

Supreme Court: Enforcing the Law or Upholding Dharma?

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Abstract

“Anubhavati hi moordhnaapaadapasteevramushnam
Shamayatiparitaapamchchhaayayaasamshritaanaam¹”

Dharma is an ancient Indian concept that seeks to inculcate a certain normative order that an individual has to follow based on the situation. It is distinguished from the Western concept of religion wherein an individual can reach his objective only by following his Dharma. In the Indian conception, the greater public good holds greater importance than individual good. This article also seeks to examine whether in the modern conception of the State, the Supreme Court upholds the value of dharma. It does so by examining the Constitutional foundations of liberty, equality and fraternity contained in the fundamental rights and directive principles of the constitution along with the judicial trends regarding the interpretation of these basic values. Contemporary judicial innovations like Public Interest Litigation are also examined in the light of landmark cases. The author also discusses the challenges with regards to the enforcement of the concept of Dharma with regards to certain conflicts between the legislature and judiciary, judicial interpretations and balancing the power of the judiciary.

KEYWORDS: Dharma, Supreme Court, Constitution.

WHAT IS DHARMA?

According to Radhakrishnan, “Next to the category of reality that of dharma is the most important concept in Indian thought.”² There have been umpteen uses of the word “Dharma³” in Hindu and Buddhist philosophy. It is often used to refer to “the regulation

¹ The tree bears intense heat to protect those who take shelter underneath it.

² Creel, Austin, *The Reexamination of “Dharma” in Hindu Ethics*, 25(2) PHILOS. EAST WEST (1975) 161-173.

³ The word “Dharma” has been used in a conceptual sense of the word and hence, the authors have restrained from italicizing the word.

of a course of action” or “the normative ordering of anything”⁴. Different Dharmas prevail for different beings in nature which aim to help them in achieving certain goals in life which one should aspire for. Traditionally, whatever man aims for, or rather should endeavour to aim for is divided into four categories; Dharma (living according to regulations), Artha (material comforts), Kama (attaining earthly desires and wants) and Moksha (being completely free from any binding)⁵. The struggle in life for any man should be to fulfill the first three stages; attain the fourth stage and liberate oneself from the unending cycle of birth and re-birth.

There is no literal translation for the Sanskrit word ‘Dharma’ even though many authors liken to ‘duty’⁶. Whatever Dharma may or may not be, it definitely is difficult to discern but one cannot give up the effort of striving to follow Dharma altogether⁷. In fact, the central theme of the Indian epic Mahabharata has been to find out what Dharma is and as seen in the epic, even following Dharma does not guarantee protection from the consequences of one’s Karma⁸.

Eastern thought and more particularly, Indian thought is different from its Western counterpart on account of the fact that the West focuses more on the individuality of man who is the highest among all beings, whereas Hindu philosophy focuses on man as a manifestation of a higher reality which is the highest among beings.

Contrary to the Austinian view of law that it emanates from the sovereign who sanctions the person violating it, in the Hindu political society law was deemed to emanate from the King. In case of violation of the law of the King, his Dharma was to punish the wrong doer for his mis-deeds⁹. The one who follows his Dharma truthfully is not only entitled to the fruits accrued by such selfless action, but also to the fruit of a-dharma.¹⁰ But very often following the path of Dharma is extremely difficult, one does not understand the right thing to do but that ought not to stop one from struggling to find the right path¹¹.

Any one religion does not have a monopoly over the concept of Dharma, it is distinct from ‘religion’ as it is addressed in the Western parts of the world¹². While in Western religions, man realizes his ultimate end by praying to God, propitiating to it; in Indian thought, man can reach the ultimate goal himself by following his Dharma. Dharma is a symbol representing realization of a single Truth by man which does not differ or

⁴Koller, John, *Dharma: An Expression of Universal Order*, 22(2) PHILOS. EAST WEST (1972) 131-144.

⁵*Id.*

⁶GURCHARAN DAS, *supra* note 5, at xlii.

⁷Singh, Rahul, *Jurisprudence in and as Mahabharata: An Edifying Epic*, 22(2) NLSIR, (2010) 171-173.

⁸It was the duty of the Pandavas to fight to gain what was rightfully theirs and vanquish the wrongdoer. Achieving victory in this war came at a heavy cost and included some trickery on part of the Pandavas as well. But, despite fighting for righteousness, they were punished for their less than just behavior, including the God Krishna.

