

Original Article

Analytical Study of The Sources of Hindu Law

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Abstract

Hindu personal law has been partially codified and partially uncodified. Muslim personal law is mostly uncodified law. Its provisions are always criticised at the touchstone of equality, justice and the rule of law. However, as of now uncodified portion of Hindu law as well as the codified Hindu law, could comply with the test of equality, justice and rule of law. In this context, it is necessary to analyse the sources of Hindu law to ascertain its positive growth and development. This paper offers an analytical exploration of the ancient and modern sources of Hindu law—ranging from the Shruti, Smriti, and Nibandhas to legislative enactments and judicial precedents. It highlights how these diverse sources collectively uphold constitutional principles such as equality, justice, and the rule of law. By assessing the adaptability and continuity of these legal traditions, the study underscores the significance of Hindu law in shaping contemporary personal law discourse and its potential contribution to broader legal reforms, including a uniform civil code.

Keywords: Ancient sources of Hindu law- modern sources of Hindu law- constitutional principles: equality, justice, rule of law- codification of Hindu law

Introduction:

It is immensely important to study the sources of Hindu law to make a correct interpretation of the provisions of the Hindu law. Analysis of the sources of the Hindu law is inevitable to secure appropriate application of the provisions of Hindu law in order to procure the object of justice. Hindu law contains the legal principles and the rules in order to govern vital aspects of the Hindu life in terms of marriage, divorce, succession, adoption, maintenance and other allied aspects. Sir *Dinshah F. Mullah* has defined Hindu law in the following words. "Wherever the laws of India admit, operation of a personal law, the rights and obligations of a Hindu are determined by Hindu law. That is his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by the state."

the Hindu law was a natural as well as deliberate phenomenon. Sub-categorisation of the resources of the Hindu law is possible with the terms, namely, ancient sources and modern sources. Ancient sources of the Hindu law include *Shruti*, *Smriti*, *Upanishada*, *Nibandh* and modern sources consist of the legislation, judicial decisions and concept of justice/ equity/ and good conscience.

Ancient sources of Hindu law.

i) Shruti concept explained: Shruti in Sanskrit means 'that which is heard'. Shruti means what was heard by the 30 & more clan of the holy Sages (*Rushis*) like *Vashistha*, *Gautam*, *Bhardwaja*, *Shandilya*, etc. Every word of Shruti is regarded as a direct utterance from the Almighty, hence sacred.

Shruti includes the *Vedas* and *Vedangas* as well. *Shruti* is the primary source of Hindu law. There are four *Vedas*, namely the *Rugveda*, *Samaveda*, *Yajurveda* and *Atharvaveda*. There are six appendages to the *Vedas*.

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The *Vedas* were remembered by the *Rushis*. Subsequently Brahmin community remembered the *Vedas* and passed the same on to the subsequent generations who by heart the same till the *Vedas* were written in Sanskrit and in other scripts.

ii) Smruti concept explained: *Smruti* is derived from *Smri*, which means to remember. *Smruti* means 'that which has been remembered'. In the early days, there was no art of writing and printing; therefore, what was heard was to be remembered and was transferred from generation to generation by holy sages.

Smruti is the running commentary on certain parts of the *Shruti* written by the sages/ Brahmins. It was made by them in their languages. Thus, the base of the *Smriti* is *Shruti*; there are two kinds of *Smriti*, namely *Dharmashastra* and *Dharmasutra*. There are many *Smriti*; their count is 22. Some famous *Smriti* are *Yajnavalkyasmruti*, *Naradsmruti* and *Manusmriti*. It is also considered to be the first-ever law book written by *Manu*.

iii) Nibandhas: These are commentaries on the *Smriti*. All *Smriti* did not agree with others on a particular issue of law, and therefore learned scholars in law interpreted and explained *Smriti* by the way of commentaries called *Nibandhas*.

In case *Shruti* and *Smriti* are silent on a particular point of law, then the solution is given by the commentator in their commentaries. *Nibandhas* are running commentaries of learned persons who have cited customs, usages and traditions prevailing in the society. In case of any conflict between *Smriti* and *Nibandhas*, then *Smriti* shall prevail because the law giver is always superior to the interpreter. Similarly, the position and status of *Shruti* always remain at Apex Place.

iv) Puranas: It is a very important source of Hindu law. The rule of law in its abstract form is very difficult to understand for common people, as it is written in very precise, scientific and technical language. And therefore, in the *Puranas*, a rule of law is illustrated through instances of its application in the form of interesting stories. By reading the stories rule of law, which is otherwise very difficult to understand, can be understood by common people. Some important *Puranas* are *Vishnu Puran*, *Shiv Puran*, *Ganesh Puran*, *Garud Puran*, *Rmayana* and *Mahabharat*. Their total quantity is 18.

v) Digest and commentaries. It includes rules regarding *Mitakshara* and rules regarding *Dayabhaga*. *Mitakshara* rules have been authored by jurist *Vijaneshwara*. *Dayabhaga* rules were written by jurist *Jimutvahana*. These are the third important source of Hindu law. Digest and commentary are modified and mixed from *Shruti* and *Smriti*. These are the commentaries and a particular

interpretation adopted by those authors. These were composed between 700 AD to 1700 AD. Writing a particular *Smruti* is called commentary. Writing on different *Smruti* is called a digest. When conflicts arise between *Smruti*, they give rise to the commentaries.

