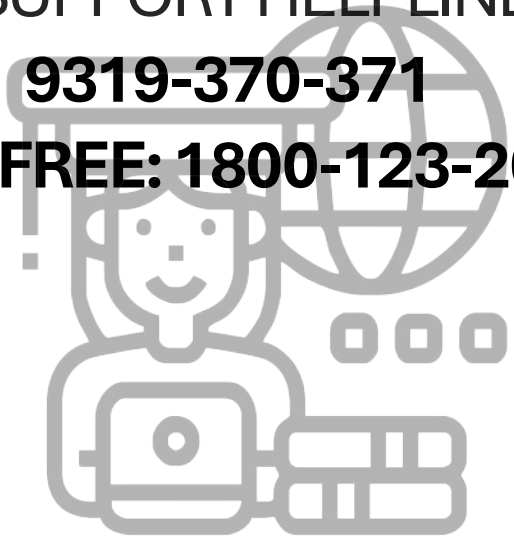
# MIPS PVT. LTD.

CAREER MAKERS SINCE 2012

STUDENT'S SUPPORT HELPLINE NUMBER:

**9319-370-371**

**TOLL FREE: 1800-123-2012**



VIRTUAL COLLEGE

A UNIT OF

MIPS PRIVATE LIMITED

*Chapter III*

# SOURCES OF HINDU LAW

Hindu system of law has the most ancient pedigree of the known systems of law. If the *Vedic* period is accepted to be 4000 to 1000 B.C., Hindu law is about 6000 years old. In this span of 6000 years, it has passed through various phases. At times it has developed and grown remarkably well, at times it has sagged, at times it has reached such heights that even the most modern system may envy it, at times it has degraded so low that it has earned contempt, and at times it has just dragged on. Yet, it has existed with remarkable durability. Like life, law is not static. Law exists to subserve the social need and, therefore, it is always desirable that law should conform to the changing needs of society and life. Just as society progresses and undergoes changes, so must the law. In this, Hindu law, despite the fact that before the advent of modern era, there was no direct law-making machinery, has shown remarkable adaptability. The study of sources of Hindu law is the study of various phases of its development which gave it new drive and vigour, enabled it to conform to the changing needs. Originally, it came to subserve the needs of pastoral people and now it has come to subserve the needs of modern welfare society.

It would be convenient to classify the various sources under the following two heads :

I. Ancient Sources.

Under this head fall the following four sources :

(i) *Sruti*,
(ii) *Smriti*,
(iii) Digests and Commentaries, and
(iv) Custom.

II. Modern Sources.

Under this head fall the following three sources :

(i) Equity, justice and good conscience,
(ii) Precedent, and
(iii) Legislation.



## I
## ANCIENT SOURCES
### *SRUTI*

Hindu law is considered to be a divine law, a revealed law. The theory is that some of the Hindu sages had attained great spiritual heights, so much so that they could be in direct communion with God. At some such time the sacred law was revealed to them by God Himself. This revelation is contained in *Sruti*

*Chapter III*

# SOURCES OF HINDU LAW

Hindu system of law has the most ancient pedigree of the known systems of law. If the *Vedic* period is accepted to be 4000 to 1000 B.C., Hindu law is about 6000 years old. In this span of 6000 years, it has passed through various phases. At times it has developed and grown remarkably well, at times it has sagged, at times it has reached such heights that even the most modern system may envy it, at times it has degraded so low that it has earned contempt, and at times it has just dragged on. Yet, it has existed with remarkable durability. Like life, law is not static. Law exists to subserve the social need and, therefore, it is always desirable that law should conform to the changing needs of society and life. Just as society progresses and undergoes changes, so must the law. In this, Hindu law, despite the fact that before the advent of modern era, there was no direct law-making machinery, has shown remarkable adaptability. The study of sources of Hindu law is the study of various phases of its development which gave it new drive and vigour, enabled it to conform to the changing needs. Originally, it came to subserve the needs of pastoral people and now it has come to subserve the needs of modern welfare society.



It would be convenient to classify the various sources under the following two heads :

I. Ancient Sources.

Under this head fall the following four sources :

(i) *Sruti*,
(ii) *Smriti*,
(iii) Digests and Commentaries, and
(iv) Custom.

II. Modern Sources.

Under this head fall the following three sources :

(i) Equity, justice and good conscience,
(ii) Precedent, and
(iii) Legislation.

## I
## ANCIENT SOURCES
### *SRUTI*

Hindu law is considered to be a divine law, a revealed law. The theory is that some of the Hindu sages had attained great spiritual heights, so much so that they could be in direct communion with God. At some such time the sacred law was revealed to them by God Himself. This revelation is contained in *Sruti*

or *Vedas*. The word *Sruti* literally means "what was heard". The *Vedas*, thus, contain the divine revelation. The term *Sruti* stands for four *Vedas viz.*, the *Rig*, the *Yajur*, the *Sama* and the *Atharva*, alongwith their respective *Brahmanas*. The *Brahmanas* are like appendices to the *Vedas* which were added later on. They deal with various ceremonies, rituals, and sacrifices. Since the *Vedas* are said to contain the voice of God, they are considered to be the fundamental or the primary source of law. The *Vedas* are said to be the source of *all knowledge*. In that view the entire body of Hindu law has emanated from the *Vedas*. And since it has emanated from *Vedas*, Hindu law is a divine law, a divine revelation. Thus, in theory, the *Sruti* is considered to be the fundamental source of Hindu law. However, its importance as a source of positive law is doubtful. One view is that the *Vedas* contain practically no law and are of little value. The *Vedas* contain "no statements of law as such, though their statements of facts are occasionally referred to in the *Smritis* and Commentaries as conclusive evidence of legal usage. The *Vedas* contain passages alluding to the *Brahma*, *Asura* and *Gandharva* forms of marriage, to the necessity of son, to the *Kshetraja*, the *Dattaka* and the son of the appointed daughter, to partition, among sons, and to exclusion of women from inheritance."[1] The other view is that though rules of law are not enumerated in any systematic manner in the *Vedas* and they are to be gathered from its entire body, yet it would be wrong to say that the *Vedas* are totally devoid of law.



