



## LEGAL STATUS OF HINDU, MUSLIM & CHRISTIAN WOMEN A COMPARATIVE STUDY

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Of all the social groups within the State, the family is at once the most closely knit, the smallest and the most enduring. It has always been recognized by philosophers, jurists and political scientists, that the closeness and intimacy of family ties make the relationship between State and family a problem of special importance.

W. Friedman, Law in a Changing Society  
Family is a fundamental and social unit consisting basically of two adults, a male and a female living in one household co-operating in many activities and frequently producing and caring for children. This gives rise to various legal relationships of great social importance, particularly those of husband and wife (including questions of the creation and dissolution of that relationship), parent and child, legitimation, adoption and problems of individual, joint and community property and of inheritance.

Legal systems commonly treat the family as a social institution to be preserved and supported. In many systems of different times rules have been sought to encourage family life, favouring marriage, legitimate children and succession within the family. This object has justified provisions in such fields as property, succession, evidence and criminal law as well as in family law itself.

David M. Walker, The Oxford Companion to Law

### MEANING OF FAMILY

Family is the fundamental biological unit regularizing sexual relationships, and psychological and emotional intensities. It is a social unit, a small but the most important part of the social organisation. It is an all-pervading relationship and is found at every given point of time in history.

### FAMILY: MEANING, ORIGIN, TYPES AND FUNCTIONS

Adoption, often consisting of a single household, interacting and communicating with each other in their respective social roles of husband and wife, mother and father, son and daughter, brother and sister, creating a common culture. Family wields enormous influence on the attitudes of its members and it moulds their character. Confucius recognized the importance of family and said, "[if you want to improve the society, improve the family.]"

The word "family" always signifies a group, and the plurality of persons is an essential attribute of a family. A single person, male or female, does not constitute a family. He or she would remain, what is inherent in the very nature of things, an individual, a lonely wayfarer till perchance he or she finds a mate. A family consisting of a single individual is a contradiction in terms.

### Friedmann's view



According to Friedmann, a family is a well-knit unit existing from ancient times. Compared to a State, the intimacy and well-knitness of a family has created various problems for the State. Those who subscribe to the idea of sovereignty of the State say that family is a hurdle which creates a number of problems and confusions insofar as faithfulness to the State is concerned and that for this reason, family must be destroyed.

### **ORIGIN OF FAMILY**

#### **Prehistoric period**

A Primitive human beings existed like beasts. At night, they used to climb a tree for safety, and eat plants and flesh for food. Life at that time was a struggle; to live was a great unknown challenge. In the beginning, there was nothing like a rule. The strong and the powerful had the lion's share, and that was considered just at that time. Thousands of years must have passed in the emergence of law on this earth. Prehistoric man must have perceived and reflected on the functioning of the laws of nature. This observation must have produced a thought in man's mind to regulate his life by some contrivance resulting in the birth of some rules.

#### **Birth of groups and clans**

In the course of transition from animal existence to civilised life, this struggle for life gave birth to various groups; and when one group came in contact with the other, they got together and formed clans and tribes and lived together. These clans also fought with other clans for food and females. As time passed, from the growing numbers of clans sprang settlements or colonies. Somewhere within this time-frame only evolved the concepts of marriage.

#### **Ubi societies jus**

As time passed, at some auspicious moment, a thought must have crossed

somebody's mind that some rules must be made for society. Snatching food, children and females from others was not good and that if others agreed with and understood this, the struggle and fear for life would lessen. From this idea must have come into existence an understanding or compromise between clans and colonies. This must have given rise to the concept of "family". Thereafter, this idea of living together must have caught momentum, which in turn gave birth to "society". The end result was the birth of law. Roman law, therefore, has rightly stated *ubi societas ibi jus* (where there is society, there is law).

