

## SOME ETHICAL ISSUES OF JURISPRUDENCE: AN INDIAN APPROACH

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*The main purpose of the Indian judicial system is to provide justice to the people who are deprived of the same. This motto of the legal system is symbolized through idol of a lady with a balancing rod in hand and having eyes closed with black tape in front of the judges, picture of Gandhi in the court premise and a line behind it quoted from Indian tradition- satyameva jayate. From the above it is presumed that justice is to be taken in the sense of balance where there is no partiality and no favoritism. If the above-mentioned view is taken as true in the field of jurisprudence, it gives rise to much philosophical questions which are as follows. First, is truth objective or subjective? If objective then it is transparent provable with the witness and evidences automatically without taking the help of a legal professional. If truth is determined by a legal professional then it is purely subjective. If truth is taken as subjective then an individual is said to be denied of justice. Secondly, it is a common belief of the people that an expert of legal professional can save his client though in actual case he has committed wrong actions like murder, stealing or any other crimes. If lawyer can save him then it is to be taken for granted that truth can be falsified. Sometimes false case may be proved as true. If false is turned to be true, what would be the value of truth? Thirdly, it is the normal saying –‘justice delayed, justice denied’. In modern time no case is cleared within limited period of time, but takes a prolonged time losing the merit of the case. Can it not be taken as a darker side of our legal system? Fourthly, why are the legal language, its clause or bye-clause very much interpreter-dependent? Can there be no simpler language so that non-legal person can come forward to defend someone or the client can defend his own case? Lastly, can legality work without the help of morality? Legality can be active if it is in consonance with morality. Legality finds an immoral outlet if it is not well-guarded by morality.*

Indian theory of justice is called *nyāya*, *satya* and *rta*. The main purpose of the Indian judicial system is to provide justice to the people who are deprived of the same. This motto of the legal system is symbolized through idol of a lady with a balancing rod in hand and having eyes closed with black tape in front of the judges, picture of Gandhi in the court premise and a line behind it quoted from Indian tradition- *satyameva jayate*. From the above it is presumed that justice is to be taken in the sense of balance where there is no partiality and no favoritism. No one, as Plato observes, is ‘self-sufficing’;<sup>1</sup> there are many things, which we want for our lives. Hence there arises the question of exchange. It is possible if ‘one gives and another receives under the idea that the exchange will be for their good’. From this it implies that, when a man discharges his duties, other person can exert his right. Plato’s observation that no one is self-sufficing and there arises the question of exchange reminds me the derivative meaning of the term ‘ought’ used to convey the sense of duty, which comes from the verb ‘owe’. In old English the past tense form of the verb ‘owe’ is ‘ought’, which implies that

the sense of 'ought' may come in one's mind if one thinks that one owes (*ṛṇa*) something from others. In other words, one will have a sense of duty if one has a feeling of gratitude to others for their free exercise of rights. Hence the term *ṛṇa* may be taken as the sense of obligation to them who have performed their duties to them. From this it can be decided that the sense of morality denoted by the term 'ought' cannot be imposed on an individual, rather it comes from within when he thinks himself *ṛṇī* or obliged to others<sup>2</sup>. Someone can exercise his right and duty if he feels a sense of obligation to others. That is why; another name of justice is balance in the society. It reminds us the sense of balance in the society prevails in the society if there is justice to all which is of two types- justice done in the court and justice done among the social beings. The idol of a lady whose eyes are closed signifies the fact that there is no room for personal weakness leading to favoritism. The weight machine found in hand of the idol is in perfect balance, which metaphorically points to the fact in the field of jurisprudence there is no questions of imbalance, favoritism, partiality etc. but to judge the case as per law. The closing eyes of the idol also signify that law will proceed in its own course in which our favoritism etc have no room at all.

If the above-mentioned view is taken as true in the field of jurisprudence, it gives rise to much philosophical questions which are as follows. First, is truth objective or subjective? If objective then it is transparent provable with the witness and evidences automatically without taking the help of a legal professional. If truth is determined by a legal professional then it is purely subjective. If truth is taken as subjective then an individual is said to be denied of justice. For, the truth is said to be transparent or as it is. Under such case an individual having no financial ability will be deprived of justice. For such persons- '*vicārevāṇinīrabenibhṛtekānde*' (the judgment concerning justice goes on lamenting in a lone and solitary place).

Secondly, it is a common belief of the people that an expert of legal professional can save his client though in actual case he has committed wrong actions like murder, stealing or any other crimes. If lawyer can save him then it is to be taken for granted that truth can be falsified. Sometimes false case may be proved as true. If false is turned to be true, what would be the value of truth? Justice under such cases would be tools in the hands of legal personnel. Does morality permit to argue against the true incident to save the real criminal? If someone is really

criminal or does not depend on the reasoning and argumentation by a lawyer, the truth would be taken as purely subjective. If truth is subjective then its nature may vary from lawyer to lawyer or court to court.

