
AN INSIGHT INTO THE SOURCES OF HINDU LAW

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Hindu law is considered to have an ancestry. It was evolved by *seers* and *Sages* who after their long penance and meditation discovered certain rules of conduct that according to them are necessary for peaceful coexistence in the society. According to the sages, the ultimate aim of living life as per the Hindu philosophy is to get salvation from the world i.e. to attain *moksha* from this world. According to them, the Human body is mortal and the soul is immortal.

The rules were called dharmashastra in those days. Today it's also known as Hindu law.

It was Sir Henry Maine who observed that the Hindu law has the oldest pedigree of any known jurisprudence and has not shown any signs of decrepitude even today. There are smritis written in Hindu law which are *Manusmriti*, *Yajnavalkya Smriti*, and *Narada's smriti* are as old as 13 centuries Before Christ (B.C.). Generally, the Dharmashastra applies to the smritis.

Sources of Hindu law:- As mentioned above, Hindu law has an ancestry which means it is the oldest system of personal law.

According to *Yajnavalkya*, "The *Surti smriti* is the approved usage of what is agreeable in one conscience and desires, sprung from due to deliberation, ordained as the foundation of dharma (law), According to Manusmriti there are four sources of dharma, namely, the *Vedas*, *smritis Sadachara* (approved customs and usage)

We can classify the source of Hindu law under the following two main heads:-

1. Ancient sources
2. Modern sources

The two main heads are also subdivided:-

Ancient sources:-

1. Srutis

2. Smritis
3. Commentaries and digests
4. Customs

Modern sources:-

1. Judicial decisions
2. Legislations
3. Justice, equity, and good conscience

Let's start with ancient sources

Smritis:- The name *smriti* was derived from the root '*Sru*' to hear and signifies 'what is heard'. 'By *smriti*' or what was heard from the above, is meant for the *Veda*. It is believed to contain the very words of '*Deity*' revealed to inspire *sages* and is therefore in theory considered the primary and paramount source of Hindu Law. The *smritis* consists of the Four Vedas and the Upanishads dealing chiefly with religious rites and the means of attaining true knowledge and moksha or salvation. Vedas are the ultimate traditional ways of the law. Of these texts, *Rig Veda* is the oldest. The text of *Yajur Veda* is more frequently associated with rituals and endowed with magic properties, *Atharva Veda* consists of magic charms, they are the study of mantras and not the law.

Smritis:- unlike '*smriti*', '*smriti*' means 'what was remembered' and is of human origin and is believed to be the recollections of *rishis* handed down to us constituting the principal sources of Hindu Law. There are two kinds of *Smritis* viz. Dharmasutras and Dharmashastras. Their subject matter is almost the same. The difference is that the Dharmasutras are written in prose, in short maxims (*Sutras*) and the Dharmashastras are composed in poetry (*Shlokas*). However, occasionally, we find *Shlokas* in Dharmasutras and *Sutras* in the Dharmashastras. In a narrow sense, the word *Smriti* is used to denote the poetical Dharmashastras. The number of *Smriti* writers is almost impossible to determine but some of the noted *Smriti* writers enumerated by *Yajnavalkya* (*sage from Mithila and a major figure in the Upanishads*) are *Manu, Atri, Vishnu, Harita, Yajnavalkya, Yama, Katyayana, Brihaspati, Parashar, Vyas, Shankh, Daksha, Gautama, Shatarupa, Vasishtha, etc.*

The rules laid down in Smritis can be divided into three categories viz. Achar (relating to morality), Vyavahar (signifying procedural and substantive rules which the King or the State applied for settling disputes in the adjudication of justice) and Prayaschit (signifying the penal provision for the commission of a wrong). Smritis are considered as text which has been remembered and then interpreted by the rishis throughout the generation. There is a further classification of the term Smritis which are as follows:

Dharma Sutra (Prose)

Dharma Shastras (Poetry).

Commentaries and Digests:- Owing to the obscurity, incompleteness are not infrequent conflicts in the rules of the smritis and the desirability of interpretation of the injunctions of smritis in a manner to suit prevalent customs and usages of different parts of the country, there was the necessity of the education of the texts of smritis and to reconcile them on the points of difference. In this process there arose what constitutes the most significant source of Hindu Law.

A single interpretation of the smritis is called a commentary while different interpretations of the smritis are known as digestive. Dayabhaga and Mitakshara are considered to be the two most important commentaries. The period of commentaries and digests is between 700 A.D. to 1700 A.D.

Customs:- Customs is a tradition that has been practiced in society since ancient times. It is the type of practice that is under the continuous observation of the people and has been followed by the people.