#### **TYPES OF FAMILY**

The basis of family is varied. It can be based on ancestry, authority, affiliation, size, structure, residence or even plurality. On the basis of the grounds stated above, we can say that there are various types of families

Hindu joint family remotely, from a common ancestor and it includes their wives, widows, A Hindu (joint) family consists of all males lineally descended, however adopted children and unmarried daughters. Shastric Hindu Law treated even the widowed daughters living in their parental family, illegitimate sons of male members and the female slaves as members of a Hindu joint family. The daughter, on marriage, ceased to be a member of the family of her birth and acquired membership of her husband's family. A joint family lived under one roof; it was a joint venture of persons related closely by blood and they carried on the joint family occupation by joint efforts, pooled their income and enjoyed the fruits of their efforts together. Normal presumption of a Hindu family is that it is joint in food, worship and estate, and the presumption is stronger in case of near relations. The remoter we go, the weaker



does the presumption become. A Hindu joint family is a creature of law. It cannot be brought into exist except by adoption. The absence by agreement amongst strangers, surviving male member is known as the Karta or manager of the family. The fundamental principle of the Hindu joint family is sapinda ship, and Rama Jois, Legal and Constitutional History of India, Vol. I (Universal Law Publishing, 1984) 225-26.

**MARRIAGE** being a creature of law it cannot be created by act of parties, except in the case of adoption.

Roman joint family w Joint family under Roman law was very similar to the joint family under Hindu Law. The head of the family was called pater families. He exercised unlimited authority over his descendants who were called filiusfamilias. Such authority of the head of the family was described as patria protests®. There was a similarity in the membership of joint family under Roman law and Hindu Law. But the difference that existed was that unlike the unlimited authority given to the pater families over the life and liberty of the filiusfamilias, a Hindu father was not given the power to deal with the life and liberty of the members of his family as he pleased.

#### **FUNCTIONS OF A FAMILY**

A family has the following important functions to perform:

1. It is a legalized marital relationship. Both the partners obtain exclusive sexual satisfaction from each other which sets off familial bonding. Family controls the sexual impulses of its members often acting as deterrent to polygamous behavior, thus preventing disruptions in the larger social context.
2. As per Hindu belief, the very object of marriage is begetting children. By procreation of children, the basis of a

closely knit family relationship is laid down.

3. Familial relationships provide a buffer against emotional turbulences, shock, pain and mental trauma; it provides love, warmth, a sense of belonging and well-being to its members.

4. Family influences the conduct and character of its members. It helps develop and transmit traditions, choice of religion, value systems and social norms. It is, therefore, a strategic social unit.

#### **FAMILY: MEANING, ORIGIN, TYPES AND FUNCTIONS**

An institution devised by society to sanction the union and mating of a male and a female for the purposes of

1. entering into sexual relations
2. procreation of children
3. establishing a household, and
4. providing care for the offspring of marriage.

Each religious community, as and when it developed, gave its own meaning and definition of marriage. As will be discussed later, Hindus traditionally consider marriage as a sacrament and an indissoluble union for procreation of a son for obtaining salvation. According to Muslims, it is a civil contract and an Ibadan (religious duty). Among the Parsis, it is contract and the Ashirwad ceremony is an essential part of it; and according to Christians, it is a contract solemnized by a Minister of Religion.

Western outlook in most Western societies, marriage is exclusively a union of one man and woman forever, excluding any third party.0 This is a monogamous marriage. From this fundamental principle arises the idea of legitimate and illegitimate children. This principle is actually an ideal concept, but facts are different. Consequently, the concept of marriage is under serious scrutiny in certain parts of the world. However, in



Eastern countries, like India, marriage is still a revered institution.

### **MODERN FAMILY AND CURRENT DEVELOPMENTS**

From the beginning of the 16th century, a clear transformation was perceived in the concept of marriage. Industrialization, Renaissance and Reformation movements have effected a change in the idea of a family. Marriage rules were loosened and the idea of a small family came into existence which resulted in the freedom of individuals.

