

The Chronicle of Indian Tort Law: Dharmic Resignation, Colonial Subjugation and Legislative Development

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Abstract

Tort law is the field of law in which courts give a remedy for private or civil wrongs or injuries by enabling a lawsuit for (often monetary) damages. Thus, the objective is to return the sufferer to his or her pre-injury state. It has been stated that India, the world's biggest democracy, has a very undeveloped tort law. The majority of Indian tort law emerged after British occupation. Nonetheless, Hindu law, in its varied manifestations and evolutions, is the world's oldest continuous legal system. For numerous millennia, Hinduism was India's exclusive religion and legal system; it coexisted with Muslim and Christian legal systems in the previous millennia, but it remained culturally dominant and continues to apply to the majority of Indians to some extent now. When we consider the lengthy history of Hindu law in conjunction with India's tremendous variety of culture, language, and even governmental systems throughout history, the issue becomes even more perplexing. Furthermore, the persistent underdevelopment of Indian tort law is unexpected in light of the Indian constitution's strong dedication to both compassion and comprehensiveness, which was passed in 1950 (three years after independence from Britain). Tort law is supposed to have evolved from the ancient maxim Ubi jus ibi remedium (Every right needs a remedy). This paper examines whether Indians are endowed with less rights in this critical area and what are we to make of this underdevelopment in relation to a central issue in practically all legal systems i.e. how to restore the victim's dignity and grant reparation, where any component of Indian civilization or culture that elucidates on this lacuna.

Keywords: English Law, Identification of negligence, Hindu private law, Dharmashastras.

INTRODUCTION TO LAW OF TORT IN INDIA

When an American observer first considers tort law in India today, he or she is likely to be impressed by its similarity. A closer examination, however, shows certain structural variances and even more operational discrepancies. The Indian legal system is a common law democratic democracy in the traditional sense. Law is done in English, using a similar set of categories and language to that used in the United Kingdom and the United States. There is a written (although fairly lengthy) constitution, as well as judicially created common law. The Indian constitution guarantees all

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essential rights included in the United States Constitution but emphasises social and economic justice i.e. which is understandable given India's more liberal and impoverished status. Article 39's phrasing (in the section on "directive principles" or what we could term aspirational rather than enforceable legislation) is a homage to the progressive leaders who fought for India's independence. Thus, in Section 39 (b), the state is urged to direct its policies in such a way that "ownership and control of the community's material resources are distributed in the most efficient manner possible to serve the common

good,” and in Section 39 (c), in such a way that “the economic system’s operation does not result in the concentration of wealth and means of production to the detriment of the common good”.

Regrettably, a disconnect exists between these guiding ideals and India's socioeconomic and legal reality. Nonetheless, Indian judges are motivated by a concern for social justice in ways that many Western observers would find unexpected, if not alarming. At first look, India's underdevelopment of torts may seem to contradict the fundamental nature of a common law system. In a significant sense, a common law jurisdiction can never have lacunae in any field of law since the common law of England and her previous dominions and colonies is accessible for adoption to varied degrees. India's constitution included all existing English law with the condition that appropriate adaptations be made. If new English rules or legislation are more consistent with the needs of justice, Indian courts may disregard previous common law rules in favour of them. Additionally, a common law judge has the authority (within certain boundaries) to create new law as mandated by equity.

Lord Scarman stated the following remark in a British opinion: “The common law encompasses everything that is not covered by legislation”. It is impervious to gaps: no *casus omissus* is possible. The court's purpose is to resolve the issue before it, even if that resolution necessitates the expansion or adaption of a principle or, in certain situations, the formation of a new law to address the case's justice. However, whatever the court determines, it begins with an established concept (OP Dwivedi, 1998) [1]. Mass torts and hazardous torts are becoming prevalent in a number of common law countries. Union Carbide, for example, was compelled to remove its insecticide Temik from the market in the United States after tort suit. Whether in the United States, Canada, or India, tort law is founded on judge-made common law originating from ancient English causes of action. Indian courts have conceptual access to these advances in tort law in other common law jurisdictions.

INDIA'S HISTORICAL EVOLUTION OF TORT LAW

In contemporary western jurisprudence, terms such as law, religion, ethics, and morality have acquired distinct meanings. Without the jargon, law, for example, is a system of rules intended to control human behaviour with the sole purpose of improving temporal wellbeing. On the other hand, religion, although instilling faith or belief (which may be purely superstitious), controls human behaviour primarily for the purpose of improving spiritual wellbeing. However, these terms fall short of expressing old Hindu notions. The word *Dharma* (Sushant Sailan, 2002) [2] was broad enough to include all that is now recognised by the terms law, religion, ethics, and morality taken together.