Further, the customs have been classified into two categories-

Legal customs

Conventional customs

Legal customs

Legal custom is those customs that are enforceable or sanctioned by law. It can't be deemed invalid until the law itself declares it invalid.

There are two types of legal customs:

1. Local customs
2. General customs

Local Customs:- Local customs are the customs that are practiced in a local area. This type of custom is not highly recognized.

General customs:- These are the customs or traditions which are practiced in a large area. This type of Custom is highly recognized by people.

Conventional customs:- Conventional customs are customs that are related to the incorporation of an agreement and it is conditional. more

What are the essentials of a Custom?

Following are the essential points that constitute a custom-

1. A custom must be continuous in practice
2. A custom should not be vague or ambiguous
3. A custom must have time antiquity
4. There must be a complete observation of the custom
5. It should be certain and clear
6. A custom must not oppose the public policy which will affect the interest of the general public.

Deivanai Achi v. chidambaram (1954) Mad. 667.

In the instant case, it was held that to become legally sanctioned by law and binding on the people a custom must be continuous in practice, it should not be vague and ambiguous, and should not oppose the well-established public policy. A customary rule must be in the complete observation of society.

Laxmi v. Bhagwantbuva AIR 2013 SC 1204

In the instant case, the supreme court stated that a custom becomes legally enforceable when the majority of people make continuous use of such practice.

Onus

Generally, when a custom attains the judicial recognition no further proof is required, however in certain cases where the customary practices do not attain the judicial recognition, the burden of proving lies on the person who alleges its existence.

Munna lal v. Raj Kumar AIR 1972 SC 1493

In the instant case, the supreme court stated that a custom brought before a court several times, the court might hold that such custom has been enforced by the law with the necessity of its proof.

Indian Courts recognize three types of customs:

(a) **Local custom** – these are customs recognized by Courts to have been prevalent in a particular region or locality.

(b) **Class custom** – these are customs that are acted upon by a particular class. Eg. There is a the custom among a class of Vaishyas to the effect that desertion or abandonment of the wife by the husband abrogates the marriage and the wife is free to marry again during the lifetime of the husband.

(c) **Family customs** – these are customs that are binding upon the members of a family. Eg. There is a custom in families of ancient India that the eldest male member of the family shall inherit the estates.

Modern sources:-

Judicial Decisions:- Judicial decisions are considered to be the most important ingredient of modern sources. Judicial decisions are considered to be authoritative and binding. The doctrine of precedent was established and it was applied in the cases resembling the same facts and circumstances of a case already decided. The legislation is considered to be the codification of customs which plays an essential role in expanding the concept of Hindu law. Legislations are enacted by the parliament.

Legislation:-The legislation is considered to be the most important source of Hindu law. It is considered as a base for the growth of Hindu law in the modern world. It has been stated that to meet the new conditions of the society it became a necessary to codify the law.

Justice equity and a good conscience:- Justice, equity, and good conscience is the basic rule of law. This rule of law applies when an existing law doesn't apply in a case before the court decides the particular matter by applying its rationality and the concept of justice, equity and good conscience. This rule is considered to be the fairest and reasonable option available to a person. There are two cases regarding the justice equity and good conscience, which are as follows:-

Gurunath v Kamlabai: In this case the supreme court held that in the absence of any existing law the rule justice, equity and good conscience was applied.

Kanchava v. Girimalappa (1924) 51 IA 368: In the instant case, the privy council barred the murderer from inheriting the property of the victim.

Conclusion:-

In the above article, we saw the introduction of Hindu law and sources of Hindu Law in which we learned that it has the ancestry. In Sources of Hindu law we learned about that there are two types of sources:

1. Ancient Sources
 2. Modern sources
- Ancient sources in which, we saw that there are four subtypes in Ancient sources
 1. Srutis
 2. Smritis
 3. Commentaries and digests
 4. Customs
 - Modern Sources in which, we saw that there are three subtypes
 1. Judicial decision
 2. Legislations
 3. Justice, equity, and good conscience

After all this at last we saw some case laws also which were

1. Gurunath vs Kamlabai.
2. Kanchava vs Girimalappa (1924) 51 IA 368.
3. Deivanai Achi v. chidambaram (1954) Mad. 667.
4. Laxmi v. Bhagwantbuva AIR 2013 SC 1204.
5. Munna lal v. Raj Kumar AIR 1972 SC 1493.

Note:- Case laws no 3,4,5 are from the Ancient sources subtype customs in that conventional customs.

References

<https://old.amu.ac.in>

Hindu Law- RK Agarwal