Thirdly, it is the normal saying –‘justice delayed, justice denied’. In modern time no case is cleared within limited period of time, but takes a prolonged time losing the merit of the case. Can it not be taken as a darker side of our legal system? Moreover, there is a provision to appeal to the higher court if one is not satisfied with the judgment given in the lower court, which is again a time-consuming matter.

Fourthly, why are the legal language, its clause or bye-clause very much interpreter-dependent? Can there be no simpler language so that non-legal person can come forward to defend someone or the client can defend his own case? Most of the persons associated with the legal profession are found more busy with interpreting clauses or bye-clauses of a code than to see the merit of a case.

Lastly, can legality work without the help of morality? Legality can be active if it is in consonance with morality. Legality finds an immoral outlet if it is not well-guarded by morality.

In fact, legality backed by morality has been admitted in modern jurisprudence. Considering this moral aspect of legal profession ethical dimensions like duties to the client, respect for client’s autonomy, conduct of lawyers, judges, legislators, judicial temperament, judicial wisdom, justice etc have been highlighted. That is why, law is called *dharma*(another name of morality) and those who are dealing with it called *dharmāvatāra* or embodiment of justice. They do not have any freedom of their own, because they are bound with the panel codes just as the prisoners are bound in the prison as endorsed by Rabindranath- ‘*bandio jemanbaddhavicaraka o temnibaddha*’. From this subjectivity criterion of truth is ruled out. This moral factor in judicial system had been accepted in our ancient Hindu Law.

The Justice in ancient time was normally handled by the king who was called king-seer (*rājarsi*) having four-fold knowledge like logic (*anvikṣikī*) for the development of reasoning faculty, three Vedas for moral development (*trayī*), agriculture, animal husbandry and commerce (*vārtā*) for economic stability and

law (*dandanīti*) for maintaining law and order. Any person is not entitled to be a judge, but a man who is saintly in nature is an ideal judge cum ruler as drawn by the coinage of the term ‘*rājarsi*’ having four-fold knowledge viz, logic (*ānvīkṣikī*), *trayī* (three Vedas as a basis of spirituality), *vārtā* (agriculture, animal-rearing and commerce) and penal codes (*dandanīti*)<sup>3</sup>. A ruler in the form of judge having such qualifications can do justice to the subjects. The *Ānvīkṣikī* is meant for development of logical faculty which is essential for the ruler because in case of justice towards subjects logic will work, but not any favoritism, blind faith and superstition. The study of the three Vedas (*trayī*)<sup>4</sup> is prescribed only have moral development of the ruler which is the basis of justice. If a ruler does not have any sense of righteousness or non-righteousness, he is not capable of doing justice to others. The knowledge of penal codes (*dandanīti*) can help a ruler to judge a particular case and provides punishment as per the volume of crime, which brings harmony in society after removing *mātsya-nyāya*. It is mentioned in the Manusmṛti that had there been no punishment in the kingdom, the weaker section would have been tortured by the stronger ones, just as the stronger people forcibly put the fishes in the cutting machine (*‘Śūlematsyānivāpakṣandurbalānbalavattarā’*)<sup>5</sup>. The famous commentator Medhātithi observes that the stronger persons may exploit others or may torture the weaker section of people in many ways, viz, sometimes snatching their properties, sometimes engaging them in a job which requires bodily labour, or sometimes abducting their wives (*dhana-śarīra-dārā-haraṇādinā*)<sup>6</sup>. Moreover, if the literature on penal codes is perfectly known by the ruler judge, he is not in a position to provide light punishment for heavy crime and heavy punishment to the light crime, which is the other name of justice (*‘Tīkṣṇadaṇḍo hi bhūtānāmudvejanīyah. Mṛdudaṇḍoparibhūyate. Yathārthadaṇḍahpūjyah’*)<sup>7</sup>. If punishment is given according to the crime of the subjects, the ruler and the ruled are conjoined with righteousness, prosperity and desire. If the case is otherwise, they are ruined totally with the discontentment arising out of desire and anger (*‘suvijñātapraṇīto hi daṇḍahprajāḥdharmārthakāmairyojayati. Duṣpraṇītaḥkāmakrodhābhyāmajñānāt ...kopayati.’*)<sup>8</sup>. The learning of *vārtā* which is the technical name of agriculture, animal husbandry and commerce is needed for the ruler only to do justice to his own employees and to control the enemies. The judge cum ruler’s own people as well others do not always remain under control with money and punishment (*Tayāsvapakṣamparapakṣam*

*ca vaśīkarotikoṣadaṇḍābhyām*)<sup>9</sup>. A considerate judge should resort to punishment at the end if he fails to bring the criminals under control by sweet words (*sāma*), necessary gift (*dāna*), principle of division (*bheda*). It gives us a useful methodology in the judicial procedure. Punishment is the last resort for bringing enemies or criminals under control. Before taking recourse to it the judge should use sweet and convincing words to rectify the criminals, failing which he offers some practical facilities like donations in cash or kind, other social facilities etc. In case of failure to other two methods the judge may take the help of the third one which is nothing but intentional creation of division among the group of criminals. This method is more political or diplomatic in handling the persons committing crimes. Even in case of failure in this method the last resort is prescribing punishment after considering the volume of crime. If the situation demands, the judge may think giving capital punishment to the criminals. It is said in the *KāmandakīyaNītisāra* that the judge should banish those people who maintain their livelihood after taking bribe from others and stealing others properties. Such criminals should be punished immediately without any delay after killing them secretly (*upāngśubadha* or *upāngśudaṇḍa*).<sup>10</sup>