⁹Menon, P.K., *Hindu Jurisprudence*, 9 INT’L L. (1975) 209-213.

¹⁰SARVEPALLI RADHAKRISHNAN, *HISTORY OF PHILOSOPHY: EASTERN AND WESTERN*, 77, (1957) [hereinafter “S. Radhakrishnan”].

¹¹The struggle to find the right path (What is Dharma?) is the central theme of the Indian epic Mahabharata.

¹²DONALD H. BISHOP, *INDIAN THOUGHT: AN INTRODUCTION*, 198, (1975).

contradict others¹³. Dharma is a general and widely applicable term. Dharma is need to maintain harmony in the world but individual Dharma (Svadarma) is also equally important¹⁴.

MODERN RENDITION OF DHARMA:

The nationalism of India is derived from its cultural heritage which is to be learnt from the Vedas, the Ramayana, the Mahabharata, Gautam Buddha, Guru Nanak, Swami Vivekananda, Mahatma Gandhi, and several other national leaders¹⁵. Sarvadharm is of greater importance than swadharm, which means that one's own is not greater than Dharma for the common good. The Constitution of India is the mother document for this Union and upholding the Constitution in the Union of India is akin to letting Dharma prevail in the country. The Supreme Court of India is the institution responsible for ensuring that the Dharma of the Indian Union is followed and any acts contrary to the spirit of the Constitution are immediately curbed.

HISTORY OF THE SUPREME COURT:

Courts in India were established under the auspices of the Constitution of India to aid its citizens in furtherance of the ideals mentioned therein. The first Supreme Court of Judicature was established at Calcutta under the Regulating Act of 1773¹⁶. The Supreme Courts at Madras and Bombay were established in 1800 and 1823 respectively. They were abolished by the Indian High Courts Act 1861 which established High Courts for various provinces. These Courts were the highest Courts till the Federal Court of India was set up under the Government of India Act, 1935. It functioned akin to the present Supreme Court of India and heard appeals from the various High Courts. Post-Independence, the Supreme Court of India came into existence in 1950 through the Constitution of India abolishing the Federal Court of India.

SUPREME COURT AS THE UPHOLDER OF DHARMA:

The role of Supreme Court of India today majorly consists of three functions, namely: as the guardian of the Constitution, as an impartial forum to adjudicate disputes between the Union of India and the States and the highest Court of Appeal to decide the disputes between private persons.

Even the layout of the Supreme Court displays the Dharma that it is mandated to uphold. A bird's eye view of the structure of the Supreme Court shows that it has been constructed in the shape of a balance with a pair of Scales of Justice which is a testimony to the duty that is borne by the Supreme Court¹⁷. These scales of justice have been formed without any inclination to any particular side just as the Judges dispensing justice in this honourable Court shall decide cases without any favorable bend of mind towards any party. The logo of the Supreme Court is the Ashoka Chakra that appears on the

¹³ *Id.*, at 199.

¹⁴ KIM KNOTT, HINDUISM: A VERY SHORT INTRODUCTION, 19, (2007).

¹⁵ Baxi, Upendra, *Politics as Religion: Constitution (Eightieth) Amendment Bill*, 28(39) Econ. Polit. Wkly, (1993) 2052-2054.

¹⁶ HISTORY available at <http://supremecourtindia.nic.in/supct/scm/m2.pdf> (last visited March 5, 2016).

¹⁷ HISTORY, *supra* note 9 at 5.

abacus of the Sarnath Lion with thirty two spokes along with the Sanskrit inscription “yatodharmastatojayah¹⁸”. Inside the campus of the Supreme Court one is also greeted by a sculpture of a mother watching over her young child reading a book. The said sculpture represents the Republic of India in the form of a child, the Hon’ble Supreme Court as the mother watching over him and protecting him and the book in the hands of the young child, the Constitution of India. The role of the Supreme Court is that of a nurturer helping the young Republic of India to grow under its protective ambit.

Article 130 of the Indian Constitution describes the seat of the Supreme Court which shall be in Delhi or other places¹⁹.

The foremost Dharma of the Supreme Court is to safeguard the rights of the citizens of India and uphold the Constitution of India and protect it from the excesses of the Government. Thus, the need for judicial independence becomes even more paramount and the reason for ‘judicial review’ being deemed as a fundamental feature of the Indian Constitution²⁰.