To understand the contents of the *Vedas*, we have to keep in mind the *Vedic* social context. The approximate period of the *Vedas* is now accepted to be 4000-1000 B.C. The *Vedas* depict the way of life of our early ancestors. This is the period when the Vedic Aryans after trekking into rich and fertile lands of the Punjab and the Doab had settled down. They constituted an essentially pastoral-cum-agricultural society. They had a tradition of civilised life and rich thought. The *Upanisad* philosophy and the *Yoga* system had not yet come into existence. These Aryans were a vigorous, robust and unsophisticated people. They were engaged in the pursuit of all that the life and the rich land could offer them. At that time two sets of rules existed :

A. Rules of customary law. These rules dealt with rights and duties, with right and wrong, though it seems that the emphasis was more on duties and obligations than on rights. It was *Dharma* which was practised, and *Dharma* then "signified the privilege, duties and obligations of a man, his tankard conduct as a member of the Aryan community, as a member of one of the classes (*Varna*) and as a person in a particular stage of life (*Ashram*)."

B. The Aryans invoked the law of divine wisdom by which, according to their belief, all things on earth and heaven moved and were governed. Thus, the appeal was to the divine law. The *Vedic* Aryans believed that the soul is immortal and the body, its abode, is mortal and perishable. According to them, the soul of a being suffers or enjoys in the next birth in accordance with bad or good *karmas* that he had done in this world. The *yajna* was considered to be the way of attaining salvation. To *agni* the Vedic Aryan offered everything that was dear to him, *ghee*, butter, milk, corn and cattle so that they could

enjoy the life not merely in this world, but in the next world also.

C. According to them a man could attain salvation, could return to Brahma by doing all his *Vedic karmas*, by doing all his duties and by performing all the *yagnas*. Thus, it was *karma* or action which was emphasised.

In sum, the *Shruti* (or the *Vedas*) depict the life of our early ancestors, their way of life, their way of thinking, their customs, their thought, but does not deal with rules of law in any systematic manner. Whatever rules of law exist, these have to be deduced from the vast material contained in the four *Vedas*. Kane says that the *Vedas* do not profess to be formal treatise on *Dharma*; they contain only disconnected statutes on various aspects of *Dharma*; we have to turn to *Smritis* for a formal and connected treatment of the topics of the *Dharmashastras*.[1]

*Pre-Smriti Sutras*.—It seems that after the *Vedas*, the development of law through custom continued till we come to the *Smritis*. But our knowledge of that period is shrouded in darkness. The material available is scanty. After the *Vedas* there came into existence the *Sutra* and the *Gathas*. The *Smritis*, Digests and Commentaries are full of reference to the previously existing law and custom. The *Sutras* of Gautama and Vasistha and the *Manu Smriti* mention that there existed *Gathas* for many centuries. But the material available pertaining to that period is so scanty that it is not possible to discern any systematic picture of law. It is known that at that time a catena of *Sutra* was composed. But our knowledge of these *Sutras* is almost nil; whatever we know about them is from some references made to them in the *Smritis*.

It is certain that a long period of transition existed from the *Vedas* to the *Smritis*. It is in this period that the *Brahmanas* were composed. The period immediately following the *Vedas* and preceding the *Smritis* has two main characteristics. In this period, the caste system became rigid and the learning of the *Vedas* for the male children of the first three classes became obligatory. The *Brahmans* became the teachers of the *Vedas*. During this period, means of communication were slow. The *Brahmans*, who were teaching the *Vedas* throughout the length and breadth of India, put different constructions on the *Vedas*, probably to suit the local requirements. This led to emergence of various branches (*Shakhas*) of the *Vedas*. The supremacy of the *Vedas* was emphasised and the people were enjoined to follow the *varna dharma* and the *ashrama dharma*. These priestly teachers formed themselves into various groups (*charanas*). They had their own branches (*shakhas*) of the *Veda* and laid down their own rituals and legal codes. The *charanas* of the Vedic period were known as *Samhita Charanas*. These groups continued to exist during the Brahmana period. These *charanas* composed *Sutras* regarding all aspects of life, of which the *Grihya Sutras*, in which the duties and obligations of the Aryans as an individual and as a house-holder were stated, are very important. There were also the *Shrauta* and the *Dharma Sutras*. These together were known as the *Kalpa Sutras*. We also find that a number of *Sutra* works written at about the close of the *Vedic* period dealt with legal injunctions and customs. The *Sutra* was a form in which ideals, notions and rules were trapped in very few works, and they together constituted a string as if beads were put together on a thread. The teacher provided the link between these beads, and it was he who could expound the

1. *History of Dharmashastra*, Vol. I, 7.

full meaning of the *Sutra*. But alas, on account of a total lack of original material, nothing beyond this could be said. In the post-*Vedic* period, rules of *Dharma* traditionally regarded to be promulgated by that hypothetical sage, Manu, who figures, throughout the *Shastras*, existed and the *Sutra* of that period contained aphorisms on law.

## SMRITIS

With the *Smritis* is ushered in the era of the systematic exposition of the rules and principles of law. This is known as the golden age of the Hindus.

The word '*Smriti*' literally means "what has been remembered". In theory the *Smritis* are based on the memory of the sages who were the repositories of the sacred Revelation. The *Smritis* may be divided into early *Smritis* and the later *Smritis*. The former are called the *Dharmasutras*, and the latter, the *Dharmashastras*. What has happened seems to be thus : immediately after the *Vedic* period the need of expounding the meaning contained in the *Vedas* arose. The *Vedas* were to be understood in the light of the new needs of the society which had made further progress from agro-pastoral society. Not merely the meaning contained in the various passages of the *Vedas* had to be expounded but it had to be so expanded as to subserve the social needs of the then existing society. There was the transition from *Samhita Charanas* to *Sutra Charanas*. Of the *Sutras* composed during this period, some were reduced into writing. The *Sutras* consist of the trilogy of *Shrauta* (sacrifices), *Grihya* (ceremonies relating to domestic fire) and *Samayacharika*, i.e., aphorisms on law and custom dealing with temporal duties of men in their various relations. The *Samacharika* is also known as the *Dharmasutras*.



