change in emphasis over the whole period of evolution. The Vedic concept of law had ‘ṛta’ as the central concept. ‘ṛta’ which was supposed to be the eternal law was believed to be firm and immutable (ṛtasya drdha dhārṇāni santi). Transgression of such rules was not merely a violation of human laws to be enforced by divine sanctions but was supposed to be punished in this life and hereafter by supernatural forces. ¹ Ṣṛta become the antecedent of the later conception of law embedded in Dharma. Dharma as one of the aspects of Ṣṛta refers specifically to the moral function of rewarding good and punishing evil. ²

The Śāmavedic conception of law is similar to that of the Rgveda, considering Ṣṛta as an eternal and immutable code. However, till the Upaniṣadic period, little thought was given to what was the end of law. The Brāhmaṇas and the Upaniṣads declared the end of law to be the preservation of social status quo. ³ It was then that law was looked upon as the guiding principle which aimed at settling man in his proper predetermined place, thus avoiding friction with others.

Dharmaśāstra, on the other hand was a comprehensive code which spelled rules to regulate human conduct in society in accordance with the scheme of creation. Dharma had so many definitions that no single definition could be ascribed to it. Dharma came to stand for nature, intrinsic quality, civil and moral law, justice, virtue, merit, duty and morality. ⁴ A recent definition
would restrict it to the action or duties conforming to four asramas and varnas in relation to the ends of life (Puruṣārtha). It encompassed various types of dharma like that relating to caste (varna dharma), that relating to stage of life (āṣrama-dharma), that dealing with both the two family (varnāṣramadharma), that related to function (gunadharma) and that related to occasion (naimittika dharma).

Dharma and law could be considered synonymous only in the remotest period. In the codes of Manu and Yājñavalkya, the concept of law evolved to a new stage where the monarch was seen as the upholder or fountain head of justice. The king's relation to law was considered primary, where the king was supposed to protect the subjects to maintain the status quo of varnāṣrama, punish the wicked and dispense justice to those wronged. It is only in the works of later smṛti writers that law emerges in its procedural form and a systematic attempt is made to distinguish various aspects of law and judicial procedure.

Dharma hence, was the composite of social existence that formed the basis of the emergence of legal precepts in India. Three unique features of Hindu concept of law could be probably seen as:-

1) Law existed in some form or the other (as rta, truth, morality or dharma) from the earliest times, independent of the political authority.

2) There is a systematic, evolution of these legal precepts from rudiments to somewhat refined jurisprudence.

3) Law had both the legal and metaphysical aspects which came to be accepted by society at large even though innate with caste distinctions or without egalitarian notions.

The Hindu theory did not recognize the human role in the creation of law. Law was deemed to be perfect, divine and immutable.

Human beings could only interpret it, codify or classify it by the judicial concept of dharma. India seemed to enjoy the security afforded by divine law (by wide interpretations of sources and meaning of dharma). The Hindu theory of law cannot be studied in isolation from the theory of Dharma. Varadachariar
correctly remarked that there is probably no term in Sanskrit language that could convey the legal meaning dissociated from the ethical sense.

The Hindu tradition speaks of salvation being achieved by a proper co-ordination of the three pursuits of human existence, dharma (Laws of social existence), artha (prosperity) and kāma (pleasure); dharma, of course being the most important. To maintain dharma was the king’s foremost duty and every individual of the Hindu society was expected to serve it. To act according to dharma would then imply that the man accept his position and role ascribed on the basis of caste to which he was born and follow the norms or rules enunciated by the smṛti writers. Duties implied that there was a greater emphasis on obligations than legally permitted rights.

Dharma was indispensable to the scheme of law for it promoted social welfare as well as provided individual security. As the Satapatha Brāhmaṇa puts it, dharma was the foundation of individual and collective security for a state of nature without law was equivalent to anarchy (Matsyanyāya). It was above the king and the political authority. It was deemed to be supreme and divine. The King was supposed to uphold this law by means of ‘daṇḍa’ or punishment.

These laws of dharma were embodied in the Dharmasastra texts or law books which later drew a distinct picture of the legal framework for the society. These law books were elaborate codes of law but to rely only on them as a source of study of law without considering or corroborating with the epigraphical evidence would be not without dangers. These law books, which originated verily from the Brāhmaṇa class represented aspirations at creating a perfect social system with hierarchy as its basis. It also reflected the early Indian society as conceived by the Brāhmaṇa elite. Hence, actual validity of these enunciations have to be ascertained by correlating with other historical evidences.

Moreover, since these laws originated from the highest caste of Brāhmaṇas, caste remained the keynote of such laws or regulations. Every law or enunciation that was made was laid with the aim to maintain and perpetuate the caste based social order. The primary aim of such law writers was to ensure the superior position of Brāhmaṇas through these codes. Social and
legal privileges lessened with very step down in the social hierarchy Brahmans enjoyed not only legal privileges and protection but were on occasions regarded above law.

As a result, law, rooted in dharma and based on caste was neither egalitarian nor recognized equality of all before law. Whether it was duties, rights or judicial punishments, caste, was the determinant. The higher orders enjoyed legal privileges of extreme nature while the burden of obligations was shouldered mostly by the lower orders and sudras, specifically. Romila Thapar has compared the Hindu and the Buddhist traditions with reference to law. About the Buddhist tradition, she tells it was a protest against the institution of caste. The Buddhist recognized that in practical working of society, there could be social distinctions but these ought not to be taken to a point to reject the concept of equality of all human beings. Buddha considered all castes as equally pure and hence was in favor of equality before law. An offender brought before justice must be judged and punished according to his offence and without any concession to immunities or privileges relating to his caste. Buddhists hence considered Hindu law as the conditioning of society according to the requirements of powerful Brahma elite.