Dharma was the overarching policy that intended to promote both the spiritual and temporal wellbeing of the person and, through him, the community. Finally, although the two dimensions of wellbeing were entwined in an inseparable matrix, each maintaining and obtaining nourishment from the other, and were not cleanly compartmentalised, temporal welfare was advanced via progress of spiritual welfare. *Moksha*, according to the *Dharmashastra*, was the ultimate goal of existence. *Apurva*, *adrishta*, and *karmavipak* doctrines emphasised that every action had a response and that one could not avoid the repercussions of his actions (G J Postema, 1993) [3]. If *adharma*, or non-performance of the *Dharmashastra*'s duties and responsibilities, brought one closer to *moksha*, *dharma*, or proper execution of those duties and obligations, had the reverse effect.

Individuals may reincarnate not just as humans (the greatest form of life), but also as animals, birds, bugs, and other lower-order living entities in order to seek for *moksha* via the practise of *dharma*, depending on the type and severity of their *adharma* at the time of their death. When it came to saving the individual's soul and supporting it in reaching *moksha*, the *Dharmashastra* not only stressed the significance of spiritual well-being, but it also served as a deterrent to *adharma* and secured worldly prosperity. As a result of the ancient emphasis on an individual's spiritual well-being, it is reasonable to wonder if the person who had been wronged could have imagined receiving money restitution reliant on the actions of another. The possibility that the aggrieved person offered *Kshama* in order to

improve not just the wrongdoer's spiritual wellness but also his own welfare in those days is not out of the realm of possibility. Hindus have a common belief in an ideal or faultless past that predates the present.

"*Dharma flourished in its completeness*" Krita Tuga states. "There was no advent of *adharma* among mankind." Clearly, in a region of pristine virtue, when men were only concerned with proper behaviour, the issue of regulating erroneous behaviour did not arise. Absolute conviction in the *apurva*, *adrishta* and *karmavipak* teachings was more than sufficient to ensure righteousness. However, *dharma* fell in each of the three successive yugas as *kama* and *raga* increased. Theft, deception, and untruth followed suit. The increasing number of incidents of *dharma* breaches pushed society to establish mechanisms for recognising unrighteous behaviour. It is impossible to pinpoint the specific point at when the victim's hurt was recognised and the issue of redressing his complaints was examined. The oldest mention to this subject is in the *Manusmriti*.

There were eleven *vyavaharapadas*, according to Manu:

1. *Rnadana*,
2. *Niksepa*,
3. *Asvamivikraya*,
4. *sambhuya-sammutthan*,
5. *Dattasyanapakarma*,
6. *Vetnanaduna*,
7. *Samvidvyatikrama*,
8. *Krayavikra*,
9. *Svamipalaviuada*,
10. *Simavivada*,
11. *Vakparusya*.

The results of a thorough examination of various *avahar upadas* reveal that: (1) each *vyavaharpada* contemplated and provided for various types of converse that were likely to arise in respect of the concerned *Vyavaharpada*; (2) punishment of the wrongdoer, as a supplement to the doctrines of *apurvai*, *adrishtas*, *hamavipak* and *prayaschitta*, played an important role in assuring righteous They (the different *vyavaharapadas*) acknowledged that there was a difference between civil and criminal wrongs. But none of the *vyavaharpada* acknowledged what we now refer to as torts as such, despite the fact that they consider various acts that would give rise to grounds of action in today's legal system.

In England, the tort law was deliberately crafted and cultivated in order to entice litigants to the King's court. Not only was the right to seek unliquidated damages its greatest distinguishing characteristic, but also its absence of a limitation period, which was critical in determining the venue. The fact that in the early days, a litigant preferred to air his grievances in King's court rather than in local courts indicates that he possessed not only the information necessary to make the forum selection, but also that he preferred the King's court because it promised reparation in accordance with the changing moods of the day (RA Epstien, 1995) [4]. Thus, the English tort law originated under conditions that were diametrically opposed to those in India. Nonetheless, they were transferred to India under British administration under the guise of "*justice, fairness, and good conscience*." Naturally, issues between Hindus and Muslims about "*marriage, inheritance, succession, caste or religious use*" were not resolved according to English common law (J Gordley, 1987) [5]. Additionally, "*justice, fairness, and good conscience*" did not extend the English common law to circumstances in which its application would have been "*irrational and incompatible with Indian conditions*."