Modern family is quite different from the ancient family. Villagers come to the city in search of jobs and business opportunities. The result is that the extended family that they leave behind in the village eventually cease to exist. People coming to cities do not care for their village. While the old were an integral part of the ancient Hindu family, old age homes are an option for the modern octogenarian. Previously, earning money was monopolized by males, while today, plenty of modern families are constituted of a working couple, with the responsibility of child care having devolved upon social institutions, Science has made child-bearing easy, and law has done the same with birth control. This has resulted.

### **MODERN FAMILY AND CURRENT DEVELOPMENTS**

In greater liberty and empowerment of women. An offshoot of this new development in the modern family is experimentations with “marriage”, as in live-in relationships. This implies cohabitation between a couple for a particular period, so to say, a trial marriage. If the two cohabitants do not find such cohabitation congenial, they can choose to not solemnize their relationship in marriage afterwards. Such

is the position of a family in the 21st century.

### **HINDU LAW**

The Indian soil, as observed by Dr Julius Jolly, has not only been productive in deep thinkers, eminent founders of world religions and gifted poets, but it has also brought forth a system of law, which after having spread over the vast continent of India, penetrated at an early period into Myanmar and Thailand, and has become the foundation of the written law in these two countries.

Being The most ancient legal system of Jurisprudence, which developed in India, goes far back to a period of more than 6000 years—a period before 4000 BC-when the Rigveda is believed to have had its beginning. Hindu Law was not the result of legislation. It is not “law” as is understood by the world in modern times. It is not pure customary law like English common law. As observed by the Madras High Court, "Hindu Law consists of a body of rules contained in several Sanskrit books regarded as authoritative through ages. That successive rulers recognized and continued these rules unaltered is a proof of its authority which it acquired in its enforcement. The British rulers in India and Indian legislation affirmed its applicability to Hindus so far as they were not in conflict with the statute law. Hindu Law, as understood, is a branch of dharma.' It covers the civil, religious and moral systems of law which in modern times are separate. Hindu Law was never static; it was, and is, progressive.

The Hindu Law to be administered by the courts consists of Shastras which claim divine sanction. The Hindu Law also consists of the usages or approved habitual practices of those communities whose caste status depends upon the degree of conformity to the usages of the Shastras. is Mayne says, “Hindu Law has



the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude.” The system, as modified through centuries, has been in existence for over 5000 years and has continued to govern the social and moral patterns of Hindu.

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Mayne says, “Hindu Law has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude.” The system, as modified through centuries, has been in existence for over 5000 years and has continued to govern the social and moral patterns of Hindu life with amazing catholicity of vision, harmonizing the diverse elements of Hindu cultural life.<sup>16</sup> Despite Muslim and later British supremacy in India, Hindu Law survived, first as religion and custom, and later as law applicable particularly to personal and family relations, though even in this respect this represented a restriction of the ambit of Hindu Law, in that law on Western lines came to apply to other relationships. In its application by British judges, this law was seriously distorted by the import of ideas from English Law with similar effect. The effect of the British rule was, generally, to limit the sphere of Hindu Law to family organization, land tenure, and succession. The resulting amalgam of Anglo-Hindu Law was expounded in various treatises by J.D. Mayne and D.F. Mulla. After India won independence, it formed its own Constitution. Caste system has been

rejected and India has become along Western lines so as to achieve a just social prohibited a secular state now. It has replaced law related to religion by secular law order and has discrimination on grounds of caste or sex.

Who is a Hindu?