Helping the others in following their Dharma is also part of the duty of the Supreme Court as by giving their opinion to the President of India upon his request, the Court is fulfilling its own duty of upholding the Constitution and hence the power given to the President of referring the matter to the Supreme Court where he feels the need of assistance of the apex Court²¹.

HOW HAS SUPREME COURT FOLLOWED ITS DHARMA?

- i) **Equality in society:** Articles 14, 15 and 16 of the Constitution prohibit discrimination and untouchability in the Union of India²². But even though practicing untouchability is illegal in India, it does not automatically remove the deeply entrenched superstitions regarding the caste system in many parts of India. In understanding the meaning of the word “discrimination”, Justice Shastri was of the view that “discrimination involves an element of unfavourable bias.... If such bias is disclosed and based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition.....”²³. In *Nain Sukh Das v. State of Uttar Pradesh*²⁴, the Supreme Court held that the constitutional mandate of the State not to discriminate against any citizen on the basis of religion extends to political rights also among others.

Equality in society is not restricted to merely discrimination along the lines of caste, community or religion but includes differential treatment of people

¹⁸Where there is Dharma, there is victory, Mahabharat *Bhīṣmaparva*, 21, 11-12.

¹⁹ Article 130: Seat of the Supreme Court.

²⁰ *Minerva Mills Ltd v. Union of India*, 1981 SCR (1) 206.

²¹ Article 143: Power of President to consult Supreme Court.

²² Articles of the Constitution.

²³ *KathiRaningRawat v. The State Of Saurashtra*, 1952 SCR 435.

²⁴ *Nain Sukh Das v. State of Uttar Pradesh*, 1953 SCR 1184 .

based on their gender as well. In another case filed before the Hon'ble Supreme Court in 1985²⁵, the Bench consisting of Y.V. Chandrachud C.J., Pathak J., Amarendra Nath J. held that the current adultery law regime in the nation prevented the husband and his wife from suing each other in Court, all the while stating that adultery itself was a ground for divorce and hence Section 497 of the Indian Penal Code²⁶ was upheld.

- ii) **Uniform Civil Code:** The Supreme Court first recognized secularism in the Indian state in the case of *SardarTaheruddinSyednaSaheb v. State of Bombay*²⁷ where it was stated by the Court that Articles 25 and 26 of the Constitution “embody the principle of religious toleration” which emphasizes the secular fabric of the Indian State. In another landmark decision of the Supreme Court in *KeshavanandaBharati v. State of Kerala*²⁸, the Hon'ble Supreme Court iterated that secularism was indeed a basic structure of the Indian Constitution. In *IndraSawney's* case²⁹, the Court indicated that the meaning of secularism in a modern society is more inclusive than mere religion and refers to a certain amount of cohesiveness in the society. In the *Ram Janmabhoomi* case³⁰, the Supreme Court endorsed the idea that the concept of secularism was enshrined in ancient Indian scriptures through ‘sarwa dharma sambhava’ meaning the tolerance of all religions having its roots in the Vedas³¹. In another verdict of the Court popularly referred to as the *Hindutva* judgment, the Supreme Court pronounced that *Hindutva* was to be understood as a way of life or a state of mind and not be narrowly constrained to the religious rites and practices of the Hindus³². The *Shah Bano* judgment³³ was a watershed for the rights of religious minorities in India, especially amongst the women who were often at the receiving end of unequal rights. The Court had mandated that a Muslim woman could claim maintenance under Section 125 of the Code of Criminal Procedure like other religious counterparts. The Court here referred to the need of Common Civil Code to promote social justice³⁴.
- iii) **Dharma of Ahimsa and death penalty:** Dharma has been interpreted to mean that man should abstain from violence of any kind be benevolent. However, Kant seems to believe that the punishment for murder should be the death of the murderer³⁵. He believes that execution of the murderer is needed

²⁵Smt. Sowmithri Vishnu v. Union Of India, 1985 SCR Supl. (1) 741.

²⁶ Indian Penal Code, 1860.

²⁷SardarSyednaTaherSaifuddin v. The State Of Bombay, 1962 SCR Supl. (2) 496.

²⁸KesavanandaBharati v. State Of Kerala, (1973) 4 SCC 225.

