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## Hindu Jurisprudence

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## Hindu Jurisprudence

Hindu law is a personal law. In addition to its wide application in the Republic of India, it is also applied to Hindus in other countries such as Burma, Malaya, Kenya and Tanzania by virtue of their membership of a community. Within certain limits it may be said that Hindus take the law with them wherever they go.

Hindu law is on the threshold of great evolutionary—indeed revolutionary—changes. The age-old Hindu law, lost in the mazes of Sanskrit texts which none but a coterie of Hindu pundits could ever understand, was rescued to some extent by the forensic insight of the judicial committee of the Privy Council. Despite this attempt, it remained a mass of divergent and conflicting laws varying from school to school, from custom to custom and from place to place.

The law of any country is the product of the positive morality or culture of that country. Positive morality is evolved out of the environments of a given people at a given time. Law is not like fire which burns the same for the Persians as for the Greeks. "Hindu law" as said by John D. Mayne, "has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude. . . . No time or trouble can be wasted, which is spent in investigating the origin and development of such a system, and the causes of its influence."

To the Hindu jurist, law is nothing but a collection of human practices or customs based upon principles of morality and natural justice accepted by the general consensus of society at a particular time. That customs have been handed down to Hindus from the remotest ages and not allowed to pass into forgetfulness is due to the conservative nature of man and to the reverential regard with which each member of the community or tribe looks upon them. To violate a custom is, to a Hindu, nothing short of sacrilege. Thus, by right observance and constant practice, the traditional rules have always been kept in evidence and transmitted from generation to generation without in any way being warped by extraneous influences.

Law, as understood by Hindus, is a branch of *dharma*. Hindu law, in fact,

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consists of a very large number of local bodies of usage. It is not the command of any earthly sovereign; nor is it established by any political authority. The ancient Hindu law was made by human agents like the sages and philosophers of wide and long farsightedness in the same way as law is made today by human legislatures. The status of the king was regarded as subordinate to, and included in, the society of that period. The king was not entitled to make any statute by himself; he was simply to execute the law and apply it in deciding disputes in which he had original and appellate jurisdiction. The law is supreme and its sanction is not derived from extrinsic or accidental agency, for it contains its sanction within itself in the certainty that obedience to law will lead to welfare and its violation to misery. According to Austinian view, law in its normal form consists of commands issuing from the sovereign (king) and the duty of enforcing it is a self-imposed duty while, according to the Hindu conception the law emanates from a source superior to the king and the duty of enforcing it is cast upon him from above so that the infliction of punishment is itself regarded as a *dharma* as indicated in the well-known text of Manu:

Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have recognized punishment itself as a form of *dharma*.

The sages and philosophers who were apparently legislators in the modern sense of the term had of course no political authority, but they had the fullest social authority commanding the highest reverence. Hindu law is thus primarily the result of social organization while positive law, as enunciated by western thinkers, is the fruit of political organization.

In the jurisprudential thought of all civilized countries, custom has played a predominant part in influencing the development of legal institutions.

As most of the customs have a rational basis in necessities and convenience, a custom satisfactorily proved to hold sway in fact is self-justified and recognized by the courts of law. From the several decisions given by the Privy Council during the nineteenth and early twentieth centuries, it could be inferred that the Privy Council gave too much emphasis to custom. This must have been due to the influence of the historical school of jurisprudence which agitated the world of justice throughout the last century.

To westerners, existence is full of life and reality; to the Hindus it is a dream, an illusion. The Hindu enters this world as a stranger, all his thoughts are directed to another world; he takes no part even where he is driven to act and when he sacrifices his life, it is but to be delivered from it. The climate had also played an important part in shaping the destiny of Hindus. The ancestors of western nations found themselves settled on rugged hills and the hardening influence of a colder climate and the growing congestion in cramped surroundings led to the overthrow of religious conventions, which grew

unchecked in the more spacious and fertile plains and enervating climate of the east.

The Hindus thus fell an easy prey to the toils of priestcraft while others separated the religious rites and duties from the secular law and relegated them to the domain of moral duties. This early divorce of law from religion furnishes the master key to the comprehension of the two great systems, oriental and occidental jurisprudence.

Viewed today, the principles of Hindu law constitute an anomaly unparalleled in the history of the world. Law, no less than life, must obey the principles of change, in order to be vital, to adapt itself to altered social conditions. It is a truism that old dogmas melt in new currents of thought. Law must necessarily be dynamic, not static, if it is to be assimilated to the force of milieu. The old race of commentators who by interpretation, annotation, and analogy brought the law in line with altered social conditions is extinct and their occupation is gone.

It is gratifying to note that the Indian Parliament has set its hand to the task of lifting the law out of archaic grooves, to secularize and codify the law. The government, though sympathetic, finds itself confronted with a powerful volume of orthodox opposition, which resists its codifying ardour. In spite of this sustained opposition, the renascent India of the post-independence era has brought about a substantial modification in certain branches of Hindu law by a series of enactments intended to ensure a uniform civil code for Hindus in the whole country.