It is important to establish who is a Hindu before we delve into Hindu Law, in order to understand which particular communities are or can be governed by the tents of Hindu Law. Originally, the word Hindu had an intimate relation with a geographical area; with the efflux of time, it obtained a religious color. Those who lived on the other side of time Sindhu River were known by the Greeks as Indio. In the holy book of the Parsi community, Zend Eastvale of the Sindhu River is known as Hatta Hindu. Thus, a mixture of Hindu culture and religion means Hindutva (not to be confused with “Hindutva”). As far back as in 1903, the Privy Council in Bhagwan Koer v. J.C. Bose (Bhagwan Koer)<sup>1</sup> observed:

We shall not attempt here to lay down a general definition of what is meant by the term 'Hindu'. To make it accurate and at the same time sufficiently comprehensive as well as distinctive is extremely difficult. The Hindu religious is marvelously catholic and elastic. Its theology is marked by eclectic cist and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamars who profess Hinduism, but who eat beef and the flesh of dead animals, are however low in the scale included within its pale. It is easier to say who are not

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<sup>1</sup> (1903) 30 IA 249.



Hindus, and practically the separation of Hindus

Non-Hindus is not a matter of so much difficulty. The people know the differences well and can easily tell who are Hindus and who are not.

There was a period when it was said that "a Hindu is born, not made". But with the enactment of the Hindu Marriage Act, 1955 (HMA), this concept of Hindu underwent a drastic change.

The HMA defines a Hindu and the application of the Act is given in Section 2, which says:

Application of Act.-(1) This Act applies –

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Vira Shaiva, a Lingayat or a follower of the Brahmo, Prathama or Arya Samaj,
- (b) to any person who is a Buddhist, Jayna or Sikh by religion.
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs; and
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section. In short, the following persons are governed by Hindu Law:

1. Those who are Hindus by birth.
2. Those who follow Hindu religion." [S. 2(1)(a)]
3. Those who are converts to Hinduism, 20 or those who by reconversion accept Hindu religion again. (S. 2(1), Explanation. (c)]
4. Those who are known as Hindus.
5. Jains, Sikhs and Buddhists. [S. 2(1)(b)]
6. Legitimate and illegitimate children of Hindu parents. (S. 2(1), Expl. (a)]
7. Those children one of whose parents is a Hindu, Jain, Sikh or Buddhist and who are brought up as Hindus. (S. 2(1), Expl.(b)]
8. Those who have an intention of becoming a Hindu and whose behavior so exhibits their intention.<sup>21</sup> [S. 2(1), Expl (c)]
9. Illegitimate child of a Christian father and a Hindu mother who has been brought up as a Hindu. (S. 2(1), Expl. (b)]
10. Sons of Nayakas [who have become (dagri)] who have been brought up as Hindus.
11. Brahmo Samajists, Arya Samajists and Santhal community and Lingayats who are considered as Shudras and are accepted as such by others as Hindus. [S. 2(1)(a)]



12. One who is born as a Hindu and has not renounced Hindu religion, even though his dealings and eating and drinking (1449) differ from the orthodox people.

13. A child whose name and surname is like that of a Hindu, whose father was a Hindu by birth and mother a Christian woman. 14. Malayali Brahmins.

In *Shastri Yagnapurushdasji v. Muldas Bhandardas Vaishya*,<sup>2</sup> Gajendragadkar CJ observed that it is extremely difficult, though not impossible, to define the Hindu religion in the way the other religions are defined. This is because, unlike other religions, Hinduism does not revolve around any one prophet or God, any one philosophy or dogma, or any one mode of worship. It is all-pervasive. It embraces numerous views and ways of life. Theists or atheists, idolaters or iconoclasts, those having faith in the Vedas or those calling them the works of hypocrites, those believing in the oneness of god or those believing in crores of gods and goddesses, those having faith in casteism or those having pronounced enmity with it, those who believe in temple-rituals or those who do not believe in it, or those who due to political compulsion do not openly proclaim that they believe in temple worship, etc. can be equally good Hindus.

Among the Hindus, the Vedas are read with respect. There are various ways of salvation as per Hindu religion. Moksh or nirvan (Fafor)i.e., salvation is the final goal or ideal of this religion. Hindu religion embraces within its compass the Sikhs, Jains and Buddhists.