Nonetheless, the intellectual underpinnings, the form, the substance, the method, and the potential remedies in tort claims were, if not novel, at least novel in scope. Today, with a few notable

exceptions, the English common law of torts predominates throughout India. On the other hand, the history of tort law development in England reveals a concern for the victim that is alien to Hindus. Whereas the English tort law placed a premium on rights and tended to instil a sense of right-consciousness in its practitioners, the *Dharmashastras*' counterparts placed a premium on duty and sought to instil a sense of duty-consciousness in its practitioners.

MATTER OF CONTENTION WITH THE ONGOING SYSTEM

The absence of specialised tort-related legal growth and codification, as well as a more flexible and active court, may reflect some of India's cultural preferences. To this aim, a short explanation of certain pertinent components of Hindu law and other aspects of Indian traditional judicial systems is required here. Hindu law has ancient and mysterious beginnings; although continuous commentary has existed for at least fifteen hundred years, earlier writings are cited and allusions to even older sources are made. The basic definition of Hinduism has posed great difficulties and in 1966 the Supreme Court was obliged to define some shared characteristics of religion that may be used to establish whether someone was a real Hindu. The vast quantity of documents, both ancient and mediaeval, and the habit of omitting authorship and dates has exacerbated the complexity surrounding Hindu law. For example, differences between the original and the accretion are often based on conjecture and frequently on prejudice. According to one eminent Indian scholar, the situation of Hindu law in the twentieth century was as follows: "*Hindu private law is among the most intricate in the world*" (GC Keating, 1996) [6]. No other system of law is, or has ever been, in such a state of near insanity. It is dubious that any living person comprehends the depths of the disorder into which it has descended through ages of neglect and inattentive governance, historical aberration and serendipitous mistake. It was theoretically capable of becoming a great system of law, magnificently endowed with every characteristic, substantive and adjectival, that a people desiring the finest administration of justice and the most nuanced jurisprudence could want.

Hindu law's basic conceptions are likewise difficult to reconcile with Western law's central notions. Even the fundamental notion of dharma resists brevity. In his key work, *The Classical Law of India*, Robert Lingat delves into the concept of *dharma*. To begin, *dharma* refers to the everlasting rules that govern the cosmos. Lingat regards this notion of a world ruled by an objective order as a common Indo-Iranian concept. In addition, it is highly prevalent in ancient Asian societies (RH Coase, 1990) [7]. For example, the Chinese concept of *Tian-Ming* (mandate of heaven) posits the existence of a broad cosmic moral order with which a ruler must align himself in order to be entitled to reign. The second definition of *dharma* given by Lingat is behaviours in accordance with the moral order that assist humanity in realising their destiny in this life and reaping advantages in the next. However, the most frequent definition of *dharma* is the collection of obligations imposed on a person depending on his or her rank or *varna* (most importantly, caste and gender) and *ashram* (stage of life).

It is essential to discern the conflict between a concept of law founded in a cosmic moral order and a sense of judge-made common law. However, in fact, flexibility and contextualism have been central to Hindu legal practise, and the conflict with common law may not be as strong as one would assume. In India, tradition and equity often take precedence over compliance with the law as outlined in ancient literature (RA Posner, 1997) [8]. The *Dharmasutras* (old legal and moral treatises) list the Vedas, tradition, and good custom as the basis of Hindu law. Some great lawgivers' codes include a fourth source, inner satisfaction, which is analogous to the concept of conscience. Although this appeal to conscience implies some degree of subjectivity and flexibility in the system, it appears that this source is limited to individuals of great virtue (sages living the true Hindu life), bringing it closer to Aristotelian virtue ethics, which is based on moral exemplars' choices. The *Vedas*, disclosed scriptures dating perhaps to 1100 B.C.E., are the most authoritative of the other three sources. Regrettably, these mostly literary, liturgical and philosophical works do not include a great deal of concrete guidance for the Hindu moral actor (Karl N Llewellyn, 1960) [9]. The second source, tradition or *smriti*, offers further direction. These are transmissions of conventional knowledge as

recollected by renowned sages, not heavenly revelations. However, *smriti* places a premium on ritual and liturgy. The third source is *Sadachara*, which translates as "*excellent custom*." This is not custom in the conventional sense; rather, it is a notion of actions that have historically been followed by the moral and well-educated people of the society.