In fact, the heterodox tradition moved towards recognizing the opposite of Hindu Law. It talked of equality of all humans, equality before law, abrogation of slavery and even better status of women. It de-emphasized the formalism of Brahmanical thinking. In fact their opposition to the brahmanical set up suggests that the imposition of Brahmanical thoughts on society and law in totality was not a historical reality, although it may have been the predominant system.

Moreover in the Hindu tradition, there is greater semblance of duties and obligations rather than legally permitted rights. Rights were the prerogatives of the upper classes mostly. However, within the localized group of castes, there was a limited concept of rights. As Thapar puts it, the functioning of each small unit was controlled by its own mechanism and within this unit the individual member could claim rights of equality and self expression. Similarly, a member of the sub-caste could claim social and economic security or the right to equality provided he observed the rules of that particular group. This was the key to the functioning of the Hindu tradition, where it was the group that claimed rights and not the individual. It was adherence to the
group that could ensure freedom in the society and a degree of legal protection.

However, these legal codes which highlight the theoretical aspects of the ancient Indian law conform to the worldview taken by the reigning Brāhmaṇa elite. There prevails a great degree of confusion regarding the authorship of these legal texts, whether these were written by single authors or were compiled over a period of time with different authors. The recensionary character and the heterogeneity of thoughts in a single text make it difficult to take these texts on their face value. They are neither well-articulated legal compendiums nor a manual of historical reality. They are at best a reflection of the aspirations of the ruling elite, incorporating the metaphysical thoughts from the Hindu tradition into the stream of legal and social thinking although very sparingly. At some moments, the metaphysical ideals of human rights are extended to legal realms too, but as Thapar correctly sums up—“Even in such moments, the rights were extended only to the elite groups; the slaves, the sudras, the serfs were all beyond the pale.”

Here, the dangers of selective presentation of certain maxims may be a danger which historians could face. The selective highlighting of a text could be a way of legitimizing the past. Seen in this perspective a few chosen maxims of a text can be made to convey any intended meaning or may be twisted to prove or disapprove a premise at the expense of objective history. The Arthaśāstra, which is a text advocating the maximization of remarks and the authority of monarchy can thus be seen as a treatise for the socialism of a welfare state (H.C. Ray, wrote on it), the Bhāgavadgītā as a text of desire less action and the Manusmṛti, an epitome of Brāhmaṇical patriarch as a text upholding the dignity of women. The present day dilemma of historian is to work with the discrepancies and inconsistencies in the texts. Probably, it was these dichotomous constructions or a different interpretation of Manu’s maxims, for example that led V. Raghavan to comment favorably on Manusmṛti. Skepticism to such level are justified and welcome in the sense that they are thought provoking as well as lift history from the age-old quagmire of continued interpretation on the same lines.

In approaching the historical reality, the plays which cover the life and times they represent reflect on the supposed working of law. In Kālidāsa, we come across references
pertaining to the administration of civil law, description regarding courts (even prison architecture), role of king with respect to justice, officials associated with the administration of law, on crime, punishment and death penalty. In Dašakumārcarit- there are laws relating to judges mentality. The Mṛcchakaṭṭīka brings forth that legal procedure was known by the term Vyavahāra (as also in the smṛtis) and points of law are called Vyavahārapāda. How it was possible to lodge and complaint and file a suit in the court, cross examining of witness or the evidence legally entered and judged and other points of trial all came up in this play. It even mentions the types of legal crimes such as non-payment of gambling debt, murder of a woman or other political offences. For political offences, punishment related could be anything from lashing to imprisonment. The play also talks of ordeals and suggests that punishments were probably out of proportion from modern humanistic point of view. The Mudrārākṣasa by Visākhadatta describes a society where king could announce corporal punishment on his ministers, although theirs might have been sparingly practised.11

It is historical evidence in the form of inscriptions which brings us closer to the historical reality. The Aśokan edicts which embody the philosophy of Emperor Aśoka on his professing of ahimsa depict him as functioning as the fountain head of justice. His edicts are meaningful in our context, as they come forth as attempts of a ruler at solving the problems of human beings in a complex society. His exhortations to his periodical officials and certain complications like the uniformity of law (Vyavahārasamatā and Daṇḍasamatā), permission of reappeal in the capital punishment bear considerably on his aspirations towards law and society. The norm of conduct suggested by him depicts his conviction or faith in humanity, within the framework of existing social relations. Aśoka's edicts are a plea for dignity and justice based on a sense of tolerance of one another in societal relations.

Another very important window to the functioning of legal aspects in society is available from the ācāra-sthiti-pātra of Viṣṇuśena. It enlists 79 acaras, of which some throw light in the principles of procedural law, same on aspects of civil law and others on matters of crime. Viṣṇuśena acts in the nature of modern day legal functionary, from whom it was expected that this body of customary laws be taken in for incorporation into the written law.
REFERENCES

7. Buddhist legal ideals were never codified in a single source; legal ideals are found in Buddhist Canon in *Vinaya pitaka*.
10. Thapar, op cit., p.33.

11 दुःखालेदयी काफिलसमद्वी प्रकृति परं गृहाला \\ नित देन वशिष्ठी गाति लगुत्तमी अन्नम्य योग्या