The Privy Council, in *Bhagwan Koer*, held that lapses from orthodoxy would not put a person outside the pale of Hindu Law. One who did not believe in

Hindu scriptures, its rituals or even in some dogmas and even the dissenters from Hinduism like Sikhs, Buddhists, Jains, Arya Shamanists and Brahma Shamanists, etc., are nevertheless Hindus. Illegitimacy does not bar the application of Hindu Law, provided the illegitimate child is brought up as a Hindu.

As can be seen from the section given above and what has been observed by the Madras High Court in *Ratanshi D. Morarji v. Administrator General of Madras*<sup>3</sup>, those who renounce their religion and convert back to Hinduism will also be called Hindus. For conversion to Hinduism, there is no formal ceremony. What is important and necessary is an honest and strong determination to accept the Hindu religion.

As far as caste among Hindus is concerned, Manu explained that caste in Hinduism is not dependent upon birth but upon actions; and a Shudra may, by his actions, raise himself to the position of a Vaishya, Brahmana or Kshatriya. However, this has been forgotten by courts and the evil of presuming or assigning caste of a person on the ground of birth alone has grown deep-rooted in the Hindu society, since the study of the Vedas and old Shastras was given up. A Migration and its effect.-What about the Indian who opts to live outside India or acquires citizenship of a foreign nation? What happens to the family and property of a Hindu who died as an American citizen in the US? Since this Indian ceased to be an Indian resident or citizen, would Hindu Laws of succession be still applicable in This case- A Hindu family residing in India is presumed to be governed by the Hindu Law prevalent in

<sup>2</sup> AIR 1966 SC 1119.

<sup>3</sup> AIR 1971 SC 2352



that place. When a Hindu family leaves one district and goes to another district, that does not affect its personal law. However, if it is shown that the family by such transfer intended to change its personal law and has in fact so changed it, the presumption would not be applied. In matters of personal relations and status, there is no *lex loci* in India. Consequently, every person is governed by the law of his personal status. This is so because the existence of a *lex loci* is inconsistent with the existence of personal communal law. A Hindu family migrating from one part of India to other carries with it the law of the place of its origin. Of course, this presumption on production of proof. Similarly, when a family migrating from India to a foreign country settles there and acts in a manner denoting that it has cut itself off from its old environment, a presumption arises that it has adopted the laws of the people among whom the family has settled.

Thus, it is the law existing at the time of migration to govern the migrated members until it is renounced. Strong proof is required for establishing that the party has given up the law of origin in favor of a different system of law. Khojas and Kutchi Memons of Kutch and Kathiawar, on migration to Chennai and other parts of India retained the rules of Hindu Law (*Mitakshara*) in general, not only in matters of succession and inheritance but also with regard to their property including the Hindu concept of coparcenary and survivorship.

#### CHAR

Manu, the ancient Hindu law-giver, mentions four sources of dharma or law (ancient sources):

1. The Vedas (i.e., the Shrutis)
2. The Smritis or Dharma shastras
3. The conduct (or customs) of the virtuous

4. One's own conscience

Today sources of Hindu Law are (modern sources)

1. Judicial decisions
  2. Legislation
  3. Equity, justice and good conscience
- Sources of Hindu Law can also be understood as
- 1) formal sources, and
  - 2) material sources.

When Parliament or the legislature instructs that in particular matters Hindu Law should be applied to Hindus, that direction is a formal source of law. Material sources mean the matter from which something is or can be made.

Ancient sources

Shrutis or Vedas

The word Vid means "to know" and Veda means "knowledge". The four Vedas constitute the foundation of Hindu religion. Shrutis or Veda is that which has been heard by the inspired sages and verbally handed down from generation to generation. It is what is known as revelation. It is divine revelation containing the very words of God. Vedas are, therefore, regarded as infallible and considered as the supreme authority by all law-givers. They contain the root and the original sources of dharma. As expressed by Manu, the law-giver, Shrutis and Smritis contain and lay down dharma. However, the later and less orthodox writers do not refer to the Shrutis at all as a source of positive law.<sup>46</sup> The Vedas are four in number.