### Dharmasutras

The *Dharmasutras* were mostly written in prose, though a few of them were written both in prose and verse. The *Dharmasutras* generally bear the names of their authors. In some cases the *Shakha* or school to which the author belonged is also indicated. The approximate period of the *Dharmasutras* is usually reckoned to be between 800 and 200 B.C. The main *Dharmasutras* are : Gautama, Baudhayana, Apastamba, Harita, Vasistha and Vishnu. These are the extant *Dharmasutras* : Probably there were other *Dharmasutras* also, but we do not know much about them.

The *Dharmasutras* deal with the duties of men in their various relations. They do not pretend to be anything more than the compositions of mortals, based on the teaching of the *Vedas*, on the decision of those who were acquainted with law, and on the customs of the Aryans. Nobody can doubt for a moment that they are manuals written by the teachers of the Vedic schools for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that later on they were acknowledged as sources of the sacred law.[1] Composed in different parts of the country and at different times, they did not present any anomaly, but tended to slide into each other. Most of the *Dharmashastras* mingled religious and moral precepts with secular law. Some of them are remarkable for their manner and vigour of the expression and the multifariousness of the subjects of a living interest covered by them. The authors

1. Dr. Buhler, *Introduction to the Laws of Manu*, Sacred Books of the East Series, Vol. 25, XI.

of the *Dharmashastras* took the law from earlier *Gathas* and *Sutras* and custom which had grown up bit by bit and reduced them to some order and symmetry.[1]

*Gautama.*—*Gautama* belonged to the *Sama Veda* school. Gautam's *Dharmasutras* is considered to be the oldest of the extant *Dharmasutras*. Written in prose, it deals extensively with legal and religious matter. Among other things it deals with inheritance, partition and *stridhan*. Gautama attaches importance to tradition, practice and usages of the people of all walks of life. He enjoined on the king to preserve the time-honoured institution of each country and to give effect to custom. Hardatta (AD 12 century) wrote a commentary called the *Mitakshara* on the *Gautama Dharmasutra*.

*Baudhayana.*—Baudhayana belonged to the *Krishna Yajurveda* school. He probably lived on the Eastern coast of Andhra Pradesh. The *Baudhayana Dharmasutra* is not available in its integrated form. Baudhayana deals with numerous subjects, including marriage, sonship, adoption, and inheritance. He also refers to numerous customs of his region, such as the custom permitting marriage with one's maternal uncle's daughter. He also refers to the custom of people living in the north and to the custom and excise duties.

*Apastamba.*—Of all the extant *sutra*, Apastamba Dharmasutra is the best preserved one. Like Baudhayana, Apastamba belonged to the *Krishna Yajurveda* school. He was probably the native of Andhra Pradesh. His language is very forceful and full of clarity. It seems that in his work he had embodied most of the customs of his part of the country. He very forcefully rejected the *Prajapatya* forms of marriage. He also did not recognise secondary sons, not even an adopted son. He emphasised that the *Vedas* were the source of all knowledge.

*Vasistha.*—Vasistha belonged to Northern India. He is concerned with the *Rigveda*. Not much of Vasistha's *Dharmasutra* is extant. He holds the view that the custom of the *Aryavarta* must be everywhere acknowledged as authoritative. Like Apastamba, he recognises only six forms of marriage and excludes from his reckoning the *Paisacha* and the *Prajapatya*. He permits the marriage of virgin widows. He states that an assembly (*Parisad*) often should be constituted for settling disputes. Along with other topics, he deals with marriage, sonship, adoption, inheritance, sources of law and jurisdiction of courts.

*Vishnu.*—Vishnu's work, the *Vishnu Smriti*, is partly in an aphoristic style and partly in verse. It deals with criminal law, civil law, marriage, sonship, adoption, inheritance, debt, interest, treasure trove, and various other topics. He denounces atheism and the study of irreligious books. The *Vishnu Smriti* is closely connected with the *Manu Smriti* primarily, and with the *Yajnavalkya Smriti* secondarily.

*Harita.*—Harita's work is known as *Harita- Smriti*. Harita is probably one of the early exponents of law. The work is not available in its original form and we have to rest content with the quotations of the *Haritasmriti* available in other *Smritis*, Digests and Commentaries. From Visvarupa down to the latest writers on *Dharamashastras*, Harita is quoted most profusely; the *Dharmasutras* of Baudhayana, Apastamba and Vasistha quote him. The *Harita Dharmasutra* deals with the source of *Dharma, Brahmacharya, Snataks*, householder, prohibition about food, impurity on birth and death, duties of kings, rules of statecraft, court

1. Mulla's *Hindu Law*, (14th Ed.), 13.

procedure, various principles of law, duties of husband and wife, various kinds of penances, expiatory prayers and many other matters.

That there were other *Dharmasutras*, there seems to be no doubt. The *Dharmasutras*, of Shankha, Likhita, Usanas, Hiranykesin, Kasayapa, Paiteenani may be mentioned. The *Dharmasutras* not merely propounded certain jurisprudential concepts, but with their aid we are also in a position to construct ancient legal history. They refer to many previously existing though unrecorded custom, and from them we know how early usage and custom were transformed into the rules of law.