EVOLUTION OF DHARMASUTRAS [LAW AND MORALITY]: A PILOT UNDERTAKING

The above consideration of the nature of analogy law in Hindu culture and the social and cultural ramifications of particular forms of tort proceedings demonstrates that:

1. *Dharma* was the overarching strategy that intended to promote both the spiritual and temporal well-being of the person and, through him, the community;
2. Temporal welfare was advanced through advancing spiritual wellbeing;
3. The *Dharmashastras* placed a premium on obligations rather than rights;
4. The monarch imposed severe penalties on anybody who disobeyed his orders;
5. The *Dharmashastras* did not recognise a legal action for trespass, conversion, slander, or injury to family connections (Guido Calabresi, 1975) [10];
6. The *Dharmashastras* made no mention of carelessness, which has become one of the most common causes of tort action in contemporary times;
7. In general, it was the king's obligation rather than the victim's right to seek reparations and necessary damages claimed;
8. There was no judgement of damages since there was no evidence of injury stemming from the breach of duty (C A E Goodhart, 1997) [11];
9. Non-physical injury was not recognised as a kind of damage for which damages could be assessed in the *Dharmashastras* (MR Chertow, 1977) [12]; and that
10. Provision was given for only ordinary or compensatory damages, not for exemplary or vindictive damages. These elements have unavoidably influenced the public's attitude toward tort-based litigation.

CONCLUSION: THE PROSPECT OF A TORT LAW LITIGATION IN INDIA

The lack of proceedings for assault, battery, mayhem, false imprisonment and injuries affecting family relations may be explained by the fact that these were, more or less exclusively, crimes committed in the distant past. It is true that, in current times, the frequency of tort lawsuit for defamation is significantly very high, despite the fact that defamation was considered a criminal offence in ancient India. The growth in the number of defamation lawsuits, on the other hand, indicates that people's attitudes have changed as a result of the shift in their circumstances. Apart from the fact that defamation was considered a criminal offence in ancient India, no compensation could have been obtained in respect of it since it did not result in any bodily harm. People have been encouraged to seek remedy in civil courts by the recognition of non-physical injury as a kind of loss for which compensation may be recovered, as well as the awarding of relatively substantial damages for wrongs harming reputation.

If the possibility of damages for non-physical injury has resulted in claims for nervous shock, among other things, the actionability of *injuria sine damnum* has resulted in claims that could not previously be sustained. Similarly, the rejection of the concept that negligence simply reflected the wrongdoer's mental condition and the identification of negligence as a distinct tort have resulted in a significant amount of tort litigation.

While in previous times abuse of legal process was tried to be curbed exclusively by the penalty of the perpetrator, today's law gives a civil remedy to the person who has been wronged as well as criminal recourse to the perpetrator. Indeed, the fact that the public is aware of the existence of a civil remedy may have resulted in the courts of law being more tolerant of abuse of the legal process and perjury in general. The trend toward seeking legal remedies in these situations, as one would think, is growing as well (Mark Sagoff, 1988) [13]. A reflection of this may be seen in the steadily rising

number of lawsuits brought to recover damages for malicious prosecution. The focus has shifted from obligations to rights, but the breach of rights is still a criminal offence as well as a civil wrong; injury (even if it does not result in harm) is actionable; and the definition of harm encompasses non-physical hurt. Either people are unaware of the dramatic changes that have occurred or, if they are aware, they are unable to break free from their ties to the past. This might perhaps be one of the reasons for why there is such a large disparity between the prevalence of tortious behaviour.

In addition to the widespread illiteracy in India, the court procedures are held in a foreign language, which contributes to the lack of understanding of civil remedies and apprehension about adapting to contemporary developments. A person's ability to recognise and appreciate advances that are in conflict with his or her customary ideas and expectations increases dramatically when such advancements are conveyed in a language that the person does not understand. An unintentional consequence of such a setting is that the is emphasised, and if the overall outcome is not helpful, the progress is rendered meaningless. The granting of paltry sums of damages has made a positive difference on the situation. Railroads heralded the beginning of India's industrial revolution. However, legislative rules place a limit on the amount of damages that may be recovered from railway companies. In addition, legislative limitations on the amount of damages may be found in the domains of road, water, and air transportation, among other things (G Williams, 2006) [14]. The theory of state immunity has further restricted the scope of tort lawsuits in an area that would have otherwise been one of the most fruitful for tort litigation, if it had not been for this doctrine.