1. Rigveda,
2. Yajurveda,
3. Samaveda, and
4. Atharvaveda (or Atharvaveda).

The Rigveda is the oldest and consists of hymns and songs in praise of the forces of nature. The Yajurveda deals with rituals and sacrifices and the mantras in this connection. A mantra is a





sacred prayer to any deity; it is a word or a sound repeated to aid concentration when meditating. The Samaveda contains prayers composed in meter and set to music. The Atharvaveda is devoted to magic, spells and incantations.

These Vedas contain only the fundamental principles of Hindu Law; and the law prevailing amongst the Hindus at present is not exactly the same as enjoined by the Vedas. Gradual departure from the Vedic tenets or principles brought several evils in this law and modern legislation tries to remedy them. For example, the Vedas did not allow polygamy or child marriage, but the practice came into vogue amongst the Hindus about 2000 years ago. It was only with the enactment of the HMA that this evil was put to an end.

The Vedas include auxiliary works called Vedanta's which are six in number:

1. Siksha-The science of proper pronunciation
2. Chhandas--Prosody
3. Vyakarana-Grammar
4. Nirukta-Etymological definition of words found in the Vedas
5. Jyotishya-Astrology
6. Kalpa-Ritual ceremonies

Further, there are 18 Upanishads which are considered as a part of, and supplemental to, the respective Vedas. The Vedas and Upanishads and other texts which together constitute the Shruti are mainly religious books. There are no special chapters pertaining to law or provisions dealing directly with law in these religious texts.

#### SOURCES

Smritis or Dharma shastras

"Smriti" means "recollections" or quintessence of traditional conduct or the remembered wisdom of the race. The basis of Smriti is Shruti or Vedas. They are human creations. Since Shrutis contained little of positive law, the Smritis

constituted the principal source of Hindu Law. The early Smritis were termed as Dharma sutras (800-200 BC).

The Smritis constitute the basic structure of Hindu Law and lay down or declare the rules and precepts of dharma. The Smritis are also called Dharma shastras and this word is very wide, connoting something more than mere law books. Dharma shastras are systematized knowledge, its injunctions being religious, moral, social and legal.

Smritis are of two kinds:

1. Sutras
2. Dharma shastras

The sutras appeared earlier in point of time compared to the Dharma shastras which appeared later.

#### Sutras

According to the learned persons, a sutra is a pithy statement being unambiguous, substantial, universal and logically sound. 50 Sutras can be said to be aphorisms of law Aphorisms being a short witty remark which contains a general truth or broad and general principles of common sense and justice which are concise in expression, comprehensive in meaning and very easily committed to memory. To facilitate the process of remembering the traditional rules of dharma and the rules for the special observance of each group, the sutras came to be formulated into three classes:

1. Srauta sutras deals with rituals
2. Grihya sutras deals with domestic ceremonies
3. Dharma sutras deals with law

Dharma sutras of Gautama, Baudhayana, Apastamba, Vasistha and Vishnu are the principal extant in Dharmasutras. Apastamba displays a modern outlook and denounces the practice of Niyogi or vicarious primogeniture. Vishnu's exposition is in



prose and at times in poetry or metrical verse. He deals with rules of civil and criminal law. A new feature of his work is that sometimes he proves to be a forerunner of our time. According to him, after the death of the father, when there is partition among the brothers, not only is the mother entitled to share equally with the sons, but the unmarried sisters are also entitled to their aliquot (meaning, parts of the whole) shares. Gautama's Dharmasutra is the oldest Dharmasutra covering nearly every aspect of the Hindu dharma, like the four ashramas, varnas, samskaras, etc. According to Gautama's Dharmasutras, administration of justice shall be regulated by the Vedas (the institutes of the sacred law), the Vedangas and the Puranas. Customs of countries, castes and families which are not opposed to sacred laws also have authority. Brihaspati Smriti also expresses instructions to this effect. Baudhayana has presented his work in the form of prashnas or questions.