## Dharmashastras

The later *Smritis* or *Dharmashastras* are mostly in metrical verses, and are later in age than the *Dharmasutras*. They are in a sense based on the *Dharmasutras*, but they are not metrical renditions of the *Dharmasutras*. They deal with the subject-matter in a very systematic manner. Most of the *Dharmashastras* are divided into three parts : *Achara*, *Vyavahara* and *Prayaschitta*. The first deals with the rules of religious observances. The last deals with the penance or expiation. The second part deals with civil law. The early Smritikaras laid more emphasis on the subject-matter of the first and the third parts, while the later Smritikaras have exhaustively considered rules of positive law. Some Smritikaras like Narada, deal only with civil law. In the *Vyavahara* part, the Smritikaras have dealt with law under 18 titles and 132 sub-titles. They have discussed rules of both substantive law and procedural law. Many principles and rules which were propounded by them at that time have found place even in the modern law.



The *Yajnavalkya Smriti* gives a list of twenty sages as law-givers, *viz.*, Manu, Atri, Vishnu, Harita, Yajnavalkya, Usanas, Angaris, Yama, Apastamba, Samvarta, Katyayana, Brihaspati, Parasara, Vyasa, Sankh, Likhita, Daksha, Gautama, Satatapa and Vasistha. According to the *Mitakshara*, the enumeration is illustrative and not exhaustive. It does not mean that the *Dharmasutras* of Baudhayana, the *Dharmasutra* of Narada, and others are excluded. However, as Kane says, all these Smritis are not equal in authority. Most of them are obscure and are rarely cited by ancient commentators. Excluding the *Dharmasutras*, hardly a dozen Smritis have found commentators.[1] Of the later *Smritis*, those of Manu, Yajnavalkya and Narada are the most important.

*Manu Smriti*.—The Manu Smriti has been all along considered to be supreme authority in the entire country. However, we do not know the identity of the person who compiled this work. In fact, we have not been able to establish the identity of this great sage whose teaching the *Manusmriti* contains. We know that the name of Manu has been mentioned from the earliest. Sometimes he is referred to as *vridha* (old) Manu, sometimes as *brihat* (great) Manu, sometimes as *Adi Manava* (first patriarch). It may be that Manu, described in the *Manusmriti* as the first ancestor of mankind, is purely a mythical figure. Even in the *Veda* the supreme position of Manu is recognised in these words : "Whatever Manu says is medicine". Manu's pre-eminent position is accepted not only by Hindu law givers but also by the Buddhist writers of Java, Siam and Burma.

1. Kane, *History of Dharmashastras*, Vol. I, 12.

from local usage and from the sacred law. *Sadachara* (custom) is defined as the custom handed down in regular succession from time immemorial, among the four chief castes and the mixed races of the country. Pre-eminent position is given to custom by Manu, though his commentators are divided in the view whether a custom repugnant to sacred law is valid or not. (See in the subsequent page under the title "custom").

Manu, being the protagonist to Brahminical revival, preached orthodox doctrines. He is particularly harsh to women and *sudras*. He supports the dominant position of the *Brahmanas* in the society. For instance, he holds the view that for the intentional killing of *Brahmanas*, there is no *prayaschitta*, as no amount of penance can redeem the sinner from the sin. If a *Sudra* marries a Brahman woman, death is the only punishment for him.

On the *Manusmriti*, several commentaries have been written. The important ones are : Kulluka's *Manvarthamuktavali*, Medhatithi's *Manubhashya* and Govindraja's *Manutika*.

*Yajnavalkya Smriti.*—In date and authority, the *Yajnavalkya-smriti* comes after the *Manusmriti*. It is substantially based on *Manusmriti*, though the *Yajnavalkyasmriti* is more synthesized, concise and logical. Yajnavalkya belonged to the *Sukla Yajurveda* and is closely connected with the *Brihadaranyak Upanishad*. Yajnavalkya belonged to Mithila (northern Bihar). The *Yajnavalkya Smriti* is divided into three sections. All topics are arranged in their proper places and repetition is avoided. Almost all subjects found in the *Manusmriti* are dealt with by Yajnavalkya in a precise manner. Brevity is the hallmark of the work. Yet, nowhere is it obscure. It has a flowing and direct style. The *Manu Smriti* though deals with both substantive and procedural law, yet does not give due importance to rules of procedure. The *Yajnavalkya Smriti* deals with rules of procedural law in detail. Yet the law of procedure is not bogged down in arid technicalities.

The approximate date of the *Yajnavalkya Smriti* is the beginning of the Christian era.

*Juristic formulations.*—Yajnavalkya does not subscribe to the theory of divine right of the King, rather, he is opposed to it. According to him, the King is subordinate to law. He enjoins on the King to be modest, even minded and righteous, to devote himself to the service of people and to look after the administration of justice. On the other hand, he holds the view that no one, whether a brother, a son or preceptor can escape from the punishment of the King, if he deviates from the performance of his own duties.[1] Thus, Yajnavalkya strongly favours the power of *danda* that the king enjoys as the principal law-enforcer. Yet he does not want to clothe him with any divine authority to rule. Yajnavalkya mentions the Kings' power of issuing edicts or ordinances, the *Rajyashasanas*, but he does not lend them the pre-eminent position that is ascribed to them by Narada. Like Manu, Yajnavalkya attaches importance to custom. He says, "One should not practise that which, though ordained by the Smriti, is condemned by the people".[2]

Yajnavalkya, though a follower of traditional conservatism in many matters, was a liberal sage. We do not find the same orthodoxy and sternness

1. *Yajnavalkya Smriti* 1, 358.
2. *Yajnavalkya Smriti* 1, 156.

in his work as we find in Manu's. There are many passages in the *Yajnavalkyasmriti* which show a remarkable agreement with Manu, yet there are several points on which Yajnavalkya differs from Manu and shows in general a more advanced state of thought and feeling than Manu.[1] On the matter of status of *Sudras* and women, on the women's right to hold or inherit property, he holds liberal views. Similarly, he takes a liberal view of the criminal penalties. Punishment for various offences prescribed in the *Yajnavalkya-smriti* is less severe than that prescribed by Manu. Probably there was some unseen influence of the enlightened philosophy of Buddhism. Yet, it should not be overlooked that Yajnavalkya was for revival of Brahmanism. The philosophical doctrines propounded in the third section approached very closely to that phase of the *Vedanta* that was taught by Shankara.