²⁹IndraSawhney v Union Of India, AIR 1993 SC 477.

³⁰Dr. M. Ismail FaruquiMohd. v. Union Of India, AIR 1995 SC 605 A.

³¹Padhy, Sanghamitra, *Secularism and Justice: A Review of the Indian Supreme Court Judgments*, 39(46/47) Econ. Polit. Wkly, (2004) 5027-5032.

³²Dr. Ramesh YeshwantPrabhoo v. Shri PrabhakarKashinathKunte, 1996 AIR 1113.

³³Mohd. Ahmed Khan v. Shah Bano Begum, 1985 AIR 945.

³⁴*Supra* note 29, at 5031.

³⁵Byrd, Sharon, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8(2) (1989), 151-200.

if we are to preserve justice and righteousness in society without which the society would fail to exist. He believes that Jus talionis (the right to retaliation) is necessary and a public Court will be effective in determining the quantum of punishment in proportion to the offence committed by the perpetrator. The Indian Supreme Court follows this principle where the death penalty is only imposed in cases considered the 'rarest of the rare'³⁶.

- iv) **Suo Moto intervention and Public Interest Litigation:** In a shocking case in West Bengal in 2014, a Santhal woman had been gangraped upon the orders of the local panchayat as a 'punishment' for having a paramour from a different community³⁷. In New Delhi, the Chief Justice of the Supreme Court by its own volition took the heartening step of intervening suo moto. Upon its decision in the said case, the Court was of the opinion that the ghastly crime perpetrated against the defenceless woman was preventable by the State's police machinery. Due to its failure to perform its duty, the Supreme Court directed the State of West Bengal to compensate the victim. This has not been the first time that the apex Court has felt the need for suo moto intervention into cases where it felt gross injustice had been carried out³⁸.

The series of suo moto interventions of the Supreme Court started in the horrific 1979 Bhagalpur blindings case³⁹ where the Court forayed into a new area in Indian criminal jurisprudence by ordering compensation for the first time in cases of human rights violation. Earlier the Court would also entertain the occasional letter from a party who had suffered from injustice in some way, so much so that it came to be known as the "epistolary jurisdiction" of the Court⁴⁰. However, of recent that trend has reduced to a minuscule exceptional case.

SHORTCOMINGS OF THE UPHOLDER OF DHARMA

As has been iterated previously, the Supreme Court of India is the protector of Dharma in the Union of India and the custodian of the Constitution of India. It has since long vehemently protected the rights of citizens of India from the excesses of the Government of the day. It began with a somewhat cautious attitude of the judiciary from 1950s till the mid 1960s. In the first case regarding the amendability of the Constitution, the Supreme Court upheld the First Amendment Act passed by the Parliament stating that the word "law" in Article 13 did not apply to such a constitutional law and hence the Constitution could be amended without any exception⁴¹. In 1964, in the case of Sajjan Singh⁴², the

³⁶Bacchan Singh v. State of Punjab, (1980) 2 SCC 684.

³⁷In Re v. Indian Woman Says Gang-Raped On orders of Village Court published in Business & Financial News dated 23.01.2014, 1 SUO MOTU WRIT PETITION (CRIMINAL) NO. 24 OF 2014.

³⁸Galanter, Marc, *Snakes and Ladders: Suo Moto Intervention and the Indian Judiciary*, 10 FIU L. Rev., (2014) 69-83.

³⁹Khatri v. State of Bihar, 1981 SCR (2) 408.

⁴⁰*Supra* note 37 at 76.

⁴¹Shankari Prasad Singh v. Union of India, AIR. 1951 SC 458.

⁴²Sajjan Singh v. State Of Rajasthan, 1965 AIR 845.

same question of law was put in front of the Court once again. Even though the Court upheld Shankari Prasad, there was cautious dissent from Hidayatullah J.⁴³

However, a strong counter-attack to the amending power of the Parliament was made when the Court ordered that the Legislature could not amend any Fundamental Right⁴⁴. The hostility between the Judiciary and the Executive was at its zenith. In a watershed decision, the apex Court held in the KesavanandaBharati Case⁴⁵, while formulating the Basic Structure, the Court held that the Parliament could amend any part of the Constitution except its basic structure. This way the Court was successful in formulating a middle path between the Dharma of the Supreme Court and that of the Parliament.