#### **Dharma shastras**

Dharma sutras served as a basic background for the dharma shastras to come up. Rules laid down in the Dharma shastras are those:

1. achara - it is very close to morality in its implication
2. vyavahar — it depicts those rules which the king or the State applied in settling disputes in the administration of justice; and rule of penal provisions for correction
3. prayaschit—it is the of wrongdoing. It can also be said to be a sanction for securing observance of rules.

The principal Dharma shastras are by Manu, Yajnavalkya, and Narada. Manusmriti is the most important of these. It is said that in the original Manusmriti there were 1000 chapters and 1,00,000 verses (7611497:). Manusmriti,

available at present, contains only 12 chapters and 2686 verses. It contains the following subjects: 1) origin of the world; 2) sixteen Samskaras; 3) marriage; 4) yagya; 5) good conduct; 6) duties of females; 7) duties of a king; 8) suits; 9) crimes; 10) justice; 11) taxes, obligations of males and females; 12) punishment to criminals; 13) duties of the four sects; 14) penance; 15) condition after death due to worldly activities; and 16) the nature of one's atma or self-realization.

Yajnavalkya is next to Manu in date and authority. His Smriti is considered as the best composed and most homogeneous Dharmashastra. Like most of the Smritis, Yajnavalkya Smriti also draws a lot from the Manusmriti. However, there are some highly impressive and influential changes that have been made by Yajnavalkya in the fields of jurisprudence and statecraft. It is much more systematic than Manusmriti. This Smriti is divided into three parts: Acharyadhyaya, Vyavaharadhyaya and Prayashchitadhyaya. It consists of 1010 verses. Yajnavalkya has given a respectable position to both women and Shudras in his Smriti.

Narada Smriti came later in time than the Yajnavalkya Smriti. Narada states, in the beginning of his Smriti, that it is an abridgement of the Smriti of Manu which is said to have been originally of around one lakh verses. There are about 50 verses that are common to Manu and Narada Smritis. It basically deals with positive law, i.e. vyavhar and not achara or prayashchit. It is one of the first legal codes which has been kept away from the religion and morality of man. It contains three chapters on judicial procedure and assembly. Narada favors remarriage in cases where husband is not known, is



dead, is impotent or becomes a sanyasi or outcaste.

### **Puranas**

Puranas are codes which illustrate the law by giving examples of its application. In *Lekhraj Singh v. Gang Sahais*, the Allahabad High Court has observed that the place of the Puranas is either between Shrutis and Smritis or more probably after them. Colebrook considered the Puranas as a supplement to the scripture and according to him they constitute a fifth Veda. There are 18 Puranas, 18 Up-puranas (348), and 18 Auppuranas (3īta gerot). They explain and illustrate law.

### **Where there is conflict of ideas in the texts of "Smritis"**

In case of conflicting ideas or opinions found within the texts of Smritis, various methods to resolve the same were invented:

1. If what Smriti says is in conflict with what Manu has said, it is to be discarded in favour of Manu's dictum (Brihaspati).
2. In case of a conflict between texts within the Smritis, decision should be arrived at by means of reason, i.e. yukti (Narada).
3. A party to a dispute may prefer one of them (Jaimini).
4. The Smriti which follows nyaya or equity should prevail.

Thus, in case of conflict, Smritis yielded to the authority of the Vedas or Shruti. The conduct of the virtuous or the rule of guidance to be deduced from the practice of men learned in the Vedas occupied, in the beginning, a subsidiary and secondary place only; but as Hindu jurisprudence developed, the importance of this source in the guise of customs increased and it increased to such an extent that it acquired an overriding authority over the Shrutis and the

Smritis. This place is occupied by it even today, provided its validity is established by undergoing certain tests and the courts recognize it.