Features of the commentary and digest: the concepts in the *Shruti* and *Smriti*, and the concept of the *Dharma* are simplified at the instance of the commentary and digest. It also takes cognisance of the customs and usages prevailing in contemporary times. The most important commentary is *Mitakshara*. It means a new word. It was the paramount school of law in all of India, except Bengal and Orissa. *Manusmriti* and *Yajnavalkya smruti* have the greatest number of commentators. Digests were written after commentaries. The most important digest is *Dayabhaga*. It mainly deals with the inheritance and partition in a joint Hindu family. Digest gather the scattered material in the previous text in a logical and precise way.

vi) Customs: Custom is the unwritten rule that have continuous existence in society/ community and are under strict observation. Custom which complies with the following features carries the binding force of law. Antiquity, continuity, Unambiguity, consistency, not opposed to the public policy, morality and constitutional provisions. There are certain types of customs, like local customs, which are prevalent in a particular local area. The second kind of custom is class custom; they are operative amongst a particular class. Thirdly, there are customs that are binding on the members of the family. Customs complying with the above-mentioned criteria assume the role of customary law, which has played an important role in the growth and development of Hindu law.

Modern sources:

i) The concept of justice, equity and good conscience: This concept in the modern context originated from the English common law system. It has been utilised by the judiciary in order to fill the gaps, if any exist, in the provisions of the law, in order to procure the ultimate object of justice. In the rule of law-based democratic countries, law is not supposed to be a static entity; rather, it has to evolve with the advancement of time in order to satisfy the changing needs of society with changing time. This concept provides a means to secure the end that the law will not be static, but it will be progressive. In *Gurunath vs Kamla Bai Laws SC (decided on 10/12/54)*, the Supreme Court held that, "In the absence of any existing law, the rule of justice, equity and good conscience was applied." However, such a decision must not be inconsistent with the express provisions of the Hindu law.

ii) Judicial precedent: In the common law countries, judges are the law givers. This concept originated from the realistic School of jurisprudence, where it is believed that the judges, with their skill of interpretation, add life to the dead letters of the statute. Under Article 141 of the Indian Constitution, the judgments pronounced by the Supreme Court and parent high court are binding on the subordinate courts. Even judgments passed by the high courts other than the parent High Court have the persuasive legal value /enforcement. In this background, over the years Indian Higher judiciary has passed in number of landmark judgements on different provisions of the Hindu law, and these judgements and their ratios are an important source of the Hindu law. These judgements have ensured that the provisions of the Hindu law will be interpreted in a dynamic manner, satisfying the aspirations of the Hindu community and upholding the constitutional objectives.

iii) Legislative enactments: Legislation/ laws made by the competent legislative assembly body are the source of Hindu law. Parliament of India and state legislative assemblies under the Parent Act have passed many laws and state amendments, respectively, governing the various aspects of Hindu law. Similarly, the laws enacted either for Hindus or for all the religious communities, including Hindus and which are valid and operative under Article 13 of the Constitution, do also operate as a source of Hindu law, like the Guardianship and Ward Act 1890, the Indian Succession Act. 1925 etc.

These laws are naturally in consonance with the noble constitutional provisions and social policies. The following statutes are the modern sources of Hindu law, namely the Hindu Marriage Act 1955, the Hindu Succession Act 1956, the Hindu minority and Guardianship Act 1956 and the Hindu Adoption and Maintenance Act 1956. Similarly, the other laws, like the Child Marriage Restraint Act 1929, amended in 1967, etc., are also operative sources of Hindu law.

Critical analysis:

The critics have levied the following criticisms on the various aspects of the sources of Hindu law.

i) Hindu law is applicable to the Hindus only; therefore, it is inevitable to find out who is a Hindu person. In the above-mentioned legislations on Hindu law definition of the term Hindu has been given. This definition is negative because, besides giving an indication of who Hindus are, it also states that the person who is not Muslim, Christian, Parsi and who is not governed by any other law is

also a Hindu. This criticism is a futile exercise because it has served the practical purpose regarding many persons who do not incline to call themselves Hindus or do not associate themselves with any of the Abrahamic faiths are governed by the Hindu under the said definition.

ii) Hindu law is said to be a divine law because the Shruti is the primary source of a law, and the creators of the Shruti are believed to have direct communication with the Almighty. Critics don't believe it, and they cite that no evidence regarding the same has been given. Moreover, it has been criticised that there is less law in the *Shruti* and *Smriti*, and they have also failed to specify any difference between the law, morality and religion. This criticism could be answered on the basis that the source of divine law of Christian Muslims Parsis is similar, that is, the connection of the Prophet with God. Hence, it could be concluded that rather than challenging the legality of such sources of the divine law, its utility should be pondered upon. The answer to the second criticism is that for Hindus, the concept of the law religion Dharma has always been used interchangeably.

iii) It is criticised regarding the *Smritis* that it is just the process of memorising something by human beings, which could be fed upon, so how could it be the source of a law. Here we must not forget that the art of memorising was a skill systematically developed, where the process was undertaken under the guidance of the trained Guru by the Shishyas; therefore, there was little room for any mistake in the process of memorisation.

