

SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE (1990). By Rama Jois. Eastern Book Co., Lucknow, P. 170. Price Rs.125.

THE CENTRAL concept in ancient Indian jurisprudence is of "*dharma*". It was conceived to embody the rules of social order and was believed to be of divine origin. It was a broad concept and comprised law, religion and morality. It was binding on all including the King. The King under the Hindu conception of law was not the source of law but an arm of it. *Dharma* assigned to the King the duty to protect people and promote their welfare and maintain order in society so that they may be able to carry out their duties and functions in safety and security. Robert Lingat explains *dharma* in the following words "dharma is what is firm and durable, what sustains and maintains, what hinders fainting and falling." He says further, "applied to the universe, dharma signifies the eternal laws which maintain the world."¹

Dharmasastras had provided detailed framework of rules of private law but there were gaps in public law such as powers and functions of state and the King, criminal law and procedural laws, etc. These gaps were filled by the royal edicts or ordinances. The King was virtually free to issue ordinances according to his will to realise the objectives of the state within the broad parameters laid down by the *dharma*, viz., people's welfare and maintenance of social order. Much of public law in general and administrative law in particular developed through use of royal ordinances.

Reading through the book² one is struck with a sense of wonder by the wide range of legal developments in public law in ancient India which look so modern and contemporary. The ideas of the supremacy of the Constitution and the rule of law, independence of judiciary, separation of powers, freedom of speech and association and other fundamental rights, social welfare provisions like protection of children and women, concept of minimum and fair wages, compensation for wrongful dismissal, pension on retirement and laws relating to environmental protection had developed as is shown by the painstaking research of the author. These laws reveal a high level of social consciousness, civilisation and urbanisation.

The book is divided into three long chapters which cover, (i) concept of welfare state; (ii) state or social control through law; and (iii) administrative set-up and administrative justice.

In the first chapter the author discusses the supremacy of *dharma* or the rule of law. He quotes the *Upanishad*, and observes:

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1. See, Robert Lingat, *Dharma and Royal Ordinance in the Classical Law of India*, ch. 3 (1973).
 2. Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence* (1990).

"Law is the king of kings; Nothing is superior to law; The law aided by the power of the king enables the weak to prevail over the strong."³ Law is used here in the sense of righteousness.

A King was required to decide cases according to the rules of *shastras*. In the absence of a provision in the texts he was to follow the usages. He could not act according to his own fiat. Thus the supremacy of law was affirmed. Although the legislative activity of the King was limited there did remain a vast field in which it might operate by way of framing the rules for the enforcement of laws. The majority of the topics which come within the scope of administrative law fell under royal authority and he used it effectively by issuing ordinances or royal edicts which are the important sources of ideas on public law in ancient India.

The author refers to the remarkable royal edict issued by King Vishnu Sena in 592 A.D. It contained various directions to the state officers to uphold the rules of law, *e.g.* :

- (i) Property shall not be confiscated by royal officials disregarding the claims of heirs of the deceased.
- (ii) No person should be apprehended on mere suspicion.
- (iii) Wife shall not be apprehended for the offence committed by the husband.
- (iv) A case should be heard in the presence of both the parties,⁴ *etc.*

There are many other provisions imposing conditions to ensure rule of law.

A great concern for personal liberty and the rule of law was expressed by Kautilya. The author quotes Kautilya as follows :

The superintendent of a jail is liable to be punished :

- (i) for putting a person in jail without disclosing the ground for such detention;
- (ii) for subjecting prisoners to unjust torture.⁵

The king's duty to follow the rule of law was emphasised by Narada in the following words : "The King should try cases with great care and caution and should give decision according to law and adhering to the opinion of the Chief Justice."⁶ Manu emphasised the duty of impartiality. He said, "The King should not leave an offender unpunished, whatever may be his relationship with him."⁷

3. *Id.* at 24.

4. *Id.* at 32.

5. *Id.* at 102.

6. *Id.* at 39.

The idea of compensation to the victims of crime, a modern law concept, was affirmed by Katyayan as follows :

The King should cause restoration of stolen property to the owner. If it is not possible to restore the same property he must pay the owner the price of the stolen property.⁸

It is clear from the above passages that the King was required to act according to law and was guided by the Chief Justice on questions of law. Manu provides for the formulation of a new law by a *parishad* (an assembly of ten persons as representatives of the important classes of the society) wherever there is no provision in the traditional sources of law. Even though the King had powers to issue edicts in administrative matters it was a secondary legislative power like the delegated legislation in modern times. Thus we find a clear affirmation of the doctrine of separation of powers to uphold the rule of law.