Several commentaries have been written on the *Yajnavalkya Smriti* of which those by Visvarupa, Vijnaneshwara, Aparaka and Shulpani are the most famous ones. On account of the paramount importance of Vijnaneshwar's commentary, the *Mitakshara*, the *Yajnavalkya Smriti* indirectly became very important in Hindu law. But, this should not only imply that the *Yajnavalkya Smriti* is important because of the *Mitakshara*. The *Yajnavalkya Smriti* is one of the three principal codes among the *Dharamshastras*, and has its own importance.

*Narada Smriti.*—The *Naradasmriti* is the last of the three metrical *Dharamshastras* whose complete text is available to us. Narada seems to have belonged to Nepal. The approximate date of the work is of 200 A.D.. This is the first legal code which is mostly free from moral and religious feelings. Narada deals only with *vyavahara* and does not deal with *achara* and *prayaschitta*. The work is based on the *Smritis* of Manu and Yajnavalkya though on some matters Narada markedly differs from them. The *Naradasmriti* is outstanding in this that it deals with the law of procedure and pleadings in detail and with remarkable clarity. It is not elaborate on the rule of substantive law. The work is divided into two parts. The first part deals with judicature (in three chapters he deals with the principles of judicial procedure and the judicial assembly) and the second part deals with eighteen titles of law.

*Juristic formulation.*—The most remarkable feature of the *Naradasmriti* is that it is a very systematic and exhaustive treatise on rules of law. Narada was bold in accepting the changes that occurred during his period and does not hesitate in differing from his predecessors. He formulated and declared new rules which came into existence on account of social, economic and political change of his times.

At the time when the Naradasmriti was composed, Harshvardhan had established his rule in the Aryaverta. Since the rule of Mauryas it was felt that the need of the empire required that the king should have some law-making power. Many edicts and ordinances were promulgated by the Kings. Narada was bold enough to recognise this and gave it juridical formulation. The Narada *Smriti* is, therefore, first of the *Dharmashastras* which recognises not merely the King's power of making law (*Rajyashasana* or *Rajyadesh*) but also that the law made by the king overrides the sacred law and custom. However, Narada does not sanction unlimited law-making power to the King. The King is still enjoined to remain within the framework of sacred law. Yet, the fact remains that for the

1. Kane, 160.

## Origin and Nature of Custom

When human beings came to live in groups, it was but natural that the should, for harmonious group-life, conform to certain patterns of huma behaviour. By experience man learnt that a particular mode of behaviour o conduct was conducive to collective living. In course of time, a pattern o behaviour emerged, and by consistent adherence to it, it achieved spontaneou and conscious following by the members of the group. When this stage i reached, the pattern of human behaviour is called usage. As Mayne puts it, "A belief in the propriety of the imperative nature of a particular course of conduct produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct produces a belief that it is imperative or proper to do so. When from either cause or from both causes, a uniform and persistent usage has moulded the life and regulated the dealing of a particular class of community, it becomes a custom."[1] In modern law, before a custom can be enforced by a court, it is necessary to prove the existence of custom. For a custom to receive recognition it is necessary that it should be ancient and invariable, it should be established by unambiguous evidence, and it should be continuous, certain and ancient.[2]

1. *Hindu Law and Usage*, 63-64.
2. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, (1872) 14 MIA 585; *Rabindra* v. *State*, 1969 Cal 55.

## Requirements of a Valid Custom

(1) *Custom should be ancient.*—It is necessary that custom should be ancient. The word "ancient" means that it belongs to antiquity. According to Section 3(a) of the Hindu Marriage Act, 1955, it should be observed for a 'long time'. In point of time what could be said to be the observance for a long time, is difficult to say. In India, custom need not be immemorial in the English law sense. The courts have time and again expressed an opinion that if a custom is established to be 100 years old or more, it is of sufficient antiquity to be called ancient. Derrett thinks that if it is 40 years old it is enough.[1] The Privy Council observed that it is not the essence of this rule that its antiquity in every case be carried back to a period beyond the memory of man, still less that it is ancient in the English technical sense, it will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent been accepted as the governing rule.[2] A custom cannot come into existence by agreement. Similarly, no new custom can be recognised. In two cases, before the Madras High Court the question was : whether a group or organisation was free to lay down new ceremonies of marriages. In these cases, "the self-respecters cult" in Tamil Nadu State organised a movement under which traditional ceremonies were substituted by simple ceremonies. The basic idea was to abandon the *Brahmanical or Shastric* ceremonies of marriage. The first such marriage took place in 1925. In the first case which came in 1954 the main question before the court was : Could this ceremony be considered as established by custom ? The court said that 25 years is not a sufficiently long period to elevate a practice to the rank of custom.[3] In the second case which came in 1966, the court said that it was a different matter as to how much time should pass to enable a practice to gain judicial recognition as custom, but no useful purpose could be served by performers by merely presiding over such marriage and conducting the ceremony according to their own ideas unmindful whether such things are valid in law. The court was of the view that in modern times, no one is free to create a law or custom; that is the function of the legislature.[4]

(2) *Custom should be continuous.*—Continuity of a custom is as essential as its antiquity. Suppose it is established that a custom has an antiquity of 400 years, but if it has not been followed since then, it may be sufficient indication of its abandonment. The Privy Council observed : "Their Lordships cannot find any principle, or authority, for holding that a point of law, a manner of descent of an ordinary estate, depending solely on family usage may not be discontinued, so as to let in the ordinary law of succession. It is of the essence of family usages that they should be certain, invariable and continuous and well established. Discontinuance must be held to destroy them."[5] Such a discontinuance may be intentional or accidental. Mayne says that in the case of

1. *Introduction to Modern Law*, 15.
2. *Mt. Subhani v. Nawab*, (1941) Lah 134.
3. *Deivana Achi v. Chidambara*, 1954 Mad 657.
4. *Rajothi v. Selliah*, (1966) MLJ 46. In 1969 the Tamil Nadu Government passed a legislation validating such marriage.
5. *Rajkishen v. Ramjoy*, (1876) 1 Cal 186.

widely spread local custom, want of continuity would be the evidence that it had never had a legal existence, but it is difficult to imagine that such a custom, once thoroughly established, would come to a sudden end. Suppose, it is established that one hundred years back a custom existed. But there is not a single instance or other evidence available that after that time it has been ever followed. The inevitable inference is that people had abandoned it or that it had become obsolete. An obsolete law can be repealed, but there is no method of repealing custom except by abandonment. Abandonment, conscious or unconscious, is the mode by which a custom stands repealed.