Another important element to consider is the distribution of wealth throughout the society. If the defendant's financial indigence makes it pointless to suit him, the plaintiff's poverty renders it difficult for him to pay the court fees, the lawyer's fees, the expenditures associated with the presence of witnesses, and even the costs associated with his own court appearances. Thus, the problem is exacerbated by frequent adjournments, protracted litigation, and the potential of first appeal and revision or second appeal exists in India today.

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Brief Career History

Participated (through invite) at the 3rd International Conference on Arbitration in the era of Globalization at Federation House, Tansen Marg, New Delhi, with the Current Chief Justice of India, Justice Sharad Arvind Bobde, as the Chief guest. Understood arbitration under contract law, through participating in the 10th Indian Willem C. Vis International Commercial Arbitration Moot 2020, by Surana and Surana; with Internships at Supreme Court of India and Delhi High Court.

Conflicts of Interest

"The authors declare no conflict of interest." This is to solemnly swear that the submitted research article is the Author's i.e., Dev Agrawal original work and is being submitted for publication in the Journal of Law of Torts and Consumer Protection Law exclusively.

REFERENCES

1. OP Dwivedi, "Environmental Ethics: Our Dharma to the Environment" (Sanchar Publishing House, 1994) 169; Christopher K Chapple, 'Hinduism, Jainism, and Ecology' 1998 (10:1) Earth Ethics. <https://www.researchonline.mq.edu.au/vital/access/services/Download/mq:33186/SOURCE1>.
2. Sushant Sailan, "History of the Removal of the Fundamental Right to Property", (2002) Centre for Civil Society, 231–255. https://ccs.in/internship_papers/2002/25.pdf.

3. Bergkamp, G J Postema, "Risks Wrongs and Responsibility: Coleman's Liberal Theory of Commutative Justice", (1993) 103 Yale Law Journal 889. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186639.
4. RA Epstein, "Simple Rules for a Complex World" (Harvard University Press, Cambridge, 17th February 1995) Page No 38. https://www.jstor.org/stable/764686?seq=1#metadata_info_tab_contents.
5. J Gordley, "Tort Law in the Aristotelian Tradition" in Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997) 157, 158; E J Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 Columbia Law Review 472. https://www.jstor.org/stable/24562818?seq=1#metadata_info_tab_contents.
6. GC Keating, "Fairness and Two Fundamental Questions in the Tort Law of Accidents: Olin Working Paper No 99-21" (University of Southern California Law School, Los Angeles, 1999) 28, 61. <https://www.corteidh.or.cr/tablas/r34960.pdf>.
7. RH Coase, "Notes on the Problem of Social Cost" in R H Coase, *The Firm, The Market And The Law* (University of Chicago Press, 1990). <https://go.gale.com/ps/i.do?id=GALE%7CA145572327&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=02733072&p=AONE&sw=w>.
8. RA Posner, "Wealth Maximisation and Tort Law: A Philosophical Inquiry" in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997). <https://www.researchonline.mq.edu.au/vital/access/services/Download/mq:33186/SOURCE1>.
9. Karl N Llewellyn, "The Bramble Bush: On Our Law and its Study", (Oceana, Dobbs Ferry, 1960) 12 cited in Lucas Bergkamp, *Environment and Liability* (Kluwer Law International, 2001) 67. <https://www.barnesandnoble.com/w/bramble-bush-karl-n-llewellyn/1101869215>.
10. Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr." (1975) 43 University of Chicago Law Review 69, 105. <https://www.jstor.org/stable/1599192>.
11. C A E Goodhart, "Economics and the Law: Too Much One Way traffic?" (1997) 60 Modern Law Review 1, 13. <https://www.jstor.org/stable/1097288>.
12. MR Chertow and DC Esty (eds), "Thinking ecologically: an introduction" in MR Chertow and DC Esty (eds), *Thinking Ecologically: The Next Generation of Environmental Policy* (Yale University Press, New Haven, 1997) 1-16, in Bergkamp, above n 76, 73. https://link.springer.com/chapter/10.1007/978-1-4020-6598-9_24.
13. Mark Sagoff, "The Economy of the Earth: Philosophy, Law and the Environment" (Cambridge University Press, Cambridge, 1988). <https://www.goodreads.com/en/book/show/1356962>.
14. G Williams, "The Aims of the Law of Tort" (1951) 4 Current Legal Problems 137; Perry, Ronen "The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory" (2006) 73 Tennessee Law Review 177. <https://ore.exeter.ac.uk/repository/bitstream/handle/10871/18742/FoxT.pdf;sequence=1>.