Moreover, a ruler-judge is not morally eligible to rule others if he is addicted to hunting (*mrgayā*), dice-playing (*akṣa-krīdā*), women (*striya*). A question may be raised that customarily a ruler is found attached to these. Hence one point of caution is given to the ruler-judge that it is addiction which is prohibited but not little inclination (*atyantāsaktirniṣidhyate, natuīśadāsevanam*)<sup>11</sup>.

If the legal professionals have got such morality along with sensitive minds, they can do justice in a proper manner towards the offenders. National Knowledge Commission of India emphasizes the fact that one should provide a human touch to his fellow officers, subordinate staff and others associated to his enterprise. To speak frankly, legality without morality cannot save our society. We see there are a lot of legal prohibitive acts against child labour, torture over women, dowry system, pre-natal sex-determination, environmental protection, deforestation etc. yet illegal acts like pre-natal sex determination, use of children as labour, torture over women like trafficking, witch-killing, bride burning etc are going on in the society without caring the legal prohibitions. From this it is clear that legality cannot do wellbeing of the society if it does not join hands with morality. Morality comes from within spontaneously and hence no police force or legal

force can make us moral. Laws are there to prevent such unwanted incidents, but one should see so that these are implemented properly. The statutory warnings like-‘Pre-natal sex determination is a punishable offence’, ‘Cigarette smoking is injurious to health’ etc. are normally written in a very small font which is very much difficult even to read. From this one may gather an impression that as if the statutory things are as per law but they have nothing to do with practical life.

It is to be borne in mind that the term ‘justice’ has been originated from the word ‘just’, which signifies that an incident should be proved as it is but not otherwise. That is why, our legal system is supposed to be embedded in liberty, equality and justice and hence it is the tie that binds to bring all in one Nation. In a society it is crucial that judges render decisions which are not arbitrary but ‘just’ or reflective of our shared understanding. If too many legal decisions begin to seem unconvincing, unreasonable or less than fully fair, the society shall become unglued and lack of sense of community.

Considering the present hazards of the society the legal studies have extended the scope of study of environmental jurisprudence under Environmental Protection Act 1986, the Water Prevention and Control of Pollution Act 1974, Air Act under article 253, Forest Conservation Act, Green Bench etc. These acts will hardly be effective if the people are not aware of moral implication of environmental pollution, deforestation etc. On account of this legality and morality should go together. Law in isolation cannot do justice to the people.

In our Indian tradition there is only one word ‘*adhikāra*’ denoting both right and duty. When we talk about human right, animal right, legal right, is it free from duty? An individual cannot exert his own right if others do not perform their duties. Animals are not capable of exerting their right if the human beings do not have certain duty to protect them. Hence right and duty are the two sides of the same coin. I have right to have good quality education. I can exert my right of getting quality education if the teachers or school authority perform their duties perfectly.

In present day society we find the erosion of human values from every sphere of our life. Human beings are becoming too much professional day by day and hence they are more formal to their clients. The legal profession is not an exception to this. Hence some sensitization programmes need to be arranged to train the people

regarding revival human values in every profession so that there should be the treatment of clients with human touch. In legal profession when the criminals are given hard punishment, the judge will have same feeling of sorrow as the criminals are getting themselves due to having the same sensitivity of heart- “*Danditersāthedandadātākāndejabesamānāghātesarvaśreṣṭha se vicār*” (Rabindranath). Such is the case of ideal justice or justice per excellence due to having the club legality with morality.

References:

\*\* This paper is the revised version of the paper presented in The Department of Philosophy, Tripura University two years back in ICPR-sponsored seminar.

1. J.D. Kaplan (Ed) (1959): *Dialogues of Plato*, p.276, Pocket Library, New Delhi.
2. Raghunath Ghosh (1994): *Sura, Man and Society: Philosophy of Harmony in Indian Tradition*, Academic Enterprise, Calcutta, p.29.
3. *Arthaśāstra* of Kautilya-1.2
4. Ibid-1.3.
5. *Manusamhitā*-7.20.
6. *Medhātithi* on verse no.7.20.
7. *Arthaśāstra* of Kautilya, *Vinayādhikaraṇa*, 4th chapter.
8. Ibid.
9. Ibid, *Vidyāsamuddeśa*, 4th Chapter.
10. ‘*Duṣyānupāṅgśudaṇḍena hanyād rājāvilambitam/Adṛśyam vā prakāśam vā lokavidveṣamāgatān/Kāmandakīya Nītisāra*- 6.10.
11. *Manusamhitā* with *Medhātithi* on verse no.7.47.