V Further Counter of the criticism. i) The definition of the Hindu is exhaustive. After going into the definition of the term Hindu, it is evident that some of the religious denominations, sects under the Hindu religion, which do have modern and accordingly, the popular identity have been explicitly included therein. Therefore, specific mention of the Arya Samaj, Brahmo Samaj, Prarthana Samaj and Virashaiva Lingayat Community is there. Apart from these sets, there are many sets and religious denominations which have not been specifically mentioned in the definition clause, do also fall within the term Hindu, as the expression 'any person who is a Hindu by religion in any of its forms or developments' has been used there. And also under the provision that Hindu also includes any person who has not declared himself as Muslim, Christian, Parsi, or Jew, can bring these sects within the purview of the definition of Hindu. These sects are *Vaishnav*, *Ganapati*, *Surya*, *Shiva*, *Shaktya*, *Kapal*, *Wammagri*, *Avdhutmarg* and *Nath*, etc.

Moreover, a positive element of the definition of the Hindu is that the members of the

Jain, Buddhist and Sikh religions have been placed in the category of the Hindu, because their culture is the same as that of the culture of Hindus. In fact, the founder of these religions, basically, we were Hindus. In order to implement reforms in the Hindu religion, Jain, Buddhist, and Sikh traditions came into existence.

A feature of the definition of Hindu is that such tribals who have been following their indigenous customary law and who do not declare themselves to be followers of any particular religion cannot be placed within the definition of Hindu. Thus, it is evident that the definition of Hindu is unambiguous and inclusive, which takes within its purview the above-mentioned tribal group and such persons who are not interested in aligning with any religion.

ii) Hindus believe that the *Shruti* has having divine origin. There is no need to prove or disprove this belief. The same is the case regarding the *Smruti*, the *Puranas* and regarding the authorship of any particular holy text of the Hindus, like *Manu Smruti*. The important issue is that by and large there exists continuity & uniformity in the strict observation, implementation of the rules laid down in the *Shruti*, *Smruti*, *Puranas* and holy texts among Hindus regarding the matters of marriage, maintenance, adoption, succession and the pattern of living life in society. Based on these principles, codification of the Hindu law has been made in consonance with the notions of equality, justice and rule of law. Therefore, the criticism that the divinity of the sources for Hindu law has not been established is irrelevant.

iii) Similarly, there is no crux in the criticism that, as the *Shruti* and the *Smruti* were based on the oral tradition, where sages from generation to generation have memorised them, it has hampered their reliability. Rather, through this pattern, *Shruti* and *Smruti* could be preserved for thousands of years, and their contents were carried forward by then-existing generations to future generations. And when the art of writing was developed same was documented.

iv) The criticism that judicial precedent is nothing but the personal views imposed by the judges is futile. Under the realistic school of Jurisprudence, judges make (interpret the law to satisfy the changing needs of society with changing time in conformity with the principles of rationality, logic, reasonability and devoid of arbitrariness. The Indian higher judiciary has played an important role in the growth and development of Hindu law in a positive manner.

Conclusion:

The ancient sources of Hindu law include *Shruti*, *Smruti*, *Nibandhas*, *Puranas* and commentaries & digests and customs.

Modern sources of the Hindu law take within their fold the legislation and judicial decisions. Ancient sources of the Hindu law, as mentioned above, are vital for the reason that they still continue to influence the mindset and personality of the Hindus appropriately streamlined by the legislature and judiciary with the advancement of time in order to satisfy the aspirations of the Hindus. In the uncodified portion of the Hindu law, which exists in the form of the joint Hindu family, joint Hindu family property & coparcenary equal rights have been conferred at the initiation of the legislature on the sons and daughters taking birth in the joint Hindu family after 2005. Financial security has also been provided to the daughters, mothers, wives, widows and other dependent females residing in the joint Hindu family. The higher judiciary has played a constructive role in this regard. This positive change has been openly accepted by the Hindu community.

Hence, both of the sources of Hindu law, i.e. ancient and modern, are significant. It can be said that the proper codification of Hindu law on the basis of the concept of equality, justice, rule of law could be materialised because ancient sources of Hindu law reposed the flexibility, adaptability in the Hindu society. Thus, Hindu personal law based on the concept of a rule of law provides the parameter/ role model for the positive reformation in the personal laws belonging to the other religious communities, namely Muslims, Parsis and Christians. Similarly, it is needless to state that, in the proposed uniform civil code, the principles and provisions under Hindu law will be able to make a significant contribution.

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Conflicts of interest

The authors declare that there are no conflicts of interest regarding the publication of this paper

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