(3) *It should be certain.*—It is necessary to prove that custom is certain. Mere vague allegations as to existence of custom will not suffice. One who alleges a custom must show what exactly the custom is and how far it is applicable to the matter at issue. For instance, a vague assertion that divorce by mutual consent is allowed, or that the daughter inherits along with the son, or that the rule of primogeniture operates, is not sufficient to establish a custom. It is necessary to prove with reasonable amount of certainty that the custom as alleged exists, and further that it is applicable to the parties on the matter at issue.

(4) *It should not be unreasonable.*—An unreasonable custom is void, although it cannot be said that custom is always founded on reason. No amount of reason can make a custom. What is reasonable or unreasonable is a matter of social values. It may differ from time to time, from place to place. Therefore, whether a custom is reasonable or not is determined by the contemporary values of every society, though there are certain rules or practices which are considered unreasonable in all times and in all societies.

(5) *It should not be immoral.*—Like the standard of reasonability, the standard of morality may vary from time to time and from society to society. Custom which is immoral is void. Thus, it has been held that an alleged custom permitting a woman to leave her husband and to remarry without his consent, or a custom permitting a husband to pronounce divorce on payment of a sum of money to the wife without her consent, or custom under which adoptive parents pay a sum of money to the natural parents at the time of adoption, or a custom under which the trustees of a religious institution are allowed to sell their trust is void, being against morality.[1] But a custom permitting divorce by mutual consent and remarriage on repayment by one party to the other of the actual expenses of original marriage,[2] or a custom which dissolves a marriage and permits the wife to remarry on her abandonment and desertion by the husband[3] has been held to be valid and not against morality.

(6) *Custom must not be opposed to public policy.*—A custom which is opposed to public policy is void. Thus, a custom among dancing girls permitting them to adopt one or more daughters has been held to be void being opposed to morality and public policy.[4] Similarly, a custom permitting the trustee of a religious endowment to sell the trust has been held to be contrary

1. *Raja Vurmaha* v. *Ravi Vurmaha*, (1964) 4 IA 76.
2. *Chitty* v. *Chitty*, (1894) 17 Mad 429.
3. *Gopikrishna* v. *Mst. Jagoo*, (1936) 63 IA 295.
4. *Mathur* v. *Esa*, (1883) 4 Bom 545.

to public policy.[1]

(7) *It must not be opposed to law.*—Here by being opposed to law we mean opposed to statutory law.[2] A custom opposed to sacred law prevails, but no custom opposed to statutory law can be given effect. The codified Hindu Law has abrogated custom except in a few matters where it has been expressly saved.

## Proof of Custom

The burden of proving a custom is on the party who alleges it. There are certain customs of which the court will take judicial notice : when a custom is repeatedly brought to the notice of the court, the court may hold the custom proved without any necessity of fresh proof,[3] otherwise all customs are to be proved like any other fact, usually custom is proved by instances.[4] Custom cannot be extended by analogy.[5] No hard and fast rule can be laid down as to how many instances need be proved. A custom can be proved otherwise also. For instance, proof of conduct of members of the caste or locality which could be explained only on the basis of custom will be sufficient.[6] Record of custom, such as *riwaj-i-am*, can be used for proving a custom. The *riwaj-i-am*, is a public record prepared by a public officer in the discharge of his public duties under Government rules. The statement contained in the *Riwaj-i-am* may be accepted, even if unsupported by instances. But proof of custom by such records is subject to rebuttal. Certain manuals and books can also be used as record of custom. For instance, in Punjab, Rattigan's Digest on Customary Law of Punjab throws a good deal of light on Punjab customs and may be used for the purpose of proving custom. But such manuals and digests have to be used with caution. The burden of proof is on the person who asserts the custom,[7] and if he fails to prove it, he will be governed by Hindu law.[8]

## Kinds of Custom

The Smritikars mentioned four types of customs : local custom, custom of caste or community, family custom and guild custom. The guild custom, *i.e.*, custom of traders and merchants, is not a part of personal law of the Hindus. Here we are concerned only with the first three types of customs.

*Local custom.*—A local custom is a custom which prevails in a locality, in a geographical area, not necessarily confined to an administrative division or district, and is binding on all persons in the area within which it prevails. It is different from a caste custom or family custom. The Privy Council observed in *Mst. Subbane* v. *Nawab*[9] : "It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law."

---

1. *Raja* v. *Ravi*, (1876) 44 IA 76.
2. *P. Latchamanna* v. *Appalaswamy*, 1961 AP 55; *Parkash* v. *Pameshwari*, 1987 P & H 37.
3. *Ujagar* v. *Jeo*, 1959 SC 1041; *Munnalal* v. *Rajkumar*, 1972 SC 1193; but see *Kalimma* v. *Janarthana*, 1973 SC 1134; if earlier decisions are not based on evidence, then they cannot be relied on (case law reviewed).
4. *Parkash* v. *Parmeshwari*, 1987 P & H 37 (One instance cannot prove custom).
5. *Saraswati* v. *Jagadammbal*, 1953 SC 201.
6. *Ahmed* v. *Chenni*, (1925) 52 IA 379.
7. *Mrs. Kripal Kaur* v. *Bachhan Singh*, 1958 SC 199; *Mirza* v. *Pushvarthi*, 1964 SC 114.
8. *Arakkal* v. *Arakkal*, 1978 Ker 119 (FB).
9. 1947 Lah 154.