In view of the fact that Hindu law has suffered from lack of precision and certainty because of its decentralized complexities and scattered character, the codification attempt represents a giant leap forward. After a few half-hearted attempts in earlier years, a major attempt at codification was made in 1947 when the Hindu Code Bill was introduced in the Indian Legislative Assembly.

Due to the hostile reception it received in the assembly, the bill was referred to a select committee which made drastic changes in the original proposals. In spite of these changes which affected the character and substance of the bill considerably, prolonged discussion and a plethora of amendments in the assembly virtually killed the bill. After this abortive attempt, fresh efforts were made to codify the law in a piecemeal fashion as a result of which the Hindu Marriage Act of 1955, the Hindu Succession Act of 1956, the Hindu Minority and Guardianship Act of 1956, the Hindu Adoption and Maintenance Act of 1956 and the Dowry Prohibition Act of 1961 were enacted.

The basic purpose of these acts was to amend and codify the principles of Hindu personal law and to see that the prevailing variety of customs should vanish. The multitude of reforms provided in these enactments abrogates and overrides most of the rules of Hindu law previously applicable to Hindus whether by virtue of any Sanskrit text, custom or usage. Uniformity was also

imposed on all Hindus with very rare exceptions.

The concept of marriage as a sacrament conditioned the growth of the law of marriage as an indissoluble union. Indeed even the death of the husband did not dissolve the tie for the wife until the legislature during the British administration stepped in and permitted the widow to remarry in 1856 by the Hindu Widows Remarriage Act.

Apart from making some other minor changes in the civil forms of marriages, the British, dictated by their settled policy of non-intervention kept the rules of pure Hindu law in the main intact and unaffected. Against this background, the Hindu Marriage Act, 1965, has not only codified the Hindu law of marriage but it has amended it in important respects. Some of the changes would even seem revolutionary and it upholds the equality of sex. The principal changes made by the act are (1) the removal of restrictions on marriages between Hindus (including Jains, Sikhs and Buddhists) belonging to different castes; (2) the prevention of bigamous marriages; (3) the introduction of divorce and judicial separation; (4) the recognition of relief by way of restitution of conjugal rights, and (5) the abolition of the two schools (Mitakshara and Dayabhaga) in relation to the prohibited degrees for the purpose of marriage.

The Hindu Succession Act, 1956, has simplified and unified the law of succession and in particular amended the law of intestate succession considerably. For example, the limited ownership of a widow, known as "widow's estate" or limited estate is abolished and converted into full ownership. The distinction between male and female heirs on succession to a man as well as woman is removed and both males and females of equal degree of relationship are treated on equal footing. The rules of succession are made uniform for all male Hindus irrespective of the schools to which they belong.

The Hindu Minority and Guardianship Act, 1956, supplements the provisions of the Guardians and Wards Act of 1890. The new act enables the remarrying widow to retain guardianship, widens the guardians' intrinsic powers of alienation, and gives the mother the right to appoint a testamentary guardian. Among other things, it also deprives hermits (vanaprastha) and ascetics (yati or sanyasi) of the duty to act as guardians of their own children.

Adoption under the Hindu law is primarily a religious act. It is a fiction of Hindu law by virtue of which, subject to fulfillment of certain formalities, a person ceases to be the child of his or her natural parents and becomes the son or daughter of his or her adoptive parents.

The Hindu Adoptions and Maintenance Act of 1956 changes the old law of adoption considerably. The act is more an amending than a codifying one. Overriding the religious motive underlying adoption, the present law allows not only an adult person, married or unmarried, to adopt a child—a girl as well as a boy—but permits even an adult woman—unmarried, widowed or divorced—a right to adopt a child by herself.

The new law is more concerned with the material welfare of man rather than his spiritual salvation. Hence a Hindu is permitted to adopt a child irrespective of sex, though according to religious scriptures a girl is not capable of conferring any spiritual benefit on the person adopting. The new law has also made radical departure from the old one in respect of (1) the capacity to adopt, (2) the capacity to be adopted, (3) the capacity to give in adoption, and (4) the effect of adoption.

Hindu law has very generous provisions in regard to maintenance. It accords the right of maintenance on a larger number of persons than any other legal system. The new act does not make substantial changes in the old law, the important amendments made are: (1) an illegitimate daughter is given a right of maintenance against her father and his estate in the hands of his heirs; (2) it has been made obligatory on the part of a Hindu woman to maintain her legitimate and illegitimate children during minority, her aged or uniform parents and certain other specified dependents; and (3) the distinction between a legal duty and a moral one to maintain is abolished.

The Dowry Prohibition Act 1961 is another feather on the reformers' cap. By "dowry" is meant any property or valuable security given or agreed to be given between the parties to the marriage, or by any person to any person at, before or after the marriage as consideration for the marriage. The present act makes it an offence to give, take or demand a dowry. Where a dowry is in fact given (for under the maxim *factum valet* the transfer, though prohibited, is valid) the bride herself is entitled to it. Agreements for giving or taking dowries have also been declared void.