After the above landmark decisions, there were many subsequent decisions regarding basic structure doctrine of the Constitution which had not been expressly outlined by the Court in KesavanandaBharati case⁴⁶, like Minerva Mills case⁴⁷ where it was held that judicial review was indeed part of the basic structure of the Constitution.

Although this proactive role of the Supreme Court has been lauded by many and has been instrumental in protecting the rights of the people where the Government has failed to perform its duties, the Court is also prone to hyper-activism.

As is often noticed with cases where the Supreme Court takes suo moto cognizance, it often does not delegate the cases to its sub-ordinates but instead takes the onus upon itself. It seems that the apex Court is not interested in the total shake-down of machinery beneath it which has grown complacent. Also owing to some inhibition that a case may lose steam after being relegated to the sub-ordinate Courts, the Supreme Court has remained the sole guardian of India.

A change in the functioning of the Supreme Court is in the offing as the apex Court needs to delegate work to the High Courts and pull them up for any failure of justice rather than taking the onus upon itself which shall only benefit a small quantum of those seeking the Court's assistance. It is better to perform one's own duty, even imperfectly, than to perform correctly the duties of others⁴⁸ and therefore the Supreme Court ought to let the reins loosen a little and give the subordinate judiciary a chance to prove their mettle.

Another grievance against this upright upholder of Dharma is, if the Supreme Court watches over the Government, who watches over the Supreme Court? The collegium system as envisaged in the Constitution has undergone several changes. Before 1993, the power to appoint the Supreme Court judges would rest solely with the Law Minister and the President's role was merely formal⁴⁹. In the 1991 case of Subash Sharma v. Union of

⁴³ According to Hidayatullah J., "It is true that such things would never be but one is concerned whether such a doing would be possible." Here, Hidayatullah J. was referring to the possibility of the Parliament misusing its powers to remove or debilitate the Fundamental Rights enshrined in the Constitution.

⁴⁴ I. C. Golaknath v. State Of Punjab, 1967 AIR 1643.

⁴⁵ Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) 4 SCC 225.

⁴⁶ Kesavananda Bharati Sripadagalvaru v. State Of Kerala, (1973) 4 SCC 225.

⁴⁷ Minerva Mills Ltd v. Union of India, 1981 SCR (1) 206.

⁴⁸ Bhagavad Gita 18:47.

⁴⁹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 192 (2006).

India⁵⁰, the Supreme Court ruminated on the interpretation of the term “consultation”. Subsequent to the above case, the question of appointment of judges to the Supreme Court was considered in Supreme Court Advocates on Record Association v. Union of India⁵¹, whereby the primacy in appointment of Supreme Court judges was given to a collegiums consisting of the Chief Justice of India and four senior most puisne judges. In subsequent decisions of S.P. Gupta⁵², Supreme Court Advocates-on-Record Association v. Union of India⁵³ and In re: Presidential Reference⁵⁴, the present collegiums system came up to be.

In a 2015 judgment of the Supreme Court, whereby the Court struck down the National Judicial Appointments Commission Act unconstitutional, an attempt by the Government to introduce some transparency into the appointment of the Judges of the apex Court failed once again⁵⁵. It was an attempt to bring some accountability into the method of appointment of judges to the apex Court which was discarded due to some faults in the design of the Commission. One must remember that actions must be done without any attachment or expectation of results and that is the need of the hour from the apex Court. It is the messiah for millions and they deserve to know the persons who are responsible for their swaraj, since what, if not that, is the Dharma of the Supreme Court?

Karmanyevadhikaraste Ma PhaleshuKadachana,
Ma KarmaphalaheturbhurmaTeSangostvakarmani⁵⁶

⁵⁰ AIR 1991 SC 631.

⁵¹ AIR 1994 SC 268.

⁵² AIR 1982 SC 149.

⁵³ (1993) 4 SCC 441.

⁵⁴ AIR 1999 SC 1.

⁵⁵ SC BENCH STRIKES DOWN NJAC ACT AS ‘UNCONSTITUTIONAL AND VOID’ (Oct 17, 2015) available at <http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece>(last visited Mar 3, 2015).

⁵⁶ Bhagavad Gita, 2:47- “You have the right to work only but never to its fruits. Let not the fruits of action be your motive, nor let your attachment be to inaction. “