*Family custom.*—Family custom is binding only on the members of the family. As early as 1868, the Privy Council said that custom binding only on members of family has been long recognised as Hindu law.[1] A family custom different from the law or custom of the locality in which the family is living can be proved and is enforceable. A family custom can be more easily abandoned than a local custom. Impartible estate and succession by the rule of primogeniture are two important examples of family custom.

*Caste or community custom.*—By far the largest area of custom in personal law of the Hindus is covered by caste or community custom. A caste or community custom is binding on all the members of the caste or community wherever they may be. Most of the Punjab customary law is of this nature. The custom among the Jats that one can marry one's brother's widow or the custom which permits marriage with sister's daughter in South India or the custom permitting adoption of daughter's son or sister's son is of this type.[2]

## MODERN SOURCES

Among the modern sources of Hindu law are included equity, justice and good conscience, precedent, and legislation. These sources existed even in the Shastric Hindu law, though in a different form. Narada speaks of four feet of law which include *Dharma* (righteousness) and *rajyashasana*. Brihaspati also stated to the same effect : "By *dharma*, by *vyavahara*, by *charitra*, by the royal order, the decision of a disputed matter is declared to be of four kinds." Katyayana also takes the same view. In ancient times, the Hindus had a fairly perfected system of administration of justice and both the people's courts and the king's courts used to render decisions. But we did not have a system of reporting of decisions; nor did the common law doctrine of *stare decisis* or precedent exist. Little record of judicial decisions is available. In their modern version, these sources are essentially the outcome of the administration of Hindu law in British India.

### Equity, Justice and Good Conscience

The ancient Hindu law had its own version of the doctrine of equity, justice and good conscience. According to Gautama, "In cases for which no rule is given, that course must be followed of which at least ten [persons] who are well instructed, skilled in reasoning and free from covetousness approve."[3] According to Brihaspati, "No decision should be made merely exclusively according to the letter of the *Shastra* for, in a decision devoid of *Yukti* (reason or equity), failure of justice occurs."[4] Yajnavalkya said that when on a matter there were conflicting rules of law, the matter should be decided on the basis of *Nyaya* (natural equity and justice). Katyayana also said that whatever is inconsistent with equity and justice, that be avoided. In his *Mimansa*, Jaimini propounded the doctrine of *aridesha, i.e.*, where a principle has been laid down with reference to a case it could be applied to analogous cases. Thus, it seems that '*Nyaya*' and '*Yukti*' were used not merely to fill in the lacunae in the sacred law but also to overrule sacred law whenever it was found to be irksome or against conscience. The principles of *Nyaya* and *Yukti* were used to mitigate the rigour of law. In the words of Mr. Justice Desai, "It does appear that the unified legal system arrived at by the Smritikaras envisages a department or aspect of law which would permit, within limit, interpretation of the sacred texts by resorting to something akin to what the modern lawyer at time does when he appeals to the equity of the statute."[5]

In its modern version, the equity, justice and good conscience as a source

---

1. *Hindu Law and Usage* (11th Ed.), 61.
2. (1868) 12 MIA 397.
3. Gautama, XXVIII, 48.
4. Brihaspati, II, 12.
5. Mulla's *Hindu Law* (14th Ed.) 62.

of law owes its origin to the beginning of the British administration of justice in India. The Charters of the several High Courts established by the British Government directed that when the law was silent on a matter, they should decide the cases in accordance with justice, equity and good conscience. Justice, equity and good conscience have been generally interpreted to mean rules of English law on the analogous matter as modified to suit the Indian conditions and circumstances.[1] Thus, we find that there is an area of Hindu law where rules of Hindu law and English law have been blended together or where the rules of English law have been grafted on rules of Hindu law. This has been apparently done in those cases where rules of Hindu law have been considered wanting. But this has also been done in those cases where the rules of Hindu law have been found to be too rigorous or not in consonance with justice or equity. In practice, under this doctrine, it is mostly the rules of English law which have been incorporated in the body of Hindu law, though in theory the courts were also free to take recourse to other systems of law. Since most of the judges were well versed with English law, in practice, recourse was frequently made to English law. On the basis of this doctrine, the courts could also apply the rules of Hindu law by analogy.[2] The Privy Council said : "Hindu law is a jurisprudence by itself and contains, within limits, all the principles necessary for application to any given case." Thus, the Privy Council deduced principles from the law of gift and applied them to the law of wills.[3] In *Gurunath v. Kamlabai*,[4] the Supreme Court said that it is now well established that in the absence of any rule of Hindu law, the courts have authority to decide cases on the principles of justice, equity and good conscience unless in doing so, the decision would be repugnant to, or inconsistent with, any doctrine or theory of Hindu law.



## Precedent

We know practically nothing of the judicial decisions of ancient times. We did not have any system of reporting of cases. The doctrine of *stare decisis* and precedent are essentially a gift of the British administration of justice in India. Precedent is called to be a source of Hindu law in two senses : First, practically all the important principles and rules of Hindu law have now been embodied in case law. In such matters, recourse to original sources is not necessary. Reference to leading decision is enough. In this sense, precedent or case law is the source, by and large, of most of the rules and principles of Hindu law. Secondly, precedent is a source of law in the sense that by the process of judicial interpretation, doctrines, principles and rules of law stand modified or altogether new principles, doctrines and rules have been introduced in the body of Hindu law. For these principles, doctrines and rules, the source of authority is precedent. It is in this second sense that we are here concerned with the precedent as a source of law.