There is an illuminating historical episode strikingly affirming the rule of law and protection of a poor individual against the power of the state officials. This is recorded in a study.⁹

The officers of King Chandrapida of Kashmir (680-688 A.D.) undertook construction of a temple on a certain site. On a portion of that site there was a hut belonging to a cobbler. He was asked by the officers of the king to remove his hut but he refused to do so. Not knowing what to do the officers reported the matter to the king. However, to their surprise the officers got a rebuff from the king who censured them for trying to encroach upon the land of the cobbler. The king ordered thus :

Stop the construction or build (the temple) somewhere else. Who would tarnish such a pious act by illegally depriving a man of his land?

If we, who are the Judges of what is right and what is not right, act unlawfully, who then would abide by law?¹⁰

Subsequently, the land was purchased by the king from the cobbler with his consent and for a satisfactory price. This incident is a remarkable testimony of the rule of law and a King's respect for law and peoples' rights. This further illustrates the supremacy of *dharma* (law) even in regulating a religious act like the construction of a temple.

Let us examine the welfare aspects of ancient Indian jurisprudence. Manu laid down as duty of the King "to protect the inherited property of a minor, until he returned from his teacher's house or until he ceased to be a minor." Further,

7. *Id.* at 39.

8. *Ibid.*

9. *Rajatarangini*, ch. IV, pp. 59-60.

10. *Id.* at 51.

it was stated that "the king should look after the welfare of the helpless, the aged, the blind, the cripple, lunatics, widows, orphans, those suffering from diseases and calamities, pregnant women, by giving them food, lodging, clothing and medicines according to their needs."¹¹

This is a remarkable passage in its wide range of the welfare functions of the King and could be an inspiration to a modern state.

The author quotes Robert Lingat on the King's duty of protection of his subjects as follows :

Numerous texts (Boudh, 1.10.1; M. vii. 144 and viii. 307, 308; Yag, 1.337; Nar., XVIII 48) establish a strict correlation between the duty of protection incumbent upon the king and his subjects' payment of tax to which they are assessed.¹²

The protection of fundamental rights, particularly the right to freedom of association and freedom of speech which are the pillars of democracy were given due emphasis among the various duties of the king. Narada laid down :

The king should ensure the observance of compacts settled among associations of heretics, believers in the Vedas (Naigamas), guilds of merchants, corporations (pugas), troops of soldiers, assemblages of kinsmen and other such associations.¹³

The king was the final authority to decide disputes which came to him directly or by way of appeal. What is most remarkable is that the unbelievers or critics of *Vedas* and established beliefs were free to form associations and their right was recognised and protected by the King. It was truly a right, democratic in spirit.

The ideal of equality was embodied and expressed in the most ancient of the *Vedas*.¹⁴ Thus it is stated, "No one is superior or inferior. All are brothers. All should strive for the interest of all and should progress collectively."¹⁵ It was reaffirmed in *Atharvaveda*. "All have equal rights on articles of food and water". *Manu*¹⁶ declared : "The king should protect and support all his subjects without any discrimination in the same manner as the earth supports all living beings."¹⁷ Hindu social order was not egalitarian since the growth of caste system and became rigid being based on birth. But in the earlier *Vedic* period stratification of society started on the principle of division of labour and was not

11. *Id.* at 41.

12. *Id.* at 42.

13. *Id.* at 47.

14. See, *Rigveda*, 5-60-5.

15. *Id.* at 49.

16. See, ch. IX, 311.

17. *Id.* at 50.

with the ideal of fundamental equality and dignity of all human beings. Distortions crept up later as a result of fossilisation of social order.

The second chapter discusses the content and classification of ancient Hindu law. It divided the whole corpus of law into eighteen topics or divisions. The law of master and servant is infused with a liberal and enlightened spirit and was more liberal than the English law of master and servant. *Sukraniti*¹⁸ advised as follows :

Wages to be considered as fair must be sufficient to procure the necessities of life from out of the wages. The wage of an employee should therefore be a fair wage, so as to enable him to procure all the necessary requirements of life.¹⁹

Land laws as drafted by Kautilya and quoted by the author were progressive and production oriented. He provided :

Land, if not cultivated by the owners, should be confiscated and given to others for cultivation, or it may be allowed to be cultivated by labourers and traders of the village.²⁰

There were laws for consumer protection, adulteration and environmental protection.

The author reveals a wide range of legal developments in public law which look so modern and meaningful even in today's context. The author's style is readable and simple. He has followed a narrative style. Deeper analysis of the basic concepts and their interrelationships is somewhat lacking. What were the remedies and procedures available in cases of violations of individual rights and against misuse of powers by the state officials should have been further researched. Whether something equivalent of writ jurisdiction as in English law was available in ancient India may be a question of great interest which may be pursued by other researchers in the field. This book will certainly stimulate a desire to explore further the jurisprudential vistas of ancient India.

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18. See, *Sukraniti* II, 813-14.

19. *Id.* at 69.

20. *Id.* at 77.

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