Where no guidance was available from any of the first three sources, an individual who was free from hatred and inordinate affections was termed as a free to follow the voice of his own conscience. This may be the light of reason. It is a subsidiary source of law and its exercise was limited because of its indefiniteness. In course of time, however, it died a natural death. Moreover, on grounds of public policy, its authority would not be recognized. Such liberty or freedom is given to a judge exercising his discretion at the time of administering justice. In case of absence of authority, the judge would decide according to the principles of justice, equity and good conscience. However, as decided by the Privy Councils, justice, equity and good conscience do not mean the judge's private opinion as to what is right or wrong, but they mean the rules of English Law insofar as they are applicable, to Indian conditions.

### **Judicial decisions**

Important source During the British regime, Hindu Law was administered by the British judges with the help of Hindu Pandits. This continued till 1868, but this and the Pandits interpreted the Sanskrit texts for them to apply to the disputes and arrive at a decision. This gave scope for misinterpretation and the court itself was not confident of its own opinion.<sup>198</sup> However, the Judicial Committee and the High Courts in India have given judgments in such a large measure that all the important points of law can now be found in the law reports, and to this extent it can be said that these decisions have supplemented the commentaries.



Strictly speaking, legislation and judicial decisions are not sources but they have modified and supplemented pure Hindu Law to such an extent that they have now emerged as important sources of Hindu Law. Just as the commentators in the past bridged the gulf between law as enunciated in the text and the changing society, the superior courts are now discharging the same function, though a delicate one. Article 141 of the Constitution recognizes the Supreme Court's role in this regard. One must remember that the progress which Hindu Law has made in the 19th and 20th centuries is due to court rulings entirely. As almost all the points of Hindu Law are to be found in law reports, the pride of place can be given to judicial decisions. Its importance is stressed by Bose J in a Nagpur Court decision," saying:

View it how you will, the laws we are administering are judge-made laws. The ancient sages said nothing about the present matter, and even when they spoke, they often spoke with conflicting voices, and when they did not, sometimes spoke so enigmatically that the learned and the able commentators were unable to agree as to what they meant. In the circumstances, it is the courts which have molded the Hindu Law and made it what it is....

#### **Duty of courts-As observed by the Privy Council in Collector of Madura**

The duty of a court, while administering Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities or Codes (smritis), as to ascertain whether it has been received by the particular school (or sub-school) governing the locality with which it has to deal, and has there been sanctioned by usage; for 'under the Hindu system of law,

clear proof of usage will outweigh the written text of the law.

Similarly, the duty of a judge is to ascertain the law as laid down by superior courts in India as well as by the Privy Council. It is well settled that the Hindu Law as administered in this country is not the Shastric law, but which has been declared as law by courts of law.

#### **Legislation**

Rules declared as law by a political sovereign of society, group or State are called legislation. In a constitutional polity, the Constitution of the State is sovereign and an authorized group makes and declares rules that are known as legislation. Our present legal system is also based on this theory.

Legislation is the strongest source of law and it prevails over all other sources. As seen before, law and religion in India were conceived of as one and undivided. Amendments during the British regime in India were first made with hesitation. It began by abrogating practices which were not approved by the public and which were regarded as barbarous and inhuman, for example, consecration, committing of sati, practice of devadasi, practice of ostracizing a person. These rules, thus, formed additional modern sources of Hindu Law.

After coming into force of the Indian Constitution, the State has guaranteed the freedom of conscience and religion. This right, of course, is subject inter alia to certain limitations. It can be exercised subject to public order, health and morality and the condition that it shall not prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The Constitution draws its strength from the people and has consequently abolished



discrimination on grounds of caste, creed, birth or sex; guaranteed equal protection under the law; forbade the practice of untouchability; and invalidated pre-Constitution legislation that was not consistent with the rights declared in Part III.