During the British rule, though legislative machinery existed, for several reasons, its use to modify Hindu law was made sparingly. Then, the only machinery available to carry forward this process was the judiciary, which is

1. *Waghela Raji v. Sheikh Masludin*, (1887) 14 IA 89.
2. *Bhayah Ram Singh v. Bhayah Ungur*, (1870) 13 MIA 373.
3. Tagore case, (1872) 1 IA Suppl. 47.
4. (1951) I SCR 1135.

professedly, not a law making authority, though it is, now, accepted that, in the process of interpretation, judiciary does make law.

The difficulties of English judges administering Hindu law were great and many. They did not know the language of the *Dharmashastras* and they could not comprehend the spirit of Hindu law. At that stage of understanding of Hindu law, it was difficult for the English judges to grapple with a system of law in which legal obligations were co-extensive with moral and religious obligations. It was initially difficult to comprehend the distinction between mandatory and recommendatory injunctions; it was difficult to make a clear distinction between mandatory and recommendatory injunctions; it was difficult to make a clear distinction between the rules of positive law and rules of morality. However, this is not to belittle the role of courts and, particularly, of the Privy Council, as the highest court of appeal, in the development of Hindu law. In the words of Mr. Justice Desai, "With their mastery of jurisprudential concepts and their unmatched forensic ability to expound and elucidate even the most complicated matters of unfamiliar law affecting the personal status of parties, their Lordships of the Privy Council evolved principles and laid down rules on varied and complex subjects in their own unique style and generations of lawyers and judges in this country have acknowledged their indebtedness to that august tribunal for the lead and guidance given by it."[1]

The Indian courts were required to ascertain and administer the personal law of Hindus in matters relating to marriage, adoption, inheritance, succession, religious institutions, etc. They tried to ascertain the rules of Hindu law and in most of the cases they were successful. But, at the same time, in some matters they interpreted the rules of Hindu law in their own light, the way they understood the rules of law. Sometimes unwittingly they thought certain rules of English law were identical or near-identical to rules of Hindu law, and in this manner, rules of English law became part of Hindu law. The law of woman's estate and the law of religious and charitable endowments are clear illustrations of this approach. Then, once a decision was given, even if, later on, it was found to be incorrect, the doctrine of *stare decisis* was considered to be more proper a course than to change the law by overruling earlier decisions. Surprisingly, this trend continues in free India, and the Supreme Court continues to bow down before the doctrine of *stare decisis*, the latest instance of which is the Supreme Court's decision in *Lohar Amrit* v. *Doshi Jayantilal*,[2] on son's pious obligation to pay father's debts, where Gajendragadkar, C.J., following certain dictas of the Privy Council, held that the debt should be tainted to the knowledge of the creditor. (See Chapter XIII for details).

Today, the doctrine of *stare decisis* is part of Indian law. Supreme Court's decisions are binding on all courts, though the Supreme Court is not bound by its own decisions. The decision of State High Courts are binding on all subordinate courts though decisions of the High Courts are not binding on each other.

## Legislation

Legislation is a modern source of Hindu law. As a matter of policy, the

1. Mulla's *Hindu Law* (14th Ed.) 66.
2. (1960) 3 SCR 842.

Government during the British rule was slow and cautious to change Hindu law by legislative intervention. However, the legislature modifications till August 15, 1947, are not insignificant. Some of the statutes which have effected modification in Hindu law, either by reforming Hindu law or by superseding rules of Hindus, may be noted here. The earliest statute was passed in 1850, the Caste Disabilities Removal Act. It was followed by Hindu Widows Remarriage Act, 1856, Hindu Wills Act, 1870, Hindu Transfer of Bequest Act, 1914, Child Marriage Restraint Act, 1929, Hindu Gains of Learning Act, 1930, Hindu Inheritance (Removal of Disabilities) Act, 1928, Hindu Law of Inheritance (Amendment) Act, 1929, Hindu Women's Right to Property Act, 1937, Arya Marriage Validation Act, 1937, Hindu Women's Right to Separate Maintenance and Residence Act, 1946, Hindu Marriage (Removal of Disabilities) Act, 1946, Hindu Marriage Validity Act, 1949.

Thus, Hindu law was reformed and modified to some extent. But these reforms were half-hearted and piecemeal. Piecemeal reforms have their own drawbacks. One result of these piecemeal reforms was that, though reforms were introduced to change some aspects of Hindu law, their implication on other aspects was overlooked. For instance, the Hindu Women's Right to Property Act, 1937, was passed with a view to granting property rights to women, but its repercussion on the law of joint family was overlooked. The result was that these piecemeal reforms solved some problems but created others.

Although Hindu society has advanced much beyond what it was during the period of Commentaries and Digests, yet the development of laws was thwarted. Hindu law became static and did not conform to the changed context of Hindu society. The progressive section of Hindu society always clamoured for reforms. In 1941, a Hindu law Committee was constituted which in its Report recommended that Hindu law should be codified in gradual stages, beginning with the law of intestate succession and marriage. The Committee was again revived in 1944 under the chairmanship of Sir Benegal Narsing Rau. The Rau Committee evolved a uniform code of Hindu law which would apply to all Hindus by blending the progressive elements of laws of the various schools of Hindu law. The draft Code was meant to be an integrated whole.

There was a good deal of vocal opposition to Hindu Code Bill by an orthodox section of Hindus. Some opposed it on the ground that it would be impossible to give legislative form to the specious and complicated structure of Hindu law. But, by and large, the opposition was from the uninformed and orthodox section of Hindu society. The Hindu Code Bill remained on the anvil for a considerable time. It was introduced in the Interim Parliament, but no progress could be made, and it lapsed with the dissolution of Parliament. The Government ultimately decided to split up the Code and pass it in instalments. Thus, came into existence the four major enactments of codified Hindu law, *viz.*, Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoptions and Maintenance Act, 1956, and Hindu Minority and Guardianship Act, 1956. By these enactments of codified Hindu law some fundamental changes have been introduced, though a total